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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
IN AN APPEAL FROM THE ORDER
PASSED IN ITS
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

APOT/114/2022
ARISING OUT OF
W.P.O. NO. 2171 OF 2022
IA NO: GA/1/2022
MUSTAFA HUSENI CHUNAWALA
VS.
THE UNION OF INDIA & ORS.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : AUGUST 02, 2022.

Appearance :
Mr. Rachit Lakmani, Adv
Mr. Sumit Biswas, Adv.
Mr. Siddhant Makhan, Adv..
....for appellant
Mr. Vipul Kundalia, Adv.
...for respondent

The Court : This intra-Court Appeal is directed against order dated 6th June, 2022 in W.P. no. 2171 of 2022. The appellant had filed the writ petition challenging an order passed by the respondent authority under clause (d) of Section 148A of the Income Tax Act, 1961, (the Act for brevity). Several grounds were raised in writ petition and more particularly that the assessing authority while passing the order impugned in the writ petition dated 5th April, 2022 has not adverted to the explanation given by the appellant/assessee dated 25th

March, 2022 to the notice issued by the assessing officer dated 21st March, 2022 under clause (b) of Section 148A of the Act. The Learned Single Bench by the impugned order was of the opinion that there is no scope for granting any interim order and directed the respondents to file an affidavit-in-opposition within a time-frame and granted a liberty to the appellant/assessee to file a reply.

The appellant being aggrieved by such order is before us by way of this appeal.

We have heard Mr. Rachit Lakhmani, learned standing Counsel appearing for appellant and Mr. Vipul Kundalia, learned Counsel appearing on behalf of the respondent.

In our considered view, no useful purpose would be served in keeping the writ petition pending and, therefore, with consent of the learned advocates on either side we take up the writ appeal as well as the writ petition for disposal.

Section 148 of the Act deals with the issue of notice where income escaped assessment. Section 148A deals with conducting inquiry providing opportunity before issue of notice under Section 148 of the Act. In Section 148A of the Act there are two options available to the assessing officer. The first option is as stipulated in Section (a) of the Section 148A where the assessing officer shall, before issuing any notice under Section 148 of the Act conduct an inquiry, if required, with the prior approval of a specified authority and with respect to the information which suggests that the income chargeable to tax has escaped assessment. The second option is as per clause (b) of Section 148A which

suggests that assessing officer shall, before issuing any notice under Section 148 provide an opportunity of being heard to the assessee with the prior approval of the specified authority by serving upon him a notice to show-cause within such time as may be specified in the notice being not less than seven days and not exceeding 30 days from the date of which such notice is issued, or such time as may be extended by him on the basis of an application in this behalf as to why a notice under Section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and results of inquiry conducted, if any, as per clause (a) of Section 148A. Clause (c) of 148A mandates the assessing officer to consider reply of the assessee in response to the show cause notice referred to in clause (b). Thereafter, the assessing officer has to pass an order in terms of clause (d) of Section 148A which mandates that he shall decide on the basis of materials available on record including reply of the assessee, whether or not it is a fit case to issue notice under Section 148A by passing an order with approval of the specified authority within the time-frame stipulated in clause (b). Thus the opportunity provided under clause (b) of Section 148A should be a meaningful opportunity whereby the assessee is made known of the allegation he has to meet and on what basis, the assessing officer is of the opinion that the income chargeable to tax has escaped assessment. If the assessee submits a reply to the show-cause notice, the assessing officer is required to consider the reply furnished by the assessee in response to the show-

cause notice. It is only thereafter he can exercise his power under clause (d) of the Section 148A and decide the case based on material available on record including the reply of the assessee. The option being a statutory mandate, we are required to see as to whether assessing officer had complied with the same.

On going through the order dated 5th April, 2022 passed under clause (d) of Section 148A we have no hesitation to hold that the assessing officer did not follow the mandatory procedure under the Act. In response to the notice issued under Section 148A(b) the assessee had submitted a reply dated 25th March, 2022. We find the reply to be a detailed reply containing several annexures. The assessing officer does not dispute the fact that the assessee has submitted his reply. However, in a single line the assessing officer held the reply of the assessee is not satisfactory as per law provides. Thus the order dated 5th April, 2022 is in gross violation of the procedure stipulated under Section 148A of the Act.

Learned Advocate appearing for the assessee placed reliance on the decision of High Court of Delhi in the case of *FIRST SOLAR POWER INDIA PRIVATE LIMITED Versus ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 7 – 1 DELHI AND ANOTHER*, 2022 SCC ONLINE DEL 1627: (2022) 327 CTR 102 and the decision of High Court of Meghalaya in *JASMINE BONNY AGITOK SANGMA Versus UNION OF INDIA AND OTHERS*, 2022 SCC ONLINE MEGH 187 : (2022) 445 ITR 4. In both the decisions the Hon'ble Division Bench has interfered with the order passed under clause (d) of Section 148A by noting that in terms of

clause (C) of Section 148A there is a duty cast on the assessing officer to consider the reply as the expression “shall” has been used in the said provision.

In the light of the above discussion we are of the considered view that the order dated 5th April, 2022 passed under clause (d) of Section 148A of the Act is unsustainable in law.

For the above reason, the appeal is allowed. Consequently, the writ petition is allowed and the order dated 5th April, 2022 is quashed and the matter is remanded to the assessing officer with a direction to consider the reply submitted by the assessee dated 25th March, 2022 along with annexures, afford an opportunity of personal hearing to the assessee or his authorized representative and thereafter pass a speaking order on merits and in accordance with law.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)