* **IN THE HIGH COUROF DELHI AT NEW DELHI**

\+ **W.P.(C) 10/2022, CM APPL.16/2022 (Interim relief & CM APPL.13602/2022 (condonation of delay)**

SUMAN JEET AGARWAL ..... Petitioner

Through Mr. Satyen Sethi with Mr. Arta Trana Panda, Advocates.

versus

INCOME TAX OFFICER, WARD 61(1), & ORS. ..... Respondents

Through Mr.Zoheb Hossain, Sr. Standing Counsel with Mr. Mr.Vipul Agrawal and Mr.Parth Semwal, Junior Standing Counsel for the Revenue.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

CM APPL. 13602/2022 in W.P. (C) No. 10/2022 (Condonation of delay)

CM APPL. 13601/2022 in W.P.(C) No. 496/2022 (Condonation of delay)

CM APPL. 13914/2022 in W.P.(C) No. 2006/2022(Condonation of delay)

CM APPL. 13913/2022 in W.P.(C) No. 2137/2022 (Condonation of delay)

For the reasons, stated in these applications, the delay in filing the counter-affidavits is condoned and the counter-affidavits filed by Revenue in these writ petitions are taken on record.

Accordingly, these applications stand disposed of.

CM APPL. 12521/2022 in W.P.(C) No. 4177/2022 (for exemption)
CM APPL. 13143/2022 in W.P.(C) No. 4408/2022 (for exemption)
CM APPL. 13300/2022 in W.P.(C) No. 4459/2022 (for exemption)
CM APPL. 14048/2022 in W.P.(C) No. 4692/2022 (for exemption)
CM APPL. 14263/2022 in W.P.(C) No. 4695/2022 (for exemption)
CM APPL. 14396/2022 in W.P.(C) No. 4818/2022 (for exemption)
CM APPL. 17327/2022 in W.P.(C) No. 5145/2022 (for exemption)
CM APPL. 15322/2022 in W.P.(C) No. 5155/2022 (for exemption)
CM APPL. 15413/2022 in W.P.(C) No. 5191/2022 (for exemption)
CM APPL. 16183/2022 in W.P.(C) No. 5407/2022 (for exemption)
CM APPL. 16185/2022 in W.P.(C) No. 5408/2022 (for exemption)

Exemptions allowed, subject to all just exceptions.

Accordingly, these applications stand disposed of.

WRIT PETITIONS.

1. By way of the present batch of petitions, this Court has been called upon to decide the validity of the Notices issued under Section 148 of the Income Tax Act, 1961 (‘Act of 1961’), as it stood prior to its amendment on 01st April, 2021, by the Finance Act, 2021.

Brief Facts

1.1. The Sections 147, 148, 149 and 151 of the Act of 1961 were amended vide the Finance Act of 2021, with effect from 1st April, 2021.

1.2. As per the unamended Section 149(1)(a) of the Act of 1961, the reassessment proceedings could be initiated within 4 years from the end of the relevant Assessment Years (‘AYs’).

1.3. As per the unamended Section 149(1)(b) of the Act of 1961, the reassessment proceedings could be initiated within 6 years from the end of the relevant AY if the income chargeable to tax that has escaped assessment amounts to one lakh rupees or more for that year.

1.4. As per the unamended Section 149(1)(c) of the Act of 1961, the reassessment proceedings could be initiated within 16 years from the end of the relevant AY if income in relation to any foreign asset chargeable to taxess escaped assessment.

1.5. However, with effect from 1st April, 2021, under the amended Section 149(1)(a) of the Act of 1961, reassessment could be initiated

within 3 years from the end of the relevant AY. Thus, under amended Section 149(1)(a) of the Act of 1961, as on 1st April, 2021, reassessment could only be reopened up to AY 2018-19 and all prior assessment years were barred.

1.6. For initiation of reassessment proceedings on 1st April, 2021, for any AY prior to AY 2018-19, the pre-conditions contained in the amended Section 149(1)(b) of the Act of 1961 were required to be fulfilled by the Income Tax Department ('Department').

1.7. Further, before issuance of a notice under Section 148 of the Act of 1961 after 1st April, 2021, the Department had to comply with the mandatory procedure prescribed under the newly inserted Section 148A of the Act of 1961.

1.8. Since there was a regime change with respect to law of limitation coming into effect from 1st April, 2021, which curtailed the time limit for re-opening of assessment from 6 years to 3 years, the Department with a view to avail the limitation prescribed under the unamended Section 149 of the Act of 1961, generated reassessment Notices under Section 148 of the Act of 1961 for AYs 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18, all dated 31st March, 2021 ('Notices').

1.9. The impugned Notices were generated and sent for despatch through electronic mail ('e-mail') by the Jurisdictional Assessing Officer ('JAO') using the Income Tax Business Application ('ITBA') software developed by the Tata Consultancy Services ('TCS') for the Department.

1.10. The facts on record evidence that though the impugned Notices were generated by JAO using the ITBA software on 31st March, 2021, the same were despatched through the ITBA's e-mail system, using the ITBA servers on or after 1st April, 2021; and/or despatched by JAO through normal post on or after 1st April, 2021.

1.11. In view of the admitted fact as regards the date of despatch being 1st April, 2021, or thereafter, the Department has sought to contend that for the purpose of determining the date on which the impugned Notices have been 'issued' within the meaning of Section 149 of the Act of 1961, the date of despatch by ITBA software system through e-mail or speed post is not relevant and it is only the date of generation of the impugned Notices on the ITBA portal, which must be considered.

1.12. The petitioners have agreed that the date of receipt of the impugned Notice by the assessee is not the criterion for determining whether the impugned Notices have been 'issued' within the time limit prescribed under Section 149 of the Act of 1961.

Categories identified

1.13. The impugned Notices as categorized by the Counsel for the petitioners, Ms. Kavita Jha and recorded by this Court vide its order dated 24th March, 2022, are reproduced hereinunder:

> "…
>
> ***1. Category A****: is in respect of writ petitions where Notice is dated 31st March, 2021 or before <u>but digitally signed on or after</u>*

1st April, 2021, however sent and received on or after 1st April, 2021.

***2. Category B**: is in respect of writ petitions where Notice is dated 31st March, 2021 or before, digitally not signed, however sent and received on or after 1st April, 2021.*

***3. Category C**: is in respect of writ petitions where Notice is dated 31st March, 2021 or before, digitally signed on or before 31st March, 2021, however sent and received on or after 1st April, 2021.*

***4. Category D**: is in respect of writ petitions where Notice is dated 31st March, 2021 or before, digitally signed on or before 31st March, 2021, no service either by e-mail or by post or any other mode and assessee came to know later on through Portal or receipt of subsequent notice under Section 142(1).*

*5. **Category E**: is in respect of writ petitions where Notice is dated 31st March, 2021 or before, manually signed, no service by e-mail but despatched through speed post on or after 1st April, 2021.*

…"

1.14. Since the deadline for passing the assessment orders in most of these cases was 31st March, 2022, the proceedings pursuant to the impugned reassessment Notices were stayed till further orders by this Court vide the aforesaid order dated 24th March 2022.

2. Therefore, the controversy which has arisen for consideration is whether these impugned Notices were issued on or before 31st March, 2021 or thereafter. If this Court holds that the impugned Notices were validly issued under the unamended Section 149 of the Act of 1961 on

or before 31st March 2021, then, the re-assessment proceedings would be governed by the unamended provisions of Section 147, 148, 149 and 151 of the Act of 1961 as they stood before 1st April, 2021. However, if this Court concludes that the impugned Notices were issued on or after 01st April, 2021, then, the new regime of Section 147, 148, 148A, 149 and 151 of the Act of 1961, shall govern these re-assessment proceedings and the decision of the Supreme Court in ***Union of India v. Ashish Agarwal, 2022 SCC OnLine SC 543,*** would apply. In that case, the impugned Notices though issued under Section 148 of the unamended Act of 1961, would be considered to be issued under Section 148A(b) of the Act of 1961, as amended by the Finance Act, 2021.

3. There is no dispute that since the impugned Notices pertain to A.Ys. 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18, they were getting time barred on 31st March, 2021, as per the newly amended Section 149(a) of the Act of 1961 and were therefore, as per law required to be '*issued*' on or before 31st March, 2021.

4. It is an admitted fact in all these petitions that though the impugned Notices were generated on the ITBA portal on 31st March, 2021, however, the same have been despatched only on or after 01st April 2021; and therefore the issue arising for determination before this Court is whether the impugned Notices will be governed by the re-assessment regime which came into effect on 01st April, 2021, or the re-assessment regime which was in existence as on 31st March, 2021.

Submissions of the Department vide Compliance Affidavit dated 30th May, 2022

5. In accordance with the directions of this Court, on behalf of the Department, Mr. Vibhuti Bhushan, the Assessing Officer and Mr. Saurav Sharma, Joint Commissioner of the ITBA were present in Court on 23rd May, 2022, to clarify the circumstances relating to the despatch of the impugned Notices through e-mail on 1st April, 2022, and thereafter.

6. A compliance affidavit dated 30th May, 2022 ('Compliance Affidavit'), was filed by the Department in this regard to set out the technical procedure available to the JAO on the ITBA portal for issuance of Notices under Section 148 of the Act of 1961 on 31st March, 2021.

7. The Compliance Affidavit states as follows:

7.1. The JAO uses the ITBA software to generate Notice under Section 148 of the Act of 1961, and thereafter, the ITBA software triggers an e-mail, with the Notice appended as an attachment, using the e-mail ID of the JAO, which is sent to the assessee's e-mail ID.

7.2. In the ITBA software, for generating Notice under Section 148 of the Act of 1961, the JAO has the following two options on the ITBA Screen:

(a) Generating Notice + digitally signing it;

(b) Generating Notice (No option to digitally sign).

7.3. If the JAO exercises option (a) i.e., to generate Notice + digitally sign it, a Notice is generated on the ITBA portal in an un-

editable PDF format (i.e., as a PDF file). The JAO thereafter has up to 15 days to affix his/her Digital Signature Certificate ('DSC') on the Notice so generated.

7.4. Upon affixation of the DSC by the JAO, the ITBA software's e-mail system will automatically trigger an e-mail to the assessee with the DSC appended Notice enclosed as an attachment to the e-mail. The ITBA software system will also share the DSC appended Notice with the assessee's E-filing portal's software database (which is a separate portal developed by the Department for the assessee).

7.5. In the event the JAO omits to affix his/her DSC to the Notice within 15 days from the date of its generation, the said Notice (without DSC) will be automatically triggered by the ITBA software system through e-mail and it will also be shared on the E-filing portal's database.

7.6. In case the JAO opts for option (b) i.e., to generate the Notice without DSC, the Notice is generated in an un-editable PDF format on the ITBA portal. Upon generation itself, the ITBA software's e-mail system is triggered and an e-mail containing the said Notice (without DSC) is sent to the e-mail address of the assessee and also uploaded on the E-filing portal, which is accessible by the assessee for his/her viewing.

7.7. The e-mail will be sent by the ITBA e-mail system to the assessee only if the assessee's valid e-mail ID is present in the ITBA system.

7.8. On 31st March, 2021, the average time taken for triggering the e-mail process by the ITBA software system was approximately 6 hours. The said delay was due to the high number of documents being generated on the said date. Therefore, a substantial time was taken by the ITBA servers for triggering the e-mails and consequent receipt of e-mails by the assessee.

7.9. The ITBA software's e-mail triggering system is programmed in such a manner that e-mails are triggered in a batch mode, in a controlled manner i.e., at the rate of 400 documents per 2 minutes so as to avoid getting the ITBA system's IPs blacklisted by e-mail service providers like Yahoo or Google.

7.10. The ITBA software's process of triggering of e-mail and sending of Notices to the E-filing portal's data base is an automated function.

7.11. The e-mails are triggered by the ITBA software using the Simple Mail Transfer Protocol ('SMTP') from back end, which reach the messaging gateway of the ITBA system. Upon reaching the messaging gateway, message ID is created by the messaging gateway and the same gets updated in the 'e-mail table'. Thereafter, depending on the availability of the destination domain server i.e. assessee's server and the user account, e-mails are either immediately delivered to the assessee or re-attempted in cases of failure.

7.12. The JAO of his/her own has no control over the Notice document generated on the ITBA portal, once it has been so generated. After the notice document is generated on the ITBA portal,

the JAO cannot alter, amend, or delete the said Notice document through the ITBA system.

7.13. The ITBA portal allows the JAO to cancel a draft of the notice under Section 148 of the Act of 1961, which is a step prior to its generation. Once a notice has been generated on the ITBA software portal, the JAO cannot cancel the same.

Arguments on behalf of the respondents

8. Mr. Zoheb Hossain, Mr. Puneet Rai and Mr. Sunil Aggarwal, the learned Senior Standing counsel submitted arguments on behalf of the respondents.

9. Mr. Zoheb Hossain, learned Senior Standing counsel for the Department has submitted as follows:

9.1. After the generation of Notice by the JAO, a unique Document Identification Number ('DIN') is assigned by the ITBA to the said Notice and once a DIN has been assigned, the JAO loses complete control over the Notice so generated by him/her i.e., the JAO can neither amend, alter nor cancel the said Notice. The JAO loses "locus poenitentiae" i.e. opportunity to withdraw the Notice once this DIN has been assigned. Therefore, upon generation of a DIN on the ITBA portal, the Notice should be considered as 'issued' and the despatch of the notice through e-mail or any other mode should not be a pre-requisite for determining whether the Notice has been issued to the assessee. [***The Collector of Central Excise, Madras v. M.M. Rubber & Co. Tamil Nadu***, [1992 Supp (1) SCC 471]

9.2. In terms of Section 13 of the Information Technology Act, 2000 ('Act of 2000'), the JAO is the "originator" and the ITBA portal is the "computer resource" which is outside the control of the originator. As per Section 13 of the Act of 2000, despatch occurs when, the notice generated by the JAO (originator) enters the ITBA system (computer resource) which is outside his/her control. Therefore, once the Notice is generated by the JAO the time taken by the ITBA's e-mail software system to trigger the e-mail process should not be attributable to the JAO. [***Qualimax Electronics Pvt. Ltd. v. Union of India & Ors.***, 2010 SCC OnLine Del 2189, Para 32].

9.3. With respect to Notices dated 31st March, 2021, which bear digital signature of a subsequent date and form part of category 'A', the note appearing as a footer of the impugned Notices to the effect that, "if digitally signed, the date of signature may be taken as date of document" has no statutory backing. There are no Central Board of Direct Taxes ('CBDT') instructions or circulars which have led to the said note appearing in the communications issued through the ITBA portal. Therefore, the Department is not bound by that note. Affixation of DSC is neither mandatory nor a requirement for issuance of a Notice by the JAO. Hence, the date of Notice should be reckoned as 31st March 2021 for category 'A' as well.

9.4. The impugned Notices forming part of category 'C', upon generation, bears the date as 31st March, 2021, therefore, there can be no dispute that the Notices were in fact generated by JAO on 31st March, 2021, and not thereafter. Further, there does not exist any

possibility of ante-dating the said Notices once a DIN Number has been assigned.

9.5. On perusal of the Compliance Affidavit, it can be seen that the time lag in the despatch of Notice by the ITBA portal was on account of the programming of the ITBA software itself and in no manner attributable to the JAO. Therefore, the Notices which were digitally signed on 31st March, 2021, though despatched by the ITBA software on or after 01st April, 2021, should be declared to have been issued on 31st March, 2021, itself.

9.6. The 'despatch' of the notice is separate from 'issue'. The words 'issue', 'forward' and 'serve' are distinct and the act of issuance always precedes the act of 'forward' or 'despatch' or 'sent out'. [***Sanjay Engineering Corpn. v. Commissioner of Income Tax***, (2000) 244 ITR 58].

9.7. Section 148 of the Act of 1961, specifically refers to the 'Assessing Officer' ('AO') by its designation. Therefore, the AO and the ITBA portal are distinct, thus the time taken by the ITBA portal for triggering the e-mail cannot be attributed to the AO.

9.8. As per the provisions of Section 282A (2) of the Act of 1961, if a document duly mentions the name and designation of the officer, it would be considered authenticated. Further, as per Rule 127A of the Income Tax Rules, 1962 ('IT Rules'), every communication in electronic form by an Income Tax Officer shall be deemed to be authenticated if the name and office of the officer are mentioned in the e-mail body or printed on the attachment to the e-mail. Therefore,

there is no mandatory requirement of affixing DSC and the Notices falling under category 'B', which have been issued without the affixation of DSC are also valid.

9.9. The Court should adopt a purposive interpretation to the machinery provisions to give effect to the legislative intent to tax rather than destroy the same. [***CIT v. Calcutta Knitwears***, 2014 (6) SCC 444].

10. Mr. Puneet Rai, learned Senior Standing counsel for the Department submitted as follows:

10.1. The date of issue of the impugned Notices is a disputed question of fact in the instant petitions and since the same have been filed at the stage of 'Notice for reopening of assessment', the Court should not be inclined to examine these factual aspects. [***Rajesh Sunderdas Vaswani v. Deputy Commissioner of Income Tax***,(2017) 88 taxmann.com 602 (Gujarat) at para 9 and 13].

10.2. The service of Notice upon the assessee is not a condition for determining if a notice has been validly issued under Section 149 of the Act of 1961. [***R.K. Upadhyaya Vs. Shanabhai P. Patel,*** (1987) 3 SCC 96] The phrase 'forward' as it appears in Clause (iv) of Explanation 1 to Section 153 is not to be interpreted in the same manner as words 'issue' or 'serve', the act of issue of Notice therefore precedes the act of despatch. [***Sanjay Engineering*** (Supra)]

10.3. The Division Bench of the Madras High Court in the case of ***Malavika Enterprises Vs. CBDT,*** (2022) 137 taxmann.com 398 (Madras) had, on facts, recorded that the e-mail attaching the Section

148 notice had been despatched on 31.03.2021 and thus, validly issued under Section 149 of the Act of 1961.

11. Mr. Sunil Aggarwal, learned Senior Standing counsel for the Department submitted as follows:

11.1. As per the ITBA Assessment User Manual (Version 1.9), the moment the JAO exercises the option to 'digitally sign', the DSC appended notice is sent by e-mail to assessee and simultaneously shared with the E-filing portal account of assessee. The JAO therefore, loses control over the process as soon as he/she chooses the option to "Digitally Sign" and thereafter the entire process is machine driven. Hence, in petitions where the impugned Notice bears the date and time of digital signature as 31st March, 2021, the same are liable to be dismissed.

11.2. Section 13 of the Act of 2000 would not apply to the impugned Notices as the Section begins with "Save as otherwise agreed between the originator and the addressee". This denotes that there must be an agreement in place between the tax collector and the tax payer for application of Section 13 of the Act of 2000, and since there is no such agreement, the same is not applicable in the instant petitions.

12. The submissions of the Department for each category are summarized as under:

12.1. Category 'A': The date of affixation of DSC on the Notices on 1st April, 2021, or thereafter will not determine the date of the Notice. The Notice is deemed to be issued on 31st March, 2021, when it was

allotted a DIN by the ITBA. The despatch of Notices on 01st April, 2021, or thereafter is also not determinative for deciding when the Notices were 'issued'.

12.2. Category 'B': The affixation of DSC on the Notices is not mandatory. The Notices were generated on 31st March, 2021, with a DIN and the name & office of the Income Tax Officer was duly printed thereon. Further, the e-mail appending the Notice was triggered within 15 days as the JAO had selected option (a) on the ITBA Screen but omitted to affix his/her signature within 15 days, thus, causing delay in despatch of e-mail. In these facts, the Department contends that the Notices were issued on 31st March, 2021. It is not disputed by the Department that the Notices were despatched on or after 01st April, 2021, but the said fact as per the Department is not determinative of the expression 'shall be issued' in Section 149 of the Act of 1961.

12.3. Category 'C': The Notice with a DIN was generated on 31st March, 2021, and the DSC was affixed by the JAO on the same date; nothing further could have been done by the JAO as the said notice was outside his control. The delay in triggering of the e-mail by the ITBA software system was because of the high volume of Notices generated on 31st March, 2021. The e-mails containing the impugned Notices were despatched on 01st April, 2021, or thereafter, to the assessee, however that is not determinative of the expression 'shall be issued' in Section 149 of the Act of 1961.

12.4. Category 'D': The Department has not placed any material on record nor submitted oral arguments for explaining the non-issuance of e-mail or service through speed-post or any other mode. The assessees came to know later on through E-filing portal on receipt of subsequent notice under Section 142(1) of the Act of 1961.

12.5. Category 'E': The impugned Notices are dated 31st March, 2021, and bear DIN of the said date. The subsequent despatch on 01st April, 2021, or thereafter, through speed post does not affect the validity of the Notice. The Notice is 'issued' validly for the purpose of Section 149 of the Act of 1961.

13. The learned counsel for the respondents have not disputed that the despatch of the impugned Notices in categories 'A', 'B' & 'E' were admittedly done on or after 01st April, 2021. Their sole contention was that upon generation of Notice on 31st March, 2021 the test of 'issued' for the purpose of Section 149 of the Act of 1961 was satisfied. They have not addressed the Court on facts pertaining to category 'D' notices. As per the assessees, there was no communication of the notices falling under category 'D' either by e-mail or speed post.

Arguments on behalf of the petitioners

14. Ms. Kavita Jha, Mr. Ved Kumar Jain, Mr. Piyush Kaushik, Mr. Kapil Goel, Mr. T.M. Shiv Kumar and Mr. Jaspal Singh Sethi, learned counsel have submitted arguments on behalf of the petitioners.

15. The petitioners' counsel have rebutted the explanations and submissions made by the respondent. The Counsel for all the petitioner parties placed reliance on the judgment of ***Daujee Abhushan Bhandar Vs. UOI,*** [2022] 136 taxmann.com 246 (Allahabad) to contend that the said judgment directly covers the issue under consideration.

16. Ms. Kavita Jha, learned counsel for the petitioners submitted as follows:

16.1. The expression 'issued' has been judicially interpreted by the Courts as framing of the order and taking necessary action to despatch the same. Therefore, mere generation of Notice on the ITBA portal does not satisfy the test of 'issue' without proving that the same has been despatched within the time barring period. [***Delhi Development Authority v. H.C. Khurana,*** (1993) 3 SCC 196]

16.2. Even though the service of notice is not relevant, however, for determining if a notice has been validly issued, the notice should be sent forth and go beyond the control of the authority issuing the same, to conclude that it has been issued. [***Kanubhai M. Patel (HUF) v. Hiren Bhatt,*** (2011) 334 ITR 25 (Guj)]

16.3. The provisions of Section 149 of the Act of 1961, does not contain the expression 'Assessing Officer'. Therefore, no distinction can be made between the 'Assessing Officer' and 'ITBA portal' under Section 149 of the Act of 1961. The time taken by the ITBA software for triggering of e-mail is attributable to AO and since admittedly the

impugned Notices were despatched on 01st April, 2021, or thereafter, the same are time barred.

16.4. The E-verification Scheme, 2021 issued by CBDT vide Notification bearing No. 137/2021 dated 13th December, 2021 in paras 6, 9 and 11, states that affixation of DSC in E-proceedings is a mandatory requirement. In the absence of DSC, the impugned Notices would be null and void.

16.5. The circular bearing No. 19/2019 dated 14th August, 2019, issued by CBDT mentions that the allotment of a DIN to the Notice is a mandatory requirement prescribed by the aforesaid circular only to maintain the audit trail of the documents issued by the Department and to provide transparency in the process. The allotment of DIN to the notice does not amount to issuance as sought to be contended by the Department in these proceedings.

16.6. Since the impugned Notices have been issued in an electronic form, the provisions of Section 2(1)(t), Section 3, Section 13, Section 66A of the Act of 2000 would be relevant as the same govern electronic communication. In the present case, as per Section 13 of the Act of 2000, the ITBA system should be considered as the 'originator'. Therefore, the despatch of electronic record would occur only when the same enters a computer resource outside the control of the ITBA and only after such despatch would the notice be deemed to have been issued.

16.7. The E-filing portal as viewed by the assessee clearly highlights the fact that there is a system in place for duly displaying the date on

which the Notice is 'issued' by the JAO. However, for the impugned Notices under consideration, the date of issuance is conspicuously not mentioned on any of the assessee's accounts on the E-filing portal. Illustratively the screen shot for PAN AAFCA 9047H is extracted below:

Notice/ Communication Reference ID: ***100036566022***		
Notice u/s	***ITBA/ AST/ F/17/202122/ 1034161151(1)*** *Document reference ID*	*Description:* ***[ITBA] Issue letter*** *Response* *Issued on:* ***13-Jul-2021*** **Notice/Letter PDI** **Seek/View Adjournmen** *Sub*

Notice/ Communication Reference ID: ***100033602029***		
148 *Notice u/s*	***ITBA/ AST/ S/148/2020-21 /1032044808(1)*** *Document reference ID*	*Description:* ***[ITBA] Notice u/s 148 of Income Tax Act, 1961.*** *Response* *Issued on:* **-** **Notice/Letter PD** **Seek/View Adjournment** *Vi*

16.8. A conjoint reading of the relevant provisions of Act of 1961 and Act of 2000, leads to the inescapable conclusion that for the Notice to be validly 'issued' it has to be digitally signed and should be out of the control of the originator for satisfying the test of 'shall be issued' under Section 149 of the Act of 1961.

16.9. The mere generation of notice on the ITBA Screen and signing the same is not sufficient for satisfying the test of 'issued' and it is only when the Notice has been despatched in terms of Section 13 of

the Act of 2000, would the same be declared to be issued. In this regard reliance has been placed on the judgment of the Supreme Court in ***UOI vs. G.S. Chatha Rice Mills,*** (2021) 2 SCC 209, wherein the Supreme Court has held that a notification would be in effect from the time and date on which it was uploaded on the e-gazette and not the date mentioned in the notification.

17. The learned counsel for the petitioner, Mr. Ved Jain, submitted as under:

17.1. The details of the date and time of despatch of the impugned Notices by the ITBA servers are available with the Respondent. In the case of ***Santosh Krishna HUF v. UOI***, bearing Writ Tax No. 211 of 2022 and ***Mohan Lal Santwani Vs. UOI***, bearing Writ Tax No. 569 of 2022, the Department provided the Allahabad High Court with the details of: (1) generation of notice; (2) digital signing by JAO, and (3) triggering of e-mail to the assessee. Further, the Allahabad High Court in ***Mohan Lal Santwani*** (Supra) has directed that the date and time of triggering e-mail should be reflected in the E-filing portal accessed by assessee. Therefore, in the present cases, the aforesaid information, even though available is being withheld by the respondents.

17.2. In the writ petitions, wherein the e-mail was triggered by ITBA servers before 31st March, 2021, the respondents have readily furnished the said information in their counter affidavits as is evidenced by the counter filed in W.P. (C) No. 3038 of 2022, titled as ***Sant Sandesh Media and Communication P. Ltd. Vs. ITO, Ward 22(3)***. However, in the petitions where the e-mail was triggered on

01st April, 2021, or thereafter, the said information has been withheld and an untenable submission has been made by the respondents, that the notice is deemed to have been issued on mere generation of the notice on the ITBA Screen.

17.3. The contention of the respondent, that the Notice is deemed to be 'issued' upon generation on the ITBA Screen is contradicted by the Department's own admission that upon generation the JAO has up to 15 days to sign the said Notice. This hiatus evidences that upon generation, the notice is not deemed to be 'issued'.

17.4. The Department has itself admitted in the Compliance Affidavit, that the e-mail address of the assessee is inserted in the e-mail table in ITBA, only when the ITBA e-mail software system is triggered. Therefore, it is a necessary condition for valid issuance of a notice, that the address of the assessee is mentioned for despatch and no Notice can be held to be validly issued without the address being duly mentioned. This further evidences the fact that the notice is issued only upon its despatch from the ITBA servers and not upon generation of the Notice on the ITBA screen.

17.5. The respondents have artificially created three distinct steps i.e.,(a) generation of notice; (b) signing of notice; and (c) triggering of e-mail.

17.6. The Notice can be said to have been 'issued' only when the e-mail is triggered from the ITBA servers, hence the date and time of when the e-mail was triggered from the ITBA servers should be taken into consideration.

17.7. With respect to cases falling in category 'A', wherein DSC was affixed by JAO on 01st April, 2021, or thereafter, the date of DSC shall be taken as the date of Notice, since the same is in consonance with the note appearing in the footer on the impugned Notices.

17.8. The Compliance Affidavit, in paragraph 6 records the admission of the Department that the impugned Notices were indeed despatched by ITBA servers even in case of category 'C' on 01st April 2021 or thereafter. Thus, there is a clear admission that the impugned Notices are time barred.

18. Mr. Piyush Kaushik, learned counsel for the petitioner, submitted as under:

18.1. As per Section 148 of the Act of 1961, valid issuance of Notice is a jurisdictional requirement not just a mere procedural requirement. There is a heavy onus on the Department to provide the date on which impugned Notices have been posted or the date and time on which the e-mail was sent from the e-mail ID of the JAO.[***CIT v. Chetan Gupta,*** (2016) 382 ITR 613]

18.2. All impugned Notices sent by e-mail have been issued from the designated e-mail address of the JAOs, therefore, to allege that the triggering of e-mail by the ITBA is separate from the JAO is factually incorrect. The process of triggering e-mail by the ITBA software system is for and on behalf of the JAO and therefore attributable to the JAO.

18.3. The issue of Notice is only effective when the Notice has moved out of the control of the AO for delivery to assessee. Hence,

the date on which the e-mail has been transmitted from the e-mail ID of the JAO would be the date of issuance of Notice under Section 149 of the Act of 1961.[***Yuvraj v. Income Tax Officer & Ors***. in W.P.(C) No. 28293 of 2021 order dated 3rd March 2022 (MP), and ***Kanubhai M. Patel*** (Supra)]

18.4. It is only upon despatch of the e-mail from ITBA servers that the impugned Notices could be held to have been issued [***Advance Infradevelopers (P) Ltd. v. Adjudicating Authority,*** (2021) 127 taxmann.com 197 (Madras)]:

> *"47. The argument in regard to the order being beyond the control of the person passing it is also relevant, based upon the principle that an order must be deemed to be complete and valid only when it is prepared, finalised and transmitted for communication to the concerned person."*

19. Mr. Jaspal Singh Sethi, learned counsel for the petitioner submitted as follows:

19.1. The screenshot annexed as Annexure P-5 in W.P. (C) No. 4567 of 2022 shows that each Notice in addition to a DIN, also contains a Communication Reference ID ('CRI'). The CRI is generated by the ITBA portal to record the date of the issuance of the Notice. Although the CRI for the impugned Notices issued under Section 148 of the Act of 1961, is displayed on the E-filing portal, the date of issuance is conspicuously absent.

19.2. Per contra, another screenshot annexed as Annexure P-3 in the same writ petition, shows that in the case of other Notices issued

subsequently in 2021, to the same assessee, the date of issuance is duly mentioned along with the CRI on the E-filing portal. Relevant portion of the screen shot is extracted herein below:

" …

Notice/ Communication Reference ID: ***100040446529***		
142(2) *Notice u/s*	***ITBA/ AST/ F/142(1)/2021-22/1037155946 (1)*** *Document reference ID*	*Description:* ***[ITBA] Notice u/s 142*** *View Response* ***of Income Tax Act 1961.*** **Notice/Letter PDF** *Issued on:* ***23-Nov-2021*** *Response Due Date:* ***08-Dec-2021*** **Seek/View Adjournment**
Notice/ Communication Reference ID: ***100033640093***		
148 *Notice u/s*	***ITBA/ AST/ S/148/2020-21 /1032078906(1)*** *Document reference ID*	*Description:* ***[ITBA] Notice u/s 148*** *Submit Response* ***of Income Tax Act 1961.*** *Issued on: -* **Notice/Letter PDF** **Seek/View Adjournment**

…"

19.3. The date of issuance has been selectively withheld only with respect to the impugned Notices, as providing the information would make it evident that the date of issuance even as per the ITBA software system is 01st April, 2021, or thereafter, as the software is also programmed to record the date of issuance as the date of despatch.

20. Mr. T.M. Shiv Kumar, learned counsel for the petitioner submitted as under:

20.1. As per the provisions of Section 282A of the Act of 1961, for a Notice or any other document to be issued by the income tax authority, such a Notice or document has to be signed and either 'issued' in paper form or 'communicated' in electronic form. The expression 'communicated' is also mentioned in Sections 158AB (5), 253(3) and 264 (3) of the Act of 1961.

20.2. While referring to correspondence in the digitized world, the word 'issued' has been replaced with the word 'communicated' in Section 282A of the Act of 1961. Therefore, when a Notice is in paper form, it has to leave the office of the concerned Authority for despatch to constitute a valid issuance. However, in digital form, the communication is instant and therefore, merely putting the notice into transmission cannot be deemed to be communication. To constitute a valid communication the Notice has to be effectively sent out by the concerned authority to the assessee.

20.3. The Section 282A of the Act of 1961, stipulates communication of the Notice as a sine qua non for due issuance of a Notice. Hence, the submission that generation of notice on the ITBA screen satisfies the condition of issued under Section 149 is contrary to the mandate of Section 282A of the Act of 1961.

20.4. Until the ITBA servers transmit the e-mail to the destination servers of the assessee's e-mail service provider, there can be no valid communication of the Notice therefore, consequently, there would be no valid issuance of Notice under Section 149 read with Section 282A of the Act of 1961.

21. Mr. Kapil Goel, learned counsel for the petitioner submitted as under:

21.1. The requirement of issuance of Notice under Section 149 of the Act of 1961 is not fulfilled by merely signing of the Section 148 Notice. For valid issuance, the Notice has to be sent to the assessee within the end of the relevant AY i.e. 31st March, 2021. [***Smt. Parveen Amin Bhathara v. the Income Tax Officer***, Writ Appeal No. 1795 of 2021 decided on 27th June 2022]

21.2. The Karnataka High Court, in the judgment of ***Infineon Technologies AG AM Campeon v. Deputy Commissioner of Income-Tax***; Writ Petition No. 49458 of 2018 decided on 24th June, 2022, at paragraphs 6 and 12 have concluded that since the Notice, although dated 31st March, 2017, was booked for courier on 04th April, 2017, it would be considered to be issued on 04th April, 2017. The Notice was held to be time barred since it was required to be issued on or before 31st March, 2017. The date of despatch was determinative of issuance for the provision of Section 149 of the Act of 1961 and not the date of Notice.

21.3. The relevant information with respect to the date of issuance of Notice has been left blank for each of the impugned Notices issued to the petitioners in the present matters. The said date is not available on the assessee's E-filing portal account because if the said information is shared, it would disclose that the date of issuance, even as per the ITBA software, is 1st April, 2021, or thereafter.

21.4. To demonstrate the aforesaid, the Annexure R-2 annexed with the Department's Counter Affidavit in W.P. (C) No. 856 of 2022 can be perused, which is the screenshot of the ITBA screen of the assessee as visible to the JAO only. In this Annexure, the Department itself has extracted relevant portion of the screenshot, which has complete details of the time at which the e-mail was sent, time at which the e-mail was delivered, etc. evidencing that the date and time when the e-mail containing the impugned Notice as an attachment was sent by the ITBA servers, is duly available with the Department. The relevant extract of the screenshot is reproduced herein below:

"…

▼	*Register Details*											
	☐	*Despatch No*	*Date of issue*	*PAN/TAN*	*Addressee Name*	*Subject*	*Comm. Ref. No.*	*View Documents*	*Mode of Despatch*	*Date of Despatch*	*Date of Service*	*Status*
	☐		*31.03.2021*	*AHIPG3000F*	*ANAND GOEL*	*Notice u/s 148*	*ITBA/AST/S/148/2020-21/1032116278(1)*	*Attachments*	*Email*			*Email Delivered*

…"

Sent Email (?)	*Email Delivery Status*	*Email Sent On*	*Email Delivered On*	*Shared with e – Proceeding on*
Email Details	*Delivered*	*01/04/2021 05:29:41 AM*	*01/04/2021 05:29:45 AM*	*03/04/2021 04:01:39 AM*

….."

21.5. Therefore, the time when the e-mail containing the impugned Notice as an attachment was sent by the ITBA servers, is duly available with the Department in its ITBA portal.

22. The learned counsel for the petitioner Mr. Pawan Shree Agarwal, submitted as under:

22.1. The impugned Notice in this petition is distinct from Categories 'A' to 'E' identified in the order dated 24th March, 2022. The impugned Notice was never served to the petitioner on his registered e-mail ID. Instead, it was sent to an unrelated e-mail address. The petitioner learnt about the impugned Notice only upon checking his E-filing portal account. Therefore, since there was no communication of the notice the Notice should be deemed to not have been issued.

23. Ms. Prem Lata Bansal, learned Senior Advocate for the petitioner in W.P. (C) No. 4919 of 2022, submitted as under:

23.1. The impugned Notice issued by the respondent was not served on the petitioner/assessee's registered e-mail ID and was sent to an unrelated e-mail ID. The petitioner learnt about the impugned Notice which was neither signed physically nor any DSC was appended, incidentally through its E-filing portal. Therefore, there has been no compliance of the provisions of Section 149 of the Act of 1961, while issuing the impugned Notice.

Questions of law framed

24. The aforementioned submissions made by both the parties give rise to the following questions of law for consideration by this Court: -

I. Whether the JAO's act of generating Notice in the ITBA portal on 31st March, 2021, without despatching the Notice meets the test of the expression 'shall be issued' in Section 149 of the Act of 1961, and saves the Notices from being time barred?

II. Whether "despatch" as per Section 13 of the Act of 2000 is sine qua non for issuance of Notice through electronic mail for the purpose of Section 149 of the Act of 1961?

III. Whether the time taken by the ITBA's e-mail software system on 31st March, 2021, in despatching the e-mails to the assessees is not attributable to the JAOs and the Notices will be deemed to have been issued on 31st March, 2021?

IV. Whether the Section 148 Notices sent as an attachment through e-mails, from the designated e-mail addresses of the JAOs, which do not bear the respective JAO's digital signature, are valid under Section 282A the Act of 1961 read with Rule 127A of the IT Rules?

V. Whether upload of the Section 148 Notice on the "My Account" of the assessee on the E-filing portal is valid transmission under the Act of 1961?

Analysis and reasons

25. **Question No. (I):** *Whether the JAO's act of generating Notice in the ITBA portal on 31st March, 2021, without despatching the Notice meets the test of the expression 'shall be issued' in Section 149 of the Act of 1961, and saves the Notices from being time barred?*

- The Court has answered this in the negative in favour of the assessee.

25.1. It has emerged as an admitted position on facts, that the e-mails attaching the impugned Notices dated 31st March, 2021, were despatched by the ITBA servers on 01st April, 2021, or thereafter.

25.2. Faced with the aforesaid factual position, it has been contended by the Department that since generation of impugned Notices on the ITBA portal on 31st March, 2021, is undisputed, the singular act of generation of Notice by JAO satisfies the requirement of 'issued' for the purpose of Section 149 of the Act of 1961 and despatch of the Notice on 31st March, 2021 is not a mandatory requirement.

25.3. The Department contends that since each of the impugned Notices bear a DIN, its generation as on 31st March, 2021, is beyond doubt. It is further contended that since, on the ITBA portal, after generation of Notice the JAO is left with no power to amend, alter, cancel or ante-date the Notice, the said act of generation conclusively establishes that the Notice has been issued.

25.4. The petitioners as noted above have opposed this contention of the Department as being contrary to settled law interpreting the expression 'issued', 'shall be issued' and the dictionary meaning of the phrase 'issue'. It is contended that under the Act of 1961, a Notice is held to be 'issued' on the date of its due despatch and not on the date the notice is drawn up.

25.5. It would be useful to refer to the judgments relied upon by the petitioners, which clearly bring out that for an authority to contend that a Notice has been issued, the same must be duly despatched by the issuing authority. The first instructive judgment on this point is

Delhi Development Authority (Supra) at paragraphs 5, 13 and 15, which reads as under:

> "...
> ***5.*** *The substituted clause (ii) in para 2, in O.M. dated September 14, 1992, is as under:*
> *"(ii) Government servants in respect of whom a charge-sheet has been* ***issued*** *and the disciplinary proceedings are pending; and"*
> …
> ***13.*** *…The context in which the word 'issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch of the charge-sheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision. Obviously, the contrary view cannot be taken.*
> **…**
> ***15.*** *The meaning of the word 'issued', on which considerable stress was laid by learned counsel for the respondent, has to be gathered from the context in which it is used. Meanings of the word 'issue' given in the Shorter Oxford English Dictionary include : 'to give exit to; to send forth, or allow to pass out; to let out; … to give or send out authoritatively or officially; to send forth or deal out formally or publicly; to emit, put into circulation'. The issue of a charge-sheet, therefore, means its despatch to the government servant, and this act is complete the moment steps are taken for the purpose, by framing the charge-sheet and despatching it to the government servant, the further fact of its actual service on the government servant not being a necessary part of its requirement*
> …"

(Emphasis supplied)

In the aforesaid judgment the Supreme Court emphatically laid down that despatch is an essential condition to complete the act of issuance. The Court clarified that service on the recipient was not a condition precedent for satisfying the act of issuance.

25.6. It would also be useful to refer to the judgment of the Supreme Court in the case of ***R.K. Upadhyaya*** (Supra). In the said case, the Supreme Court was concerned with the controversy of the validity of a notice with reference to Sections 148 and 149 of the Act of 1961. In the said case, the notice under Section 148 of the Act of 1961, was despatched by registered post on 31st March, 1970, but the same was received by the assessee on 03rd April, 1970; and therefore, the Gujarat High Court after observing that the expression 'issued' and 'served' in Section 148 and 149 have the same meaning, held that the notice was time barred. In appeal, the Supreme Court after taking note that the Notice was despatched by registered post on 31st March, 1970, set aside the judgment of the High Court. The Supreme Court held that the service of notice is not a condition precedent for satisfying the condition of "issued". The date of despatch of the notice was taken into consideration by the Supreme Court as the relevant date for determining that the notice has been validly issued for the purpose of Section 149 of the Act of 1961. The date of notice is discernible from the judgment of High Court[1].

25.7. The contention of the Department that since the impugned Notices were generated and digitally signed on 31st March, 2021, the

[1]Shanabhai P. Patel Vs. R.K. Upadhyaya reported in 1973 SCC OnlineGuj 42 : (1974) 96 ITR 144

same should be considered as the date of issue, notwithstanding the fact that the same had not been despatched, was categorically rejected by the Madras High Court in ***Smt. Parveen Amin Bhathara*** (Supra) following the judgment of Gujarat High Court in ***Kanubhai M. Patel (HUF)*** (Supra). The Gujarat High Court, dealing with a notice issued in paper form, at paragraphs 13 and 16 observed as under:

> *"…*
> ***13.*** *…Whereas, on behalf of the revenue, it has been contended that the notices were actually signed on 31.3.2010, hence, the said date would be the date of issue and as such, the impugned notices have been issued within the time limit prescribed under section 149 of the Act.*
> *…*
> ***16.*** *Thus, the expression to issue in the context of issuance of notices, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression "shall be issued" as used in section 149 would therefore have to be read in the aforesaid context. In the present case, the impugned notices have been signed on 31.03.2010, whereas the same were sent to the speed post centre for booking only on 07.04.2010. Considering the definition of the word issue, it is apparent that merely signing the notices on 31.03.2010, cannot be equated with issuance of notice as contemplated under section 149 of the Act. The date of issue would be the date on which the same were handed over for service to the proper officer, which in the facts of the present case would be the date on which the said notices were actually handed over to the post office for the purpose of booking for the purpose of effecting service on the petitioners. Till the point of time the envelopes are properly stamped with adequate value of postal stamps, it cannot be stated that the process of issue is complete. In the facts of the present case, the impugned notices having been sent for booking to the Speed Post Centre only on 07.04.2010, the date of issue of the said notices would be 07.04.2010 and not 31.03.2010, as contended on behalf of the*

revenue. In the circumstances, impugned the notices under section 148 in relation to assessment year 2003-04, having been issued on 07.04.2010 which is clearly beyond the period of six years from the end of the relevant assessment year, are clearly barred by limitation and as such, cannot be sustained.

…"

(Emphasis Supplied)

The Gujarat High Court categorically held that it is on the date of despatch of the Section 148 notice that the same will be held to be issued for the purpose of Section 149 of the Act of 1961.

25.8. The Madras High Court in ***Smt. Parveen Amin Bhathara*** (Supra), after approving the dicta of ***Kanubhai Patel*** (Supra) and considering Section 282 of the Act of 1961 and Rule 127 of IT Rules, held as under:

"…

8. *In the present case, the respondent reopened the assessment of the appellant for the assessment year 2011-12, through notice dated 31.03.2018 under section 148 of the Act. Admittedly, the limitation period of six years for reopening the assessment, came to an end on 31.03.2018. The main plank of contention of the learned counsel for the appellant is that the notice under section 148 of the Act dated 31.03.2018 has been received by the appellant through e-mail only on 18.04.2018 i.e., after the expiry of six years from the end of the assessment year under consideration and hence, the same is clearly barred by limitation, whereas the Department contended that mere signing of notice by the respondent on 31.03.2018 amounts to issuance of notice under section 149 of the Act and therefore, the same is within the limitation period.*

…

12. *In* ***Kanubhai M. Patel v. Hiren Bhatt and others*** *[(2011) 334 ITR 25 (Guj)], it was held by the Gujarat High Court that "date of issuance of notice under Section 148 Income Tax Act has to be reckoned not from the date when it was issued, but on the date when it was actually delivered on the assessee"…*

…

Thus, it is apparent from the aforesaid decisions that the issuance of notice under section 149 is complete only when the same is issued in the manner as prescribed under section 282 r/w rule 127 of the Income Tax Rules prescribing the mode of service of notice under the Act. The signing of notice would not amount to issuance of notice as contemplated under section 149 of the Act. In other words, the requirement of issuance of notice under section 149 is not mere signing of the notice under section 148, but is sent to the proper person within the end of the relevant assessment year.

…"

(Emphasis Supplied)

In the said judgment the Division Bench of the Madras High Court categorically rejected the submission of the Department that signing of Notice, without despatch, would amount to issuance of Notice as contemplated under Section 149 of the Act of 1961.

25.9. The Madhya Pradesh High Court in ***Yuvraj v. Income Tax Officer*** (Supra) similarly dealt with a case of a Section 148 Notice dated 31st March, 2021, which was sent by e-mail to the assessee on 16th April, 2021.The High Court held that the Notice was issued on 16th April, 2021 and quashed the same reserving liberty to the Department to issue a fresh Notice under Section 148A of the Act of

1961, in accordance with law. The grounds for challenging the impugned Notice in the said case were same as have been raised herein for challenging the impugned Notices falling under category 'A' and 'B'.

25.10. The judgment of the Allahabad High Court in ***Daujee Abhusan Bhandar*** (Supra),was earliest to hold that drawing up a Notice on 31st March, 2021, and digitally signing the same, in the absence of despatch, does not amount to issuance of Notice within the meaning of Section 149 of the Act of 1961. The High Court after elaborately discussing the provisions of Sections 282 and 282A of the Act of 1961, and the provisions of Section 13 of the Act of 2000, held that, since the impugned Notice therein though dated 31st March, 2021, was issued through e-mail on 06th April, 2021, the same was time barred and therefore liable to be quashed. The Court at paragraph 29 and 30 held as under:

> *"…*
>
> ***29.*** *Thus, considering the provisions of sections 282 and 282A of the Act, 1961 and the provisions of section 13 of the Act, 2000 and meaning of the word "issue" we find that firstly notice shall be signed by the assessing authority and then it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy thereof to the person therein named by modes provided in section 282 which includes transmitting in the form of electronic record. Section 13(1) of the Act, 2000 provides that unless otherwise agreed, the despatch of an electronic record occurs when it enters into computer resources outside the control of the originator. Thus, the point of time when a digitally signed notice in the form of electronic record is entered in computer resources outside the control of the originator i.e. the assessing authority that shall*

the date and time of issuance of notice under section 148 read with section 149 of the Act, 1961.

30. *In view of the discussion made above, we hold that mere digitally signing the notice is not the issuance of notice. Since the impugned notice under section 148 of the Act, 1961 was issued to the petitioner on 6-4-2021 through e-mail, therefore, we hold that the impugned notice under section 148 of the Act, 1961 is time barred. Consequently, the impugned notice is quashed.*

…"

(Emphasis Supplied)

25.11. In the subsequent judgments of the Allahabad High Court in the case of ***Santosh Krishna HUF*** (Supra) and ***Mohan Lal Santwani*** (Supra) the High Court summoned the details of date and time of triggering of e-mail by the ITBA e-mail software system to determine the date of issuance of the e-mail attaching the Notice. The High Court held the said date of triggering of e-mail to be the date of issue of Section 148 Notice for the purpose of Section 149 of the Act of 1961.

25.12. The review of the aforesaid judgments of the Supreme Court and the several High Courts shows that all Courts have consistently held that the expression 'issue' in its common parlance and its legal interpretation means that the issuer of the notice must after drawing up the notice and signing the notice, make an overt act to ensure due despatch of the notice to the addressee. It is only upon due despatch, that the notice can be said to have been 'issued'.

25.13. Further, a perusal of the Compliance Affidavit reveals that while the function of generation of Notice on ITBA portal and digital signing of the Notice is executed by the JAO, the function of drafting of the e-mail to which the Notice is attached and triggering the e-mail to the assessee is performed by the ITBA e-mail software system.

Thus, mere generation of Notice on the ITBA Screen cannot in fact or in law constitute issue of notice, whether the notice is issued in paper form or electronic form. In case of paper form, the notice must be despatched by post on or before 31st March 2021 and for communication in electronic form the e-mail should have been despatched on or before 31st March 2021.

In the present writ petitions, the despatch by post and e-mail was carried out on or after 01st April 2021 and therefore, we hold that, the impugned Notices were not issued on 31st March 2021.

25.14. The Department has not disputed the correctness of the law settled by the Supreme Court in the case of ***R.K. Upadhyaya*** (Supra) in which the Court was concerned with issuance of the Section 148 notice in paper form and concluded that, since the date of despatch was within prescribed period of limitation, the notice was validly issued for the purpose of Section 149 of the Act of 1961, and held that the date of service of notice was not relevant. In fact, the Department has relied upon the said judgment. The said judgment squarely applies to Notice classified as category 'E'. The amendments to the Act of 1961 including Section 282A was to enable the income tax authority to issue notice either in paper form or electronic form and were made

to provide an adequate legal framework for paperless assessment. Similarly, setting up of the digital platform of ITBA portal and the E-filing portal is for facilitating assessment proceedings electronically. The said amendments or the use of ITBA portal by Department for issuing notice in no manner mitigates against or dispense with the legal requirement of the Department to ensure due despatch of the Section 148 notice to satisfy the test of Section 149 of the Act of 1961. The contention of the Department that upon generation of the Notice on the ITBA Screen simpliciter (even before its despatch) is to be held to be issued does not persuade the Court and is contrary to the judgment relied upon by the said party.

25.15. This Court in the case of ***Court On its Own Motion v.*** Commissioner ***of Income Tax, (2013) 352 ITR 273***, while dealing with Section 143(1) of the Act of 1961, has held that the law requires that, the intimation under Section 143(1) should be communicated to the assessee. The uncommunicated orders or intimations cannot be enforced and are not valid. The relevant extract of the aforesaid decision is reproduced hereinunder:

"…

> *33. The second grievance of the assessee is with regard to the uncommunicated intimiations under Section 143(1) which remained on paper/file or the computer of the Assessing Officer. This is serious challenge and a matter of grave concern. The law requires intimation under Section 143(1) should be communicated to the assessee, if there is an adjustment made in the return resulting either in demand or reduction in refund. The uncommunicated orders/intimations cannot be enforced and are not valid.*…

2022 PLRonline 0390 (Del.)

…But when there is failure to despatch or send communication/intimation to the assessee consequences must follow. Such intimation/order prior to 31 March, 2010, will be treated as non est or invalid for want of communication/service within a reasonable time. This exercise, it is desirable should be undertaken expeditiously by the Assessing Officers. CBDT will issue instructions to the Assessing Officers.

…"

(Emphasis Supplied)

25.16. The Department sought to contend that the Madras High Court in ***Malavika Enterprises*** (Supra) has struck a discordant chord with the judgment in the ***Daujee Abhusan Bhandar*** (Supra). However, on a perusal of the judgment in ***Malavika Enterprises*** (Supra), we find that in the said case the notice had been despatched on 31st March, 2021, at 6.42 pm by the ITBA server, though served on the assessee on 01st April, 2021, at 2.00 am and therefore, the Madras High Court concluded that the notice has been validly issued on 31st March, 2021. The relevant portion of paragraph 8 of this judgment reads as follows:

"…
8. Coming to the facts of the case, it is stated that notice under section 148 of the Act of 1961 is said to have been issued on 31-3-2021 for the assessment year 2013-2014, followed by consequential notices. It is the case of the petitioner that the notice is said to have been issued vide email at 6.42 pm, but was served on 1-4-2021 at 2 am and, therefore, the unamended provision of section 148 of the Act of 1961 would not be applicable to the case…
…"

We do not find that this judgment takes the case of the Department any further as the Section 148 notice in the case was duly despatched on 31st March, 2021.

25.17. The Department has not cited any judgment which would support its contention that mere drawing up of Notice and signing it (pending despatch) amounts to issuance. The counsel for the respondent placed heavy reliance on the judgment of the Supreme Court in ***M.M. Rubber & Co.*** (Supra). In the said case as well, the apex Court was concerned with the issue of limitation while determining if the impugned order therein had been passed within time. However, the provision under consideration was Section 35-E (3) of the Central Excise and Salt Act, 1944 ("Act of 1944"), which reads as under:

> *"…*
> *Sub-Section (3) of Section 35E of the Act which deals with the limitation for exercise of the powers under sub- sections (1) and (2) of the Act and which is the relevant provision for consideration in this appeal reads as follows:*
>
> *"**No order shall be made** under sub-section (1) or subsection (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.*
> *…"*

The Court in the aforesaid judgment deliberated with reference to the phrase *"No order shall be made"* in Section 35-E(3) of the Act of 1944 and concluded that the date on which the order was made by the adjudicatory authority by signing it is a relevant date for

determining if it was passed within limitation. As is evident, the expression used in Section 35-E (3) of the Act of 1944, is "*no order shall be made*" which is distinct from the expression used in the Section 149 of the Act of 1961 which reads as "*No notice under Section 148 shall be issued*". The two statutory provisions are materially different and the ratio of the said judgment can have no bearing in interpreting Section 149 of the Act of 1961.

25.18. Additionally, the contention of the counsel for the Department that generation of Section 148 Notice on ITBA screen amounts to "issued" within the meaning of Section 149 of the Act of 1961 is not borne out from the instructions issued by the Directorate of Income Tax (Systems). On the contrary, the said circulars duly recognize that after generation of notice the concerned income tax authority is required to take overt steps for issuing the said notice to the assessee. The circulars use the words "generation" and "issuance" distinctively. In this regard reference may be made illustratively to the following Instructions:

> a. ***The ITBA Assessment Instruction No. 2 [F.No. System/ITBA/Instruction/Assessment/16-17/177 dated 01.08.2016] issued by the Directorate of Income Tax (System)***mentions that:
> *"the AO Staff/ AO Inspector will not be able to generate the notice but will be able to view the notices already **generated** by the AO for taking a printout of the same, **for issue to the assessee**."*

b. ***The ITBA Assessment Instruction No. 3 [F No. System/ITBA/Instruction/Assessment/177/16-17/] dated 03.02.2017,*** also illustrates the same distinction:

"Details of the Authority/party from whom information is requisitioned can be entered alongwith date for compliance and ***the Notice can then be generated and issued.****"*

25.19. The counsel for the Department have also sought to argue that generation of a Notice with DIN on ITBA Screen conclusively indicates that the Notice has been irrevocably issued. The submission of the respondent is not borne out from the applicable circular regarding DIN issued by CBDT and is therefore a mere *ipse dixit* of the counsel.

25.20. As per ***Circular No. 19/2019 (F. No. 225/95/2019-ITA.II)*** dated 14th August**,** 2019 issued by the CBDT, the DIN was introduced to maintain a proper audit of trail of communications issued by income tax authority. The said circular does not state that the generation of DIN would automatically constitute issuance of the notice. Relevant extract from the aforementioned circular is reproduced as under:

"…

…However, it has been brought to the notice of Central Board of Direct Taxes (the Board) that there have been some instances in which the notice, order, summons, letter and any correspondence (hereinafter referred to as "communication") were found to have been issued manually, without maintaining a proper audit trail of such communication.

2. *In order to prevent such instances and to maintain proper audit trail of all communication, the Board in exercise of power under section 119 of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), has decided that no communication shall be issued by any income tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval etc. to the assessee or any other person, on or after the 1st day of October, 2019 unless a computer-generated Document Identification Number (DIN) has been allotted and is duly quoted in the body of' such communication."*

(Emphasis Supplied)

In fact, in several cases, we take judicial notice that even as on date the JAOs issue notices which do not have DIN and in those cases the Department contends that the absence of the DIN does not make those notices invalid.

25.21. The contention of the counsel for the Department that since the date of the issuance of the Notices is a disputed issue of fact the same should not be entertained in the writ petitions is also without merit. There is no dispute in the present cases and it has been conceded during rejoinder arguments that the Notices have been despatched on or after 1st April, 2021, unlike in the case of ***Rajesh Sunderdas Vaswani*** (Supra) where the date of despatch was seriously disputed. This Court has only been called upon to determine the legal effect of the despatch of 1st April 2021 and thereafter, on the validity of the notices dated 31st March, 2021.

25.22. In this regard, it would be useful to note that, the impugned Notice in W.P. (C) 5316 of 2022 was classified in category 'C'. However, during the pendency of the proceedings, the JAO on 30th July 2022 determined that the said Notice though generated and signed on 31st March 2021 was issued through e-mail by the ITBA servers on 6th April, 2021. It has been brought to this Court's attention that the JAO has now self-determined that the same shall be governed by the judgment of the Supreme Court in ***Ashish Agarwal*** (Supra) and JAO has accordingly proceeded to treat the Notice dated 31st March 2021 as notice under Section 148A(b).

The aforesaid acts of the JAO belie the submissions of the counsel for the Department that the generation of the Notice on the ITBA screen constitutes issuance. It further substantiates the contention of the petitioners that the date and time of issue of the e-mails by the ITBA servers are readily available with the Department and therefore there is no disputed issue of facts.

25.23. We therefore answer question no. (I) in negative against the Department and hold that the impugned Notices dated 31st March, 2021, which were despatched on 1st April, 2021, or thereafter, would not meet the test of 'issued' under Section 149 of the Act of 1961 and would be time barred, unless saved by the judgment of the Supreme Court in ***Ashish Aggarwal*** (Supra).

25.24. With respect to impugned Notices falling in category 'A', there is an additional factor which evidences that the said Notices were admittedly not issued on 31st March, 2021. The said Notices were

digitally signed on 01st April, 2021, or thereafter. The note appearing at the foot of each Notice clearly declares that the date of the affixation of digital signature shall be treated as the date of the Notice. The note reads *"if digitally signed, the date of signature may be taken as date of document"*. In these Notices therefore, the date of the Notice itself is determined by the date of affixation of digital signature and not the date of generation. The contention of the Department that, the said note appearing at the footer of the Notice has no basis in law and should be ignored by this Court, cannot be accepted. The Department cannot deny the contents of its own Notice and it is bound by the said contents.

25.25. In this regard it will also be useful to refer to Para 2.10.6 of the ITBA, User Assessment Manual, Version 1.9, August 2020, as referred to by the Department in its Counter Affidavit in W.P. (C) No. 13814 of 2021. The said instruction draws the attention of the income tax officer to the consequence of the date of digital signature and date of generation of document being different, if the digital signatures are affixed subsequently. Para 2.10.6 reads as under:

> **"…**
>
> *ii.* ***Generate and Digitally sign later (Applicable for single as well as bulk generation):***
>
> - *Click* ***Generate and Digitally sign later.*** *In this case, document will be generated successfully immediately.*
> - *To sign the document later, go to "****View/Edit Despatch Register****" Screen. Select the status as 'Pending for signing' and* ***Search****.*

- *Select the document and click **Sign Documents**. Ensure DSC is attached to the system.*
- *Select the DSC of the user.*
- *Click **Sign**. Document will be signed succesfully. <u>However, this option is required to be very carefully exercised in the case of orders as the date of generation of document and date of digital sign may be different as these will be actual date of generation and digital signing.</u>*

…"

Finding for Notices falling under category 'A'

We therefore hold that the impugned Notices falling under category 'A' shall be held to be dated as on the date DSC was affixed. Since the date of affixation of DSC on the impugned Notices is 1st April 2021 and thereafter they were sent and delivered through the ITBA portal on or after 1st of April 2021, the impugned Notices falling under category 'A' can only be said to have been issued on or after 1st of April 2021.

Illustratively, in W.P. (C) 1759/2022 the Notice even though dated 31st March 2021 was digitally signed on 1st April 2021 and thereafter was sent and delivered through ITBA portal on 15th April 2021, in this case, the date of the impugned Notice is 1st April 2021 (i.e., the date on which it was digitally signed) and it was issued through e-mail on the 15th of April 2021.

Finding for Notices falling under category 'E'

25.26. With respect to the impugned Notices which have been classified as category 'E', the date of despatch through speed post is

determined as the date of issuance following the judgment of the Supreme Court in the case of ***R.K. Upadhyaya*** (Supra).

Illustratively, in W.P. (C) 11010 of 2021, the Notice dated 31st March 2021 was booked for despatch through speed post on 10th June 2021, in this case, the Notice can be said to have been issued only on 10th June 2021 i.e. when it was booked for despatch through speed post.

25.27. With respect to the impugned Notices sent by e-mail and forming subject matter of category 'C' the Department has raised an additional defence that though the e-mails were admittedly despatched on 01stApril, 2021 or thereafter, the same was due to the time taken by ITBA e-mail software system to trigger the e-mails, this delay in despatch should not be attributed to the JAO for despatch and the Notices should be '*deemed*' to have been issued on 31st March, 2021. This contention of the Department is specifically dealt with in answer to question no. (III).

26. **Question No. (II):***Whether "despatch" as per Section 13 of the Act of 2000 is sine qua non for issuance of Notice through electronic mail for the purpose of Section 149 of the Act of 1961?-* ***The Court has answered this is in the affirmative, in favour of the assessee.***

AND

Question No. (III): *Whether the time taken by the ITBA's e-mail software system on 31st March, 2021, in despatching the e-mails to the assessee is not attributable to the JAOs and the notices will be deemed*

to have been issued on 31st March, 2021? ***-The Court has answered this in the negative against the Department.***

26.1. The Principal Director General of Income Tax (Systems), empowered by Rule 127(3) of IT Rules vide Notification No. 02/2016 dated 3rd February, 2016 and Notification No. 04/2017 dated 3rd April, 2017 has laid down the procedure, formats and standards for ensuring secured transmission of electronic communication for service of notice under Section 282 of the Act of 1961.

26.2. These notifications categorically mention that the time and place of despatch and receipt of electronic communications made by the Income Tax authorities shall have the same meaning as provided in Section 13 of the Act of 2000. The relevant portions of the notifications are reproduced hereinunder: -

> ***"…***
>
> ***Notification No. 2/2016 dated 3rd February, 2016DGIT(S)/DIT(S)-3/AST/Paperless Assessment Proceedings/96/2015-1 authorized by the Principal Director General of Income Tax (Systems)***
>
> *"m. For the purpose of this notification, the time and place of despatch and receipt of electronic record or electronic communication shall have the same meaning as provided in Section 13 of the Information Technology Act, 2000 (No.21 of 2000)."*
>
> ***"…***
>
> ***Notification No. 4/2017 dated 3rd April, 2017 titled DGIT(S)/DIT(S)-3/AST/Paperless Assessment***

Proceedings/96/2015-16 authorized by the Principal Director General of Income Tax (Systems)

"n) For the purpose of this notification the time and place of despatch and receipt of electronic record or electronic communication shall have the same meaning as provided in Section 13 of the Information Technology Act, 2000 (No. 21 of 2000). Further, the registered account on the E-filing website is deemed to be computer resource designated by assessee in accordance with Section 13 of the Information Technology Act, 2000 (No. 21 of 2000).

…"

Therefore, the contention of Mr. Sunil Aggarwal, learned counsel for the Department, that Section 13 of the Act of 2000, is not applicable to the impugned Notices issued through e-mail, is in contradiction with the aforementioned notifications and the statutory provision of Section 282 of the Act of 1961.

26.3. Now therefore for determination of the time of despatch of the impugned Notices issued through e-mail, Section 13 of the Act of 2000 has to be referred to. The relevant portion of Section 13 of the Act of 2000 is reproduced hereunder:

"13. ***Time and place of despatch and receipt of electronic record.****—(1) Save as otherwise agreed to between the originator and the addressee,* ***the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.***
(2) …..…"

26.4. Thus, on a plain reading of the aforementioned provision, it is evident that, the "despatch" under Section 13 of the Act of 2000

occurs when the electronic record reaches a "computer resource" outside the control of the "originator".

26.5. In this regard, it would also be relevant to refer to Section 2(k) and 2(za) of the Act of 2000, which defines 'computer resource' and 'originator' respectively, as under :

> *"…*
> *(k) **—computer resource** means computer, computer system, computer network, data, computer data base or software;*
> *(za) "**originator**" means a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;*
> *…."*

26.6. Further, Section 11 of the Act of 2000 is also of relevance-

> *"11. **Attribution of electronic records**.—An electronic record shall be attributed to the originator—*
> *(a) if it was sent by the originator himself;*
> *(b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or*
> *(c) by an information system programmed by oron behalf of the originator to operate automatically*
> *..."*

26.7. In the present case, the "originator", as per Section 2(za) of the Act of 1961, is indubitably the Department. The same is confirmed by the contents of the Compliance Affidavit. As stated in the Compliance Affidavit, the JAO is the income tax authority designated by the Department to generate and sign the Section 148 Notice on behalf of the Department. The ITBA portal is an information system programmed by TCS for the Department to operate automatically. The

ITBA portal is the computer resource designated by the Department for (a) drafting the e-mail to which the Notice is attached; and (b) for despatching the said e-mail with Notice to the assessee through e-mail; as well as; (c) for sharing the said Notice on assessee's 'My Account' on the E-filing portal. Hence, the JAO and ITBA perform two inseparable and complementing functions for the Department, which together constitute generation of Notice + drafting of the e-mail by the ITBA e-mail software and its despatch through dedicated ITBA servers. Thus, whilst the Department is the attributed originator of the impugned Notices within the meaning of Section 11(c) of the Act of 2000, ITBA portal is the 'computer resource' under the control of the Department.

26.8. In light of the aforesaid findings of this Court, the submissions made by Mr. Zoheb Hossain, learned Senior Standing counsel for the Department, that the JAO and the ITBA are distinct and that the JAO is the originator and hence not liable for delay in despatch, are untenable in law and facts.

26.9. Now, in order to determine when does "despatch" i.e. the transmission of electronic record or the Notices in the present case, from the Department occur, we may first note the precedence set by several High Courts in the context of ITBA portal. Under Section 13 of the Act of 2000, various High Courts have concluded that the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator i.e. when the ITBA's e-mail system is triggered and the e-mail leaves the ITBA servers.

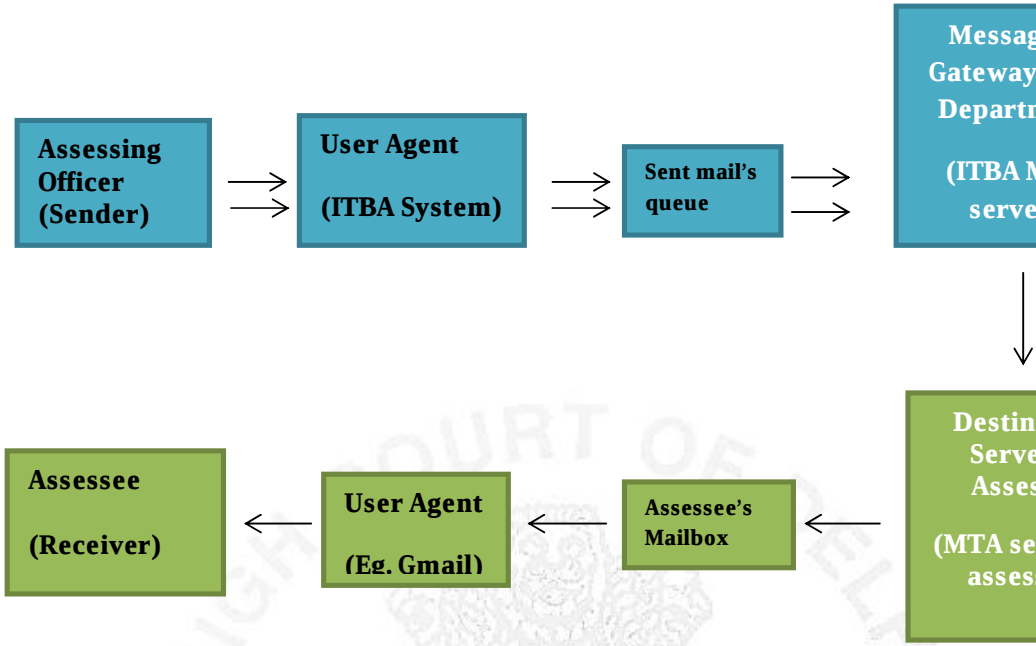
[Daujee Abhushan (Supra)***, Yuvraj v. Income Tax Officer & Ors.,*** (Supra)***, Advance Infradevelopers (P) Ltd.*** (Supra)*]*.

26.10. Qua the aforesaid, the learned counsel for the petitioners Mr. Ved Jain and Mr. Kapil Goel had submitted a compilation of recent judgments passed by the Allahabad High Court following the ***Daujee Abhushan*** (Supra) case. On perusal of the judgments submitted, it is noted that, the Allahabad Court had in ***Santosh Krishna HUF*** (Supra)**,** while dealing with the same issue of despatch, relied on the comments of the ADIT-5, ITBA O/o DIT (Systems) for determination of the aforesaid issue. In his comments, the officer forwarded the details as available with the ITBA Technical Team, the said details included (*i) Date & Generation of Notice under Section 148 in ITBA System by AO, (ii)Date & Time of Digital Signing (DSC) in ITBA by AO, (iii) Date & Time of triggering of e-mail automatedly by ITBA Technical servers and (iv) Date & Time of delivering of e-mail***.** The Allahabad Court following the ratio laid down in ***Daujee Abhushan*** (Supra),determined *the date & time of triggering of e-mail automatedly by ITBA technical servers* as the date and time of issuance of the notice.

26.11. This Court as well, in the given facts, has examined at what point does the Notice actually enter a 'computer resource' outside the control of the Department which uses the ITBA portal and its dedicated servers. In pursuance of the same, a technical breakdown of the process was called for.

26.12. The Compliance Affidavit, filed by the Department states that the ITBA e-mail software system follows the SMTP model to send e-mails to the assessees.

26.13. Typically, an e-mail service based on SMTP Model utilizes a chain of servers to transmit e-mail from the sender to the recipient. Once an e-mail is drafted and the sender presses the 'send' button, the e-mail service i.e. the User Agent ('UA') of the sender transmits it to the Message Transfer Agents ('MTAs') i.e. servers of the sender's e-mail service. Through a sequence of such MTAs i.e. servers, the e-mail reaches the destination MTA i.e. server of the recipient's e-mail service. In case the recipient is using an intermediary server, it reaches the intermediary MTA i.e. server of the intermediary. It thereafter, finally reaches the recipient. In the case on hand, the Department's e-mail service is the ITBA e-mail software system and the assessee's e-mail service is G-mail, Outlook etc. The ITBA e-mail software uses dedicated servers for transmitting e-mails and therefore the e-mail is despatched when the same leaves the ITBA servers for the recipient assessee's designated e-mail service servers. A simplified illustration of the SMTP model showing this process, as confirmed by the counsel for the petitioners and respondents, is reproduced hereinunder:



26.14. For the purpose of this illustration, the double arrows indicate transmission between computer resources that are of the ITBA e-mail software system and therefore, within the control of the Department; and the single arrows indicate transmission between computer resources that are within the control of or used by the assessee.

26.15. This illustration, as verified by the respondents, attests to the fact that the MTA i.e. server of the ITBA is a computer resource belonging to the Department. As established earlier, the Department is the originator as per Section 11(c) of the Act of 2000, hence, the despatch occurs when it leaves the last MTA server of the ITBA and enters a computer resource that the Department does not have control

over, i.e. the MTA server of the e-mail service that the assessee is using.

26.16. The counsel for the petitioners have brought this Court's attention to the screenshot of the E-filing portal submitted by the assessee, Mr. Bhushan Lal Pandita in W.P.(C) 4567/2022. The said screenshot shows that the E-filing portal, for the notices issued to the said assessee under Section 142(1), duly publishes the date of issuance, however, in the case of the impugned Notice issued under Section 148 of the Act of 1961, the 'issued on date' is blank.

26.17. This Court's attention was also drawn to the screenshot of the ITBA portal annexed to the Counter filed by the respondent in W.P.(C) No. 856/2022. The ITBA portal can only be accessed or viewed by the officers of the Department and not by the assessee. The screenshot of the ITBA portal reveals that in the "View/Enter Despatch Details" section the ITBA portal duly records the date of issue, date of despatch and date of service. It separately records the time on which the e-mail was sent, the date and time on which the e-mail was delivered to the assessee, and the date and time on which the e-mail was shared with the E-filing portal database.

26.18. Further as noted above, Mr. Puneet Rai, learned counsel for the respondent has during rejoinder arguments admitted that the information with respect to the date and time of despatch of the impugned Notices through ITBA e-mail software system is duly

available and therefore, capable of determination. This now stands established by the subsequent notice issued by the JAO in W.P.(C) 5316/2022 wherein the date of issuance through e-mail is duly recorded. The screenshots supplied by the counsel for the petitioners, also attests to the said fact, that such information is in fact available with the Department through the records of the ITBA portal.

26.19. It would also be relevant to note that the time taken by the ITBA e-mail software system on 31st March, 2021, to despatch the e-mails was not due to any software glitch. The time taken by the software system was as per the programming of the system, as admitted in the Compliance Affidavit. The programming to despatch the Notices in a controlled manner and batch mode was a pre-existing fact and to the knowledge of the Department. The time taken in despatch of the e-mail on 31st March, 2021, was therefore as per the controls set in the ITBA system.

26.20. We are in respectful agreement with the law laid down by the various High Courts in ***Daujee Abhushan*** (Supra), ***Santosh Krishna HUF*** (Supra), ***Mohan Lal Santwani*** (Supra), ***Advance Infradevelopers (P) Ltd.*** (Supra) and ***Yuvraj v. Income Tax Officer*** (Supra), that for determining when Notices were issued, the date and time of when the ITBA e-mail software system is triggered and the Notices leave the last ITBA server would be considered.

26.21. We therefore answer question no. (II) in affirmative and hold that despatch as per Section 13 of the Act of 2000, is a sine qua non

and happens when the electronic mail message leaves the ITBA's servers.

26.22. We answer question no. (III) against the Department and hold that the time taken by the ITBA's e-mail software system in triggering the e-mail and transmitting the said e-mails from the ITBA servers is attributable to the Department and therefore for the e-mails despatched on 1st April 2021 or thereafter, the Notices are held not to have been issued on 31st March 2021.

26.23. We also take judicial notice of the fact that the Department from May, 2022, for Notices issued on or after 1st April 2021, has considered the date and time of despatch of the notices as recorded by the ITBA portal as the date of issuance and disregarded the date of generation of notice i.e. 31.03.2021. For notices despatched on or after 1st April 2021, the Department, following the Supreme Court's order in ***Ashish Agarwal*** (Supra) considered the notices as issued under Section 148A of the Act of 1961. This shows that the Department itself acknowledges and admits that the date of generation is distinct from date of issuance and the Department considers the despatch by ITBA Portal as the date of issue for the purpose of Section 149 of the Act of 1961.

Finding for Notices falling under category 'C'

Since the time taken by the ITBA email software system in triggering the e-mails is attributable to the Department, the AO is directed to determine the date and time on which the emails were triggered by the

ITBA system server as per the ITBA records and consider the same as the date of issuance.

Illustratively, in W.P.(C) 8994 of 2021 for the Notice dated 31st March 2021 and digitally signed on 31st March 2021 the JAO is directed to determine the date and time of despatch as recorded by ITBA portal and consider the same as the date of issuance

27. **Question No. (IV)** *Whether the Section 148 Notices sent as an attachment through e-mails, from the designated e-mail addresses of the JAOs, which do not bear the respective JAO's digital signature are valid under Section 282A the Act of 1961 read with Rule 127A of the IT Rules?-**The Court has answered this question in the affirmative, in favour of the Department.***

27.1. Notices falling under category 'B' are admittedly not digitally signed. They were sent to the assessees via e-mail, with the Notice documents appended as an attachment, from the designated e-mail addresses of the respective JAOs. As per the Compliance Affidavit, the JAO has the option to (a) generate Notice+ affix DSC later or (b) generate Notice without DSC. In this case either of the two options may have been chosen, the JAOs may have selected option (a) and did not affix DSC later which triggered the e-mail system software of the ITBA 15 days after generation of notice and despatched the unsigned notice through email or (b) generated Notice without any DSC which ideally should have triggered the e-mail system software of the ITBA immediately.

27.2. It was stated by the learned counsel for the Department that in view of Section 282A of the Act of 1961 and Rule 127A of the IT Rules, affixation of DSC is not mandatory. A notice will be considered authenticated if the name and office of the designated income-tax authority is printed, stamped or otherwise written. It was also pleaded that the lack of DSC is merely a defect and would fall under Section 292B of the Act of 1961.

27.3. The learned counsel for the petitioners, in response, had relied upon Instruction No. 1/2018 [F. No. 225/157/2017- ITA II] dated 12.02.2018 and Notification No. 137/ 2021 dated 13.12.2021 and argued that the affixation of DSC is mandatory as per these circulars.

27.4. The aforementioned provisions relied on by the Revenue are reproduced hereunder:

> *[**Authentication of notices and other documents.***
>
> ***Section 282A.** (1) Where this Act requires a notice or other document to be issued by any income-tax authority, such notice or other document shall be [signed and issued in paper form or communicated in electronic form by that authority in accordance with such procedure as may be prescribed]*.
>
> *(2) Every notice or other document to be issued, served or given for the purposes of this Act by any income-tax authority, shall be deemed to be authenticated if the name and office of a designated income-tax authority is printed, stamped or otherwise written thereon.*
>
> *(3) For the purposes of this section, a designated income-tax authority shall mean any income-tax authority authorised by the Board to issue, serve or give such notice or other document after authentication in the manner as provided in sub-section (2).]*

(Emphasis Supplied)

*[**Authentication of notices and other documents.***

Rule 127A. (1) Every notice or other document communicated in electronic form by an income-tax authority under the Act shall be deemed to be authenticated,—

(a) in case of electronic mail or electronic mail message (hereinafter referred to as the e-mail), if the name and office of such income-tax authority—

(i) is printed on the e-mail body, if the notice or other document is in the e-mail body itself; or

(ii) is printed on the attachment to the e-mail, if the notice or other document is in the attachment, and the e-mail is issued from the designated e-mail address of such income-tax authority;

(b) in case of an electronic record, if the name and office of the income-tax authority—

(i) is displayed as a part of the electronic record, if the notice or other document is contained as text or remark in the electronic record itself; or

*(ii) **is printed on the attachment in the electronic record, if the notice or other document is in the attachment, and such electronic record is displayed on the designated website.***

(2) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall specify the designated e-mail address of the income-tax authority, the designated website and the procedure, formats and standards for ensuring authenticity of the communication."

(Emphasis Supplied)

27.5. The circulars relied on by the counsel for the Petitioners have been reproduced hereunder:

Instruction No. 01/2018dated 12.02.2018 titled- 'Section 143, Read with Sections 142 & 2(23C), of the Income Tax Act, 1961'- Assessment- Conduct of Assessment Proceedings in Scrutiny Cases Electronically'

"Sub-section (23C) of Section 2 of the Income-tax Act, 1961 (Act), applicable from 1-6-2016, provides that "hearing" includes communication of data and documents through electronic mode. Accordingly to facilitate conduct of assessment proceedings electronically, vide letter dated 23-6-2017, in file of even number, Board had issued a revised format of notice(s) under section 143(2) of the Act. Para 3 of these notice(s) provided that assessment proceedings in cases selected for scrutiny would be conducted electronically in 'E-Proceeding' facility through assessee's account in E-filing website of Income-tax Department.

…..…

4.2 Use of digital signature by Assessing Officer: All Departmental orders/communications /notices being issued to the assessee through the 'e-Proceeding' facility are to be signed digitally by the Assessing Officer.

…."

(Emphasis Supplied)

Notification No. 137/2021 - S.O. 5187(E) - e-Verification Scheme, 2021, dated 13.12.2021.

"……

3. (1) The scope of the Scheme shall be in respect of:

(i) calling for information under section 133 of the Act;

(ii) collecting certain information under section 133B of the Act;

(iii) calling for information by the prescribed income-tax authority under section 133C of the Act;

(iv) exercise of power to inspect registers of companies under section 134 of the Act; and

(v) exercise of power of Assessing Officer under section 135 of the Act.

…….

10. Authentication of electronic record.—For the purposes of this Scheme, an electronic record shall be authenticated by the –

(i) Commissioner of Income-tax (e-Verification) or the Prescribed Authority, as the case may be, by affixing its digital signature;

...”

(Emphasis Supplied)

27.6. On a perusal of the circulars submitted by the learned counsel for the petitioners, it can be seen that they are not applicable to Section 148 notices. Instruction No. 1/2018 [F. No. 225/157/2017- ITA II] dated 12.02.2018 pertains specifically to notices issued under Section 143 read with Sections 142 & 2(23C) of the Act of 1961, hence it is inapplicable to the notices issued under Section 148 of the Act of 1961. Further, Notification No. 137/2021 dated 13.12.2021 deals with the e-Verification scheme and it applies only to Sections 133, 133B, 134 and 135 of the Act of 1961, hence this is also not applicable to the present case.

27.7. In this regard, it would be relevant to note that, the Finance Act, 2008, to inter alia implement the e-filing scheme of Returns, for the purposes of authentication of the electric communication, inserted Section 282A. The original Section 282A(1) read as - *“Where this Act*

requires a notice or other document to be issued by any income-tax authority, such notice or other document shall be signed in manuscript by that authority".

27.8. This Section 282 A was amended by the Finance Act, 2016 and the expression "shall *be signed in Manuscript by the authority"* was replaced with "*signed and issued in paper form or communicated in electronic form by the authority in accordance with such procedure as may be prescribed"*.

27.9. The scope and effect of this amendment was explained in the Memorandum of Finance Bill, 2016, wherein it is stated that, the provision is being amended to enable the Income Tax authority to issue notice and documents under the Act, either in paper form or in electronic form, in accordance with such procedure as may be prescribed. The relevant portion of the Memorandum Explaining the Finance Bill, 2016 is reproduced hereunder:

> ***"Providing legal framework for automation of various processes and paperless assessment***
>
> *It is proposed to amend the relevant provisions of the Act so as to provide adequate legal framework for paperless assessment in order to enhance efficiency and reduce the burden of compliance. A series of changes are proposed to achieve this end.*
>
> *Sub-section (1) of section 282A provides that where a notice or other document is required to be issued by any income-tax authority under the Act, such notice or document should be signed by that authority in manuscript.*
>
> *It is proposed to amend sub-section (1) of section 282A so as to provide that notices and documents required to be issued by*

income-tax authority under the Act shall be issued by such authority either in paper form or in electronic form in accordance with such procedure as may be prescribed. ….

These amendments will take effect from the 1st day of June, 2016…"

27.10. The proviso to Section 282A and the amendments carried-out to the said section by the Finance Act, 2016, therefore, gives recognition to the notices served in the e-form. Sub-section (2) of Section 282A provides that any notice issued by such authority with his/her name and his/her office provided, as may or otherwise written thereon will be deemed to be authenticated and thus validly issued.

27.11. Further, it should be noted that, where the legislature intended to mandate the affixation of the digital signatures, it has specifically provided for the same in the provision itself. This is illustrated in Section 144 B(6)(i)(b) of the Income Tax Act, 1961, which reads as under :

"Section 144B (6)(i)(b) of Income Tax Act, 1961

(i)an electronic record shall be authenticated by—

xxx xxx xxx xxx

(b) the assessment unit or verification unit or technical unit or review unit, as the case may be, by affixing digital signature;
…"

27.12. Similarly, there are other circulars issued by the Directorate of Income Tax (Systems) such as the circular titled "**Miscellaneous-**

Digital Signature Certificate (DSC) Policy-2018-Letter" [F.No. System/ITBA/Digital Signature/16-17/181] dated 16th February, 2018 recommending the use of the digital signatures certificate, however, there are no instructions of the Directorate of Income Tax (Systems) which makes affixation of digital signature on a Section 148 notice mandatory.

27.13. Along with the provisions relied on by the Revenue it would be pertinent to note that there is a note under every e-mail (with the notices appended as an attachment) sent in these proceedings to the assessees. The note in the end mentions that:

> "*Note:*
>
> *-This communication is computer generated and may not contain signature*
>
> *-This communication may be treated as compliant with the requirements of Income Tax Rules 127 and 127A*
>
> *-Signed copy may be sent separately if not already digitally signed."*

27.14. Further as per the Compliance Affidavit, the ITBA portal was itself developed for the Department in such a way that it makes the affixation of DSC optional. The notice upon generation may or may not be affixed with DSC, it would, regardless of whether DSC is attached or not, be sent through the ITBA e-mail system once it has been generated.

27.15. From a combined reading of the relevant provisions, the explanation to the Finance Bill, 2016 and the abovementioned note, it

becomes evident that the affixation of DSC in notices issued under Section 148 of the Act of 1961 has not been made mandatory. As long as the requirements of Section 282A of the Act of 1961 and Rule 127A of the IT Rules, are followed the notices would be considered to be authenticated.

Finding for Notices falling under category 'B'

27.16. In the present case, the Notices were sent from the designated e-mail ID of the respective JAOs, fulfilling all requirements of authentication as per the relevant provisions. There was no doubt in the mind of the assessees that the Notices were sent by the Department. Therefore, the Notices falling under category 'B' would not be invalid simply because DSCs were not appended to the Notices.

27.17. The JAO is therefore directed to determine time of despatch as recorded by the ITBA portal for each of these Notices and the date and time of despatch as determined by the JAO will be considered to be the date of issuance.

Illustratively, in W.P.(C) No. 1761 of 2022 for the Notice dated 31st March 2021, which was not digitally signed and was received on 16th April 2021, the JAO is directed to determine the date and time of despatch as recorded by ITBA portal and consider the same as the date of issuance.

28. **Question (V)**: *Whether upload of the Section 148 Notice on the "My Account" of the assessee on the E-filing portal is valid*

transmission under the Act of 1961? - ***The Court has answered this in the negative, against the Department.***

28.1. With respect to the Notices falling under the category 'D' dated 31st March 2021 and digitally signed on 31st March 2021 it has been stated that, they were not served on the assessees either by e-mail or post or by courier services as they were just uploaded on the E-filing portals of the assessees. It is the case of the petitioners that no real time alert was received by the assessee and the Department has not disputed this fact.

28.2. The mode of service of electronic record, i.e., Notices in the present case is provided under Section 282 of the Act of 1961 and Rule 127 of the IT Rules. The mode of service of a notice, electronically, is prescribed in Section 282 of the Act of 1961, it states that service maybe made by transmitting a copy in the form of electronic record as per chapter IV of the Act of 2000. It also states that the CBDT is empowered with the responsibility to make rules providing addresses for communication through electronic mail or electronic mail message. The CBDT vide Rule 127(b) of IT Rules prescribed email addresses, as made available by the assessees, for communication transmitted electronically.

28.3. Thus, there is no dispute that the transmission of an electronic notice by placing an authenticated copy in the registered account of the assessee on the E-filing portal is not specifically prescribed in Section 282 and Rule 127. Instead, it finds a mention in the CBDT Notification - No. 4/2017 dated 3.04.2017. The said notification,

provides that, the notices issued by any income tax authority will be visible to the assessee after logging in under "E-Proceeding" tab in the E-filing portal and that an e-mail "may also" be sent to the registered e-mail address of the assessee. It also mentions that a text message notifying a real time alert to the assessees "may also" be sent to the mobile number registered on the E-filing website.

28.4. The "E-Proceedings", as per the Notification No.4/2017 is optional. The assessees have to register for the same and can also choose to opt out of it by notifying the Department.

28.5. It is unclear to us as to why e-mail based communication of notices is made optional in the Notification No. 4/2017, despite it being the statutorily prescribed mode of service through electronic transmission. Further, the ITBA portal itself is programmed in such a way that it triggers the e-mail software system when a notice is generated by the JAO and an authenticated copy of the same is thereafter also uploaded in the E-filing portal of the assessee, hence the Department cannot contend that it had done away with e-mailing of notices issued. Most importantly, the Department has been consistently using this mode of e-mail based communication to transmit notices and no reason whatsoever has been provided to explain as to why these Notices were not e-mailed to the select few assessees falling under category 'D' and was only uploaded on the E-filing portal. It is also unclear as to why the Notices though digitally signed on 31st March 2021 were never e-mailed to the assessees, because, as per the Compliance Affidavit, upon affixation of DSC by

the JAO the e-mail software system of the ITBA portal would be automatically triggered.

28.6. It should be noted that, when the legislature decided to include this mode of transmission i.e. placing it on the E-filing portal/registered account of the assessee, as valid service in the Act of 1961, it duly included the safeguard of a real time alert. For reference, Section 144 B(6)(ii)(a) of the Act of 1961 statutorily recognizes this mode of transmission between the Income Tax authority and the assessee. Section 144 B(6)(ii)(a) reads as under:

> *"Section 144B (6)(ii)(a)*
>
> *xxx xxx xxx xxx*
>
> *(ii) every notice or order or any other electronic communication shall be delivered to the addressee, being the assessee, by way of—*
>
> *placing an authenticated copy thereof in the registered account of the assessee; or.*
>
> *…..*
>
> *and <u>followed by a real time alert</u>"*

Finding for Notices falling under category 'D'

28.7. We hold that, in order for this mode of transmission i.e. uploading of the Notices in the E-filing portal of the assessees, to be considered valid service, the Department should have issued a real time alert as provisioned in the aforementioned Section 144(B)(6)(ii)(a) of the Act of 1961. Since, the prescribed mode of

service is not followed it is akin to no due despatch of Notices, therefore it cannot be said that the Notices were validly issued.

28.8. However, since the assessees in the present case did become aware of the Notices later and the assessment proceedings in their cases are still pending, we are not inclined to quash these Notices.

28.9. It has come on record that the ITBA records the time and date when the E-filing portal is accessed by the assessee, so the first date on which the Notices were accessed by the assessees is duly available. This date will be considered by the JAOs as the date of issuance of Notices by the JAOs.

Illustratively, in W.P. (C) 13888 of 2021 the Notice dated 31st March 2021 was never served on the assessee, instead the assessee claims that he became aware of the same on 23rd November, 2021 while checking his E-filing portal, the JAO is directed to verify the date on which the Notice was first viewed by the assessee, and consider the same as the date of issuance.

Regarding Notices sent to unrelated e-mail addresses

29. In a few cases, which do not fall in the categories 'A to E' as noted above, the Notices dated 31st March, 2021 were issued by the ITBA e-mail Software system to unrelated e-mail addresses which has no concern with the petitioner-assessee. In those facts, the Department cannot be permitted to contend that there was due despatch of Notice. For constituting 'due despatch', notice should be issued to the e-mail

addresses duly recognized in Rule 127, Sub rule 2(b) (i) to (iv), which reads as under :-

> *"Rule 127, Sub rule 2(b) (i) to (iv)*
>
> *xxx xxx xxx xxx*
>
> *xxx xxx xxx xxx*
>
> *(b) for communications delivered or transmitted electronically—*
>
> *(i) e-mail address available in the income-tax return furnished by the addressee to which the communication relates; or*
>
> *(ii) the e-mail address available in the last income-tax return furnished by the addressee; or*
>
> *(iii) in the case of addressee being a company, e-mail address of the company as available on the website of Ministry of Corporate Affairs; or*
>
> *(iv) any e-mail address made available by the addressee to the income-tax authority or any person authorised by such income-tax authority."*

30. Additionally, it is a settled position of law that the notice under Section 148 of the Act of 1961 must be served in accordance with the procedure established by law, to the correct addressee, otherwise the reassessment proceedings would be invalid in law. **[*Commissioner of Income -Tax (Central) - I v. Chetan Gupta* (**Supra**)]** The issuance of e-mail attaching electronic notice to an unrelated e-mail address does not constitute as due despatch and therefore, the Notices cannot be said to have been issued on 31st March, 2021. However, in each of these matters, since an authenticated copy of the notice was placed on the registered account of the assessee on the E-filing portal, as that is how the petitioners learnt about the notices, these notices will be held

to have been issued on the date on which the Notices were first viewed by the assessees on their E-filing portal.

31. For the reasons and principles that we have laid down, we dispose of these Writ Petitions with the following directions:

31.1. **Category 'A'**: The Notices falling under category 'A', which were digitally signed on or after 1st of April, 2021, are held to bear the date on which the said Notices were digitally signed and not 31st March 2021. The said petitions are disposed of with the direction that the said Notices are to be considered as show-cause-notices under Section 148A (b) of the Act as per the directions of the apex Court in the ***Ashish Agarwal*** (Supra) judgment.

31.2. **Category 'B'**: The Notices falling under category 'B' which were sent through the registered e-mail ID of the respective JAOs, though not digitally signed are held to be valid. The said petitions are disposed of with the direction to the JAOs to verify and determine the date and time of its despatch as recorded in the ITBA portal in accordance with the law laid down in this judgment as the date of issuance. If the date and time of despatch recorded is on or after 1st of April, 2021, the Notices are to be considered as show-cause-notices under Section 148A (b) as per the directions of the apex Court in the ***Ashish Agarwal*** (Supra) judgment.

31.3. **Category 'C'**: The petitions challenging Notices falling under category 'C' which were digitally signed on 31st of March 2021, are disposed of with the direction to the JAOs to verify and determine the date and time of despatch as recorded in the ITBA portal in

accordance with the law laid down in this judgment as the date of issuance. If the date and time of despatch recorded is on or after 1st of April, 2021, the Notices are to be considered as show-cause-notices under Section 148A (b) as per the directions of the apex Court in the ***Ashish Agarwal*** (Supra) judgment.

31.4. **Category 'D':** The petitions challenging Notices falling under category 'D' which were only uploaded in the E-filing portal of the assessees without any real time alert, are disposed of with the direction to the JAOs to determine the date and time when the assessees viewed the Notices in the E-filing portal, as recorded in the ITBA portal and conclude such date as the date of issuance in accordance with the law laid down in this judgment. If such date of issuance is determined to be on or after 1st of April 2021, the Notices will be construed as issued under Section 148A (b) of the Act of 1961 as per the ***Ashish Agarwal*** (Supra) judgment.

31.5. **Category 'E':** The petitions challenging Notices falling under category 'E' which were manually despatched, are disposed of with the direction to the JAOs to determine in accordance with the law laid down in this judgment, the date and time when the Notices were delivered to the post office for despatch and consider the same as date of issuance. If the date and time of despatch recorded is on or after 1st of April, 2021, the Notices are to be construed as show-cause-notices under Section 148A (b) as per the directions of the apex Court in the ***Ashish Agarwal*** (Supra) judgment.

31.6. **Notices sent to unrelated e-mail addresses:** The petitions challenging Notices which were sent to unrelated e-mail addresses are disposed of with the direction the JAOs to verify the date on which the Notice was first viewed by the assessee on the E-filing portal and consider the same as the date of issuance. If such date of issuance is determined to be on or after 01st April, 2021, the Notices will be construed as issued under Section 148A (b) of the Act of 1961 as per judgment in ***Ashish Agarwal*** (Supra).

31.7. We may note that in the writ petitions, the petitioners have raised additional defenses to challenge the impugned Notices. Such additional defenses have not been considered by this Court and the petitioners shall be at liberty to raise all such additional defenses as available in law.

31.8. We are conscious that the time granted by the Supreme Court in ***Ashish Agarwal*** to the Department has since expired on 3rd June, 2022 however, the proceedings in the present writ petitions were stayed on 24th March, 2022 until the pronouncement of this judgment. Therefore, we grant the JAOs in the first instance eight (8) weeks time from today to determine the date of issuance of the Notices as per the law laid down in this judgment.

31.9. The Notices which in accordance with the law laid down in this judgment has been verified by the JAOs to have been issued on or after 01st April 2021 and until 30th June, 2021 shall be deemed to have been issued under Section 148A of the Act of 1961 as substituted by the Finance Act, 2021 and construed to be show-cause notices in terms

of Section 148A(b) as per the judgment of the apex Court in ***Ashish Agarwal*** (Supra) and the JAOs shall thereafter follow the procedure set down by the Supreme Court in the said judgment which reads as follows:

"26. In view of the above and for the reasons stated above, the present Appeals are ALLOWED IN PART. The impugned common judgments and orders passed by the High Court of Judicature at Allahabad in W.T. No. 524/2021 and other allied tax appeals/petitions, is/are hereby modified and substituted as under : -

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

(*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 1-4-2021 till date, including those which have been quashed by the High Courts.*

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;

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

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

……."

32. With the aforesaid directions, present writ petitions and pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

27th SEPTEMBER, 2022
j/msh