

OD-8

APOT/152/2022
IA No.GA/1/2022

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

SALASAR SERVICES INSURANCE BROKERS
PVT. LTD.

-Versus-

ASSISTANT COMMISSIONER OF INCOME
TAX AND ORS.

Appearance:
Mr. Sudhir Mehta, Adv.
Mr. Anurag Bagaria, Adv.
...for the appellant.

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

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE PRASENJIT BISWAS

Date : 2nd September, 2022.

The Court : This intra-Court appeal filed by the writ petitioner is directed against the order dated 17th August, 2022 in WPO/2412/2022.

In the said writ petition the appellant had challenged an order passed by the respondent under Section 148A(d) of the Income Tax Act, 1961 dated 30th July, 2022 and the consequential notice issued under Section 148 of the Act dated 30th July, 2022 relating to the assessment year 2014-15. The learned Single Bench

was of the view that all contentions can be raised by the appellant in the re-assessment proceedings and accordingly dismissed the writ petition. Aggrieved by such order, the appellant has filed the present appeal.

We have heard Mr. Sudhir Mehta learned counsel assisted by Mr. Anurag Bagaria, learned Advocate for the appellant and Mr. Tilak Mitra, learned Advocate appearing for the respondent/department.

The procedure to be followed under the amended Section 148A has been the subject-matter of interpretation in several decisions. In *Excel Commodity and Derivative Pvt. Ltd. vs. Union of India & Ors.* (APOT/132/2022) dated 29th August, 2022, the procedure to be adopted by the assessing officer was considered and the decision in the case of *Divya Capital One (P.) Ltd. vs. Assistant Commissioner of Income Tax* reported in [2002] 139 taxmann.com 461 (Delhi) was followed. At this stage, it will be useful to refer to the operative portion of the said judgment:

"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."

Bearing in mind the above legal principle, we examine the facts of the case on hand. The assessing officer issued notice under Section 148A(b) of the Act dated 27th May, 2022 informing the assessee that information was received and it was suggested that income chargeable to tax has escaped assessment. The information as made known to the assessee is as follows:

"3. *An information was received from the Insight Portal that M/s. Salasar Services Insurance Brokers Pvt. Ltd. received an amount of Rs.91,85,430/- from the alleged accommodation entry provider namely M/s. Tridev Infra Contractors Pvt. Ltd. during F.Y. 2013-14. In view of the above facts and circumstances, you*

are hereby given two weeks time from the receipt of this letter to submit your reply, if any."

The assessee submitted reply dated 7th June, 2022 stating that M/s. Salasar Services Insurance Brokers Pvt. Ltd. has not entered into any type of transaction with M/s. Tridev Infra Contractors Pvt. Ltd. during the assessment year 2014-15. After receipt of the reply, no opportunity of hearing was granted to the appellant/assessee but the assessing officer proceeded to pass the order dated 30th July, 2022 under Section 148A(d) of the Act. The assessing officer took note of the reply but would proceed to state that the assessee has received funds from M/s. Culminating Management Pvt. Ltd. and the said company is managed and controlled by Kamal Jain who is an entry operator. Hence, the assessing officer was of the view that the transaction remained unexplained beyond reasonable doubt. Accordingly, it was held that an amount of Rs.91,85,430/- chargeable to tax has escaped assessment.

In the preceding paragraphs we have extracted the information based on which notice under Section 148A(b) was issued. However, on going through the order passed under Section 148A(d) dated 30th July, 2022, we find that the order was passed on certain material which was not made known to the appellant/assessee. The question would be whether the assessing officer can go beyond the allegations contained in the show cause

notice and what would be the effect of such an order if it is done so. We are guided by the decision in the case of *Commissioner of Central Excise & Customs, Surat vs. Sun Pharmaceuticals Industries Ltd.* reported in 2015 (326) ELT 3 (SC) wherein the Hon'ble Supreme Court set aside an order passed by the authority which was beyond the allegation in the show cause notice. Admittedly, the order which was impugned in the writ petition has been passed based on certain investigation report which report was not furnished to the assessee. That apart, the allegation is a new allegation which did not form part of the allegation as contained in the show cause dated 7th May, 2022. Therefore, the order dated 30th July, 2022 is clearly beyond the scope of the show cause notice and, therefore, calls for interference.

In the result, the appeal filed by the appellant/writ petitioner (APOT/152/2022) is allowed and the order passed in the writ petition is set aside. Consequently, the order dated 30th July, 2022 passed under Section 148A(d) of the Act and the notice under Section 148A of the Act are set aside.

The learned standing counsel appearing for the respondent would submit that opportunity may be granted to the respondent to initiate fresh proceedings. This prayer is opposed by the learned Advocate appearing for the appellant, who submitted that if, in law, the respondent is entitled to proceed, it will be well open

for them to do so, but no observation or liberty is required to be granted by this Court in the present proceedings.

The submission made by the learned Advocate appearing for the appellant is well founded. The order passed under Section 148A(d) of the Act has been set aside on a technical ground that it is based on certain investigation report which was not furnished to the assessee and such allegation did not form part of the show cause notice. Therefore, if the Department has material on hand and if the law permits, nothing prevents the Department from proceeding further and for such purpose, no liberty is required to be specifically granted by this Court.

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

(T.S. SIVAGNANAM, J.)

(PRASENJIT BISWAS, J.)