

Item No.5.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 21.07.2022

DELIVERED ON:21.07.2022

CORAM:

**THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE BIVAS PATTANAYAK**

**M.A.T. No.1036 of 2022
With
I.A. No.CAN 1 of 2022
With
I.A. No.CAN 2 of 2022**

**Somnath Dealtrade Private Limited.
Vs.
Union of India & Ors.**

Appearance:-

**Mr. Nirmalya Dasgupta,
Mr. Jitendra Patnaik**

..... for the appellant.

Ms. Smita Das De

... for the respondents.

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

Re: I.A. CAN 1 of 2022

1. This application has been filed to condone the delay of 15 days in filing the instant appeal.

2. We have heard Mr. Nirmalya Dasgupta, learned counsel for the appellant/assessee and Ms. Smita Das De, learned senior standing counsel appearing for the respondents.

3. We are satisfied with the reasons assigned in the affidavit filed in support of the application. The delay in filing the instant appeal is condoned.

4. The application being I.A. CAN 1 of 2022 is allowed.

Re: M.A.T. No.1036 of 2022

5. This intra Court appeal is directed against the order dated 23rd May, 2022 passed in W.P.A. No.9195 of 2022. The assessee is the writ petitioner. The challenge in the writ petition was to an order passed by the respondent assessing officer dated 13th April, 2022 under Section 148A(d) of the Income Tax Act, 1961 (for brevity, "the Act"). The learned Single Bench was of the opinion that the reply given by the appellant /writ petitioner was considered by the assessing officer and he has passed an order and it will be well open to the assessee to participate in

the re-assessment proceedings and the plea that there has been violation of principles of natural justice was negated. Aggrieved by the dismissal of the writ petition, the appellant is before us.

6. Heard Mr. Nirmalya Dasgupta, learned counsel duly assisted by Mr. Patnaik, learned counsel for the appellant/assessee and Ms. Smita Das De, learned senior standing counsel appearing for the respondents.

7. The following facts would be relevant to consider as to what relief the assessee would be entitled to. The assessee is a private limited company was issued a notice under Section 148A(b) of the Act dated 22nd March, 2022 stating that the assessing officer has information which suggests that income chargeable to tax for the assessment year 2018-2019 has escaped assessment within the meaning of Section 147 of the Act. The details of the information and the enquiry was enclosed as Annexure "A" to the said notice. The appellant was required to show cause as to why, in view of the details contained in Annexure "A", a notice under Section 148 of the Act should not be issued. The assessee was granted liberty to submit its

response with supporting documents electronically in e-proceeding facility on or before 29th March, 2022. The annexure to the said notice had furnished the following information:-

"On perusal of information received from insight portal downloaded from the site it has been revealed that the assessee has made transaction through fund transfer for Rs.36,00,000/- from Winsome Commotrade Pvt. Ltd. in the form of accommodation entry and was the beneficiary of transaction, which remained unexplained and prima facie requires verification. You are requested to provide details of transaction in the bank statements highlighting the alleged transaction required to be verified. Also file necessary evidences for the said transaction for establishing genuineness, creditworthiness of the transaction and source of fund thereof.

In view of the above, an opportunity is being offered to explain the issue with suitable documents along with corroborative evidence proving genuineness of the transaction on or before 29.03.2022. In case of failure to reply, action will be taken as per law.

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WARD 5(1), KOLKATA."

8. The appellant submitted its reply dated 9th April, 2022 stating that the alleged information is incomplete and completely wrong as the information said to be downloaded from the insight portal stating that the assessee has received fund of Rs.36 lakhs whereas the assessee has received fund during the financial year 2017-2018 for sale of fancy sarees amounting to Rs.37 lakhs in its bank account. The assessee further stated that all its transactions are fully disclosed in the audited balance sheet and income tax return and no such transaction of Rs.36 lakhs has been done by the assessee with M/s. Winsome Commotrade Pvt. Ltd. for which ledger copy and bills were enclosed. Further, the assessee stated that as information available with the insight portal does not match with their transaction requested dropping of the proceedings for reopening the assessment. The assessee also requested to provide detail investigation /insight portal report based on which the notice under Section 148A(b) was issued. Along with the said reply dated 9th April, 2022, the assessee submitted the copy of the ledger account for the assessment year 2018-2019, copies of sale invoices, copy of bank statement, copy of ITR acknowledgement and copy of audited balance sheet.

9. The assessee has also uploaded the soft copies of all the attachments sent along with its reply dated 9th April, 2022. Prior to submission of the reply, the assessee was intimated that the reply along with documents has to be submitted by 29th March, 2022. The assessee submitted a representation and requested for adjournment of the proceedings. Accordingly, by notice dated 5th April, 2022, the assessee was advised to submit the reply along with documents not later than 11.00 a.m. on 12th April, 2022.

10. Admittedly, the assessee had submitted the reply along with documents much prior to the said date, i.e. on 9th April, 2022 as noted above. The assessing officer has thereafter proceeded to pass the order under Section 148A(d) of the Act. The assessee, being aggrieved by such order, had filed the present writ petition. The order was challenged on the ground of gross procedural irregularity, violation of principles of natural justice, non-consideration of the request made in the reply dated 9th April, 2022, non-consideration of the documents appended along with the said reply dated 9th April, 2022 and non-compliance of the request to provide the complete information

about the insight portal report based on which the notice under Section 148A(b) of the Act was issued.

11. The learned Single Bench has dismissed the writ petition on the ground that appropriate procedure has been followed by the assessing officer. On going through the material papers placed before us, we have a different opinion. We substantiate such conclusion with the following reasons.

12. Soon after the notice under Section 148A(b) of the Act dated 22nd March, 2022 was issued, the assessee was required to submit its reply not later than 29th March, 2022. The assessee sought for an adjournment and reply was directed to be submitted by 11.00 a.m. on 12th April, 2022 and the assessee had complied with the direction and submitted the reply dated 9th April, 2022. On reading the reply dated 9th April, 2022, it is seen that it is not a comprehensive reply because the assessee has sought for providing the information based on which the notice under Section 148A(b) of the Act was issued. Therefore, the assessing officer ought to have considered such request and if for any valid reason such report cannot be furnished, the assessee was entitled to be informed about the same with reasons. However,

in the facts of the present case, such a stand cannot be taken by the assessing officer because the proceeding for re-assessment has been initiated based on the information culled out from the insight portal report. Therefore, such document or such information has to be provided to the assessee. Having not done so, the assessing officer has committed a serious error resulting in violation of the principles of natural justice. Secondly, the assessee has stated that the information said to be available in the insight portal does not match with the transaction done by it. In fact, the assessee would state that the figure mentioned is not Rs.36 lakhs but Rs.37 lakhs. That apart, the assessee has furnished documents along with the reply dated 9th April, 2022. Thus, the minimum that was expected from the assessing officer is to furnish the information culled out from the insight portal, afford a further opportunity to the assessee to submit further reply, issue a notice and hear the assessee on the submission they wish to make and thereafter consider the submission, reply and all the documents and pass a reasoned order. Thus, we have to see whether this procedure has been adopted.

13. On going through the order dated 13th April, 2022 impugned in the writ petition, we find that none of these aspects have been adhered to by the assessing officer. The assessing officer no doubt has referred to the assessee's reply dated 9th April, 2022 but there is no discussion as to the objection raised by the assessee in their reply. There is no discussion on the documents, which were placed by the assessee along with the reply with soft copies uploaded in the e-proceeding. Though the assessing officer states that "in the light of the discussion and material available on record he was of the opinion that income chargeable to tax has escaped assessment", there is no discussion on any of the materials, which were placed by the assessee along with the reply dated 9th April, 2022. Thus, it can be safely held that the order dated 13th April, 2022 passed under Section 148A(d) of the Act is not sustainable and liable to be set aside.

14. The learned Advocate appearing for the appellant placed reliance on the decision of the Punjab and Haryana High Court in the case of **Sohan Singh, Etc. - Vs. - Hans Raj**, reported in **AIR 1960 P & H 34** to explain the meaning of the expression "hearing". In the said decision, it was held "to hear" implies

that there is someone before the Court to speak; in a broad general sense, the expression "hearing" is applied to the consideration of a case before a person clothed with judicial or quasi-judicial powers at the several stages of its progress, subsequent to its inception. This decision undoubtedly explains in lucid terms the meaning of the expression "hearing". However, there are decisions, which have held that an opportunity of hearing will not always include an opportunity of personal hearing. In any event, we need not stretch the matter thus far to take a decision in this appeal.

15. The learned Advocate referred to a decision of the Hon'ble Supreme Court in **Bishal Ashwin Patel - Vs. - Assistant Commissioner of Income Tax Circle 25(3) and Ors.** reported in **2022 SCC OnLine SC 366** for the proposition that an order has to be a reasoned order. There can be no quarrel over such proposition and the assessing officer having issued a show cause notice and invited a reply from the assessee was bound to assign reasons as to how in his opinion the reply is not satisfactory. This is conspicuously absent in the order dated 13th April, 2022. Reference was also made to the decision of the High Court of Delhi in the Case of **Divya Capital One Private Limited - Vs. -**

Assistant Commissioner of Income Tax Circle 7(1)Delhi & Anr.

passed in **WP(C) 7406 of 2022 dated 12th May, 2022**. In fact, this decision was referred to and relied upon by this Court in the Case of **M/s. R. N. Fashion Vs. Union of India and Ors** passed in **APOT 85 of 2022 dated 20th May, 2022**. The relevant paragraphs of the judgment is as follows:-

" The opportunity provided under Clause (b) of Section 148A of the Act should be a meaningful opportunity.

The learned Advocate appearing for the appellant has drawn our attention to a recent decision of the Delhi High Court in the case of Divya Capital One Private Limited vs. Assistant Commissioner of Income Tax, Circle-7(1), Delhi & Anr. in WP(C) No.7406/2022 dated 12th May, 2022. We find that the facts in the said case are identical to that of the case before us. The Hon'ble Division Bench had taken note of the new re-assessment scheme introduced by the Finance Act, 2021 and pointed out that the safeguards were brought in the amended re-assessment scheme in accordance with the judgment of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. vs. ITO, reported in (2003) 259 ITR 19 (SC) before any exercise of jurisdiction to initiate reassessment

proceedings under Section 148 of the Act. Further, the Court held that the term "information" as contained in Explanation-1 to Section 148 cannot be lightly resorted so as to reopen assessment and this information cannot be a ground to give unbridled powers to the revenue. Further the Court took into consideration the order which was impugned therein and found the same to be cryptic.

The next aspect which the Court considered was whether the petitioner therein was denied effective opportunity to file reply and it was held that the petitioner therein had a right to get adequate time in accordance with the provisions of the Act to submit its reply and the assessing officer in the said case had passed an order under Section 148A(d) of the Act in great haste and in gross violation of the principles of natural justice as the assessee therein was not given reasonable time to file reply. Further the Court noted that Section 148A(b) permits the assessing officer to suo motu provide upto 30 days period to an assessee to respond to a show cause notice issued under Section 148A(b) which period may, in fact, be further extended upon an application made by the assessee in this behalf and such period given to the assessee is

excluded in computing the period of limitation for issuance under Section 148A of the Act in terms of the 3rd proviso under Section 149 of the Act. In the said case also, the assessee had file their reply by 31st March, 2022 and the same was available on record. However, the reply was not considered as per the mandate contained in Section 148A(c) thereby violating the duty cast upon the assessing officer. In paragraph 16 of the said decision the significance of issuance of show cause at a stage prior to issuance of reassessment notice under Section 148 of the Act has been pointed out in the following terms:

"This Court is of the opinion that significance of issuance of a show cause notice at a stage prior to issuance of a reassessment notice under Section 148 of the Act has been lost on the Respondents. This Court takes judicial notice that in a majority of reassessment cases post 1st April, 2021, the orders under Section 148A(d) of the Act use a template/general reason to reject the defence of the assessee on merits, namely, "found devoid of any merit because the assessee company has failed to produce the relevant documents in respect of transactions mentioned in show case notice it is established that the assessee has no

proper explanation. . ." Consequently, this Court is of the opinion that a progressive as well as futuristic scheme of re-assessment whose intent is laudatory has in its implementation not only been rendered nugatory but has also had an unintended opposite result."

16. In **Girdhar Gopal Dalmia Vs. Union of India** passed in **MAT 727 of 2022 dated 21st June, 2022**, the Court considered the scheme of the act after its amendment and introduction of Section 148A and held as follows:-

"4.....Firstly, Clause (b) of Section 148A of the Act provides for an opportunity of being heard to the assessee within such time as may be specified in the notice that has to be issued by the Assessing Officer and the period shall be not less than 7 days and but not exceeding 30 days from the date on which such notice was issued together with a power to grant further time on an application made by the assessee. Therefore, the statute gives discretion to the Assessing Officer to fix the notice period and such time limit has to be fixed bearing in mind the principles of natural justice that the assessee should be afforded reasonable and adequate opportunity....."

5. The learned standing counsel would submit that the assessee has submitted his reply which has also been referred to by the Assessing Officer in his order under Section 148A(b) of the Act. As rightly pointed by the learned senior Advocate for the appellant that nowhere in the reply given by the assessee, there is any elaborate discussion about Section 148, 148A of the Act and probably there occurred a factual mistake at the hands of the Assessing Officer. The assessee had enclosed certain documents along with the reply and had made submissions on merit and on our reading, we find that no elaborate discussion about Section 148 or 148A of the Act. Be that as it may, the opportunity of hearing to be provided should be reasonable and not illusory.....

6. Considering all these factors, we are of the view that the assessee should be granted an opportunity by the Assessing Officer in terms of Clause (b) of Section 148A of the Act, which provides for an opportunity of being heard to the assessee."

17. Thus, the legal principle that can be culled out from the aforementioned decisions is that the opportunity which is

provided for under the scheme of the Act should be a meaningful and effective opportunity as such opportunity is not an empty formality. The assessee is entitled to be heard and such hearing should be a purposeful and effective hearing and not for the sake of showing as if a hearing was conducted.

18. All the aforementioned decisions and the law which has been pointed out therein will fully enure in favour of the appellant consequently to hold that the order passed by the assessing officer dated 13th April, 2022 under Section 148A(d) of the Act would call for an interference.

19. In the result, the appeal is allowed and the connected application (I.A. No. CAN 2 of 2022) is disposed of. The order passed in the writ petition is set aside. Consequently, the writ petition is allowed and the order dated 13th April, 2022 passed under Section 148A(d) of the Act is quashed and the matter is remanded to the assessing officer for fresh consideration. The assessing officer is directed to furnish complete information, which was culled out from the insight portal *qua* the assessee and grant 7 days time to the assessee to submit further reply along with the documents, if any.

20. On receipt of such reply, the assessee shall be heard in person either by way of physical hearing or through virtual hearing and after considering the submissions, the replies and the documents filed by the assessee, a reasoned order be passed on merits and in accordance with law. Consequently, the notice issued under Section 148 of the Act dated 13th April, 2022 shall not be enforced.

21. No costs.

22. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(BIVAS PATTANAYAK, J.)

NAREN/PALLAB (AR.C)