

OD-13

APOT/132/2022
IA No.GA/1/2022

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

EXCEL COMMODITY AND DERIVATIVE
PVT. LTD.

-Versus-

UNION OF INDIA AND ORS.

Appearance:
Mr. Subash Agarwal, Adv.
...for the appellant.

Mr. Tilak Mitra, Adv.
.. . for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 29th August, 2022.

The Court : This intra-Court appeal by the writ petitioner is directed against the order dated 30th June, 2022 in WPO/2298/2022.

The writ petition was disposed of by setting aside the order impugned therein dated 7th April, 2022 under Section 148A(d) of the Income Tax Act, 1961. The learned Single Bench held that the said order dated 7th April, 2022 is devoid of reasons and without any discussion on the contentions raised by the petitioner in their objections dated 28th March, 2022 to the notice issued by

the assessing officer under Section 148A(b) of the Act. After having held so and quashing the order dated 7th April, 2022, the learned Single Bench remanded the matter back to the assessing officer to pass a fresh speaking order. Aggrieved by such direction the appellant is before us by way of this appeal.

We have elaborately heard Mr. Subash Agarwal, learned counsel for the appellant and Mr. Tilak Mitra, learned standing counsel appearing for the respondent/revenue. So far as the first portion of the order passed by the learned Single Bench is concerned, the appellant/assessee has no quarrel as the order impugned in the writ petition has been quashed. The assessee is only aggrieved by the direction issued by the learned Single Bench remanding the matter back to the assessing officer. The issue is whether in the facts and circumstances of the case, such an order of remand was justified and called for.

The appellant/assessee was issued notice under Section 148A(b) of the Act dated 22nd March, 2022. The sum and substance of the allegation in the notice was that the appellant/assessee has done fictitious derivative transactions with M/s. Blueview Tradecom Pvt. Ltd. The assessee submitted their detailed reply to the said notice enclosing all relevant documents in support of their claim to justify that they have not indulged in any fictitious derivative transaction. The procedure contemplated under Section 148A requires the assessing officer to consider the

reply and thereafter pass a reasoned order, if in opinion of the assessing officer, the information furnished by the assessee in their reply is satisfactory, then nothing more requires to be done. On the other hand, if the assessing officer is of the view that the reply furnished by the assessee is not acceptable, then he is to pass a speaking order in terms of clause (d) of Section 148A of the Act. In the instant case, the assessing officer has passed the order under Section 148A(d) dated 7th April, 2022. On a reading of the said order, we find that the assessing officer has indirectly accepted the explanation given by the appellant/assessee that they have not indulged in fictitious derivative transaction. We say so because in the order dated 7th April, 2022 in paragraph 4 therein, the assessing officer alleges that prima facie the appellant/assessee has taken accommodation entry by way of fund transfer from M/s. Brightmoon Suppliers Pvt. Ltd. which is a different company. Thus, the order passed under Clause (d) of Section 148A of the Act is not based on the reason for which notice dated 22nd March, 2022 was issued under Section 148A(b) of the Act. Therefore, the order dated 7th April, 2022 is illegal and has to be held to be wholly unsustainable. In such factual position, the necessity to remand the matter back to the assessing officer does not arise.

Further, we take note of the Circular issued by the Central Board of Direct Taxes (CBDT) dated 22nd August, 2022 giving

instruction to the departmental officers with regard to the uploading of data on functionality/portal of the Income Tax Department. This circular emphasises the earlier circular dated 1st August, 2022 and in paragraph 3 therein, it has been stated as follows:

"3). Further, it is re-emphasized that -

- i) Before initiating proceedings under section 148/147 of the Act, any information available on data-base/portal of the Income Tax Department shall be verified before drawing any adverse inference against the taxpayers. It is not out of place to mention here that the information made available/data uploaded by the reporting entities may not be fully accurate due to inter alia, error of human nature technical nature, etc. Therefore, due verification may be carried out and opportunity of being heard be given to the taxpayer before initiating proceedings under Section 148/147 of the Act.*
- ii) The supervisory authorities are hereby advised to keep an effective supervision so as to ensure that all extant Instructions/Guidelines/Circulars/SOPs are duly followed by the Assessing Officers in their charge."*

From the above it is clear that it has come to the notice of CBDT that in several cases information made available/data uploaded by the reporting entries are not fully accurate due to error of human nature, technical nature etc. Therefore, the department was advised to effect due verification and opportunity of being heard given to the tax payers before initiating proceedings under Section 148/147 of the Act. Thus, in the

preceding paragraph we have pointed out the factual position in the case on hand and it appears that proper verification was not done on the information which was available with the assessing officer at the time of issuance of notice under Section 148A(b) of the Act which has led to an erroneous order dated 7th April, 2022 being passed.

In *Divya Capital One (P.) Ltd. vs. Assistant Commissioner of Income Tax* reported in [2002] 139 taxmann.com 461 (Delhi), the Court had considered the new re-assessment claim and held as follows:

"7. This Court is of the view that the new re-assessment scheme (vide amended sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business. In fact, the legislature brought in safeguards in the amended re-assessment scheme in accordance with the judgment of the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO [2002] 125 Taxman 963/[2003] 259 ITR 19 before any exercise of jurisdiction to initiate re-assessment proceedings under section 148 of the Act.

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

under section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under section 148 post an order under section 148A(d)."

As pointed out in the aforesaid mentioned decision, the term "information" in Explanation-1 under Section 148 cannot be lightly resorted to so as to reopen assessment and this information cannot be a ground to give unbridled power to the revenue. In fact, in the case on hand, the information has been lightly used which resulted in issuance of notice. As pointed out earlier, the assessee had submitted the explanation to the notice along with documents in support of their claim. The assessing officer has given up the said allegation which formed the basis of the notice and proceeded on a fresh ground for alleging that the transaction with some other company was an accommodation entry. Therefore, on that score also the order dated 7th April, 2022 is liable to be set aside in its entirety without giving any opportunity to reopen the matter on a different issue.

For the above reasons, the appeal filed by the assessee (APOT/132/2022) is allowed and the order dated 7th April, 2022 under Section 148A of the Act is set aside and the direction issued by the learned Single Bench remanding the matter to the assessing officer is also set aside. Consequently, no further action can be taken by the department against the appellant/assessee on the subject issue.

In the result, the connected application for stay (IA No.GA/1/2022) also stands disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

As/ S.Das