

04.05.2023

Item No.19

Ct. No.1

RP/AN

MAT 189 of 2023
With
IA No.CAN 1 of 2023

High Point Merchants Private Limited
vs.
Union of India & ors.

Mr. Subash Agarwal

... for the appellant

Mr. Aryak Dutt

... for the UOI

1. This intra-Court appeal filed by the writ petitioner is directed against the order dated 28th November, 2022 passed in WPA 22828 of 2022. In the said writ petition the appellant had challenged the order dated 31st July, 2022 passed under Section 148A(d) of the Income Tax Act, 1961. The writ petition was dismissed on the ground that the order impugned in the writ petition does not suffer from lack of jurisdiction nor there is any patent violation of principles of natural justice nor there is any contravention of any specific provisions of the Statute. Further, the learned Single Bench observed that the appellant would

have ample opportunity in the course of reassessment proceeding. The appellant questions the correctness of the order passed in the writ petition in this appeal.

2. We heard learned counsel for the parties at length.
3. The assessment for the year 2016-2017 was completed under Section 143(3) of the said Act. Thereafter, the assessing officer issued notice under Section 148A(d) of the Act dated 24.05.2022 proposing to reopen the assessment. The reasons for reopening was appended to the notice dated 30.06.2021 which relate to certain allegations with regard to share capital and share premium at the time of sale of thirty six companies and according to the assessing officer the amount is nothing but the unaccounted money brought back into the books by the beneficiaries in the garb of Share capital and Share premium. The assessee submitted a reply dated 3rd June, 2022 stating that no shares were issued or allotted during the financial year 2015-

2016 and provided the details of Share Capital raised. Apart from that submission other submissions were made on the merits of the matter and also pleaded that the proceeding is barred by the laws of limitation and, in this regard, reference was made to Section 149(1)(b) of the said Act. The assessing officer has passed an order under Section 148A(d) of the said Act. The order states out the reason for reopening. In the explanation given by the assessee there is a reference to a decision of the Hon'ble Supreme Court in the case of Union of India & Ors. vs. Ashish Agarwal reported in (2022) SCC Online SC 543 and the decision of the assessing officer is contained in paragraphs 9 to 11 of the said order. On a reading of these paragraphs, it is seen that the assessee was able to convincingly explain that no Share Capital or Share Premium was issued during the financial year under consideration. The assessing officer after perusing the documents and materials placed on record

held that the assessee has substantiated their plea with facts and documents. In the light of the said conclusion the basis on which the reopening of the assessment was done loses its significance or its substrata. Curiously enough, the assessing officer in paragraph 12 of the order impugned in the writ petition refers to the statement recorded from one Sri Dinesh Kumar Dhandhanania during the course of search operation and alleges that the assessee concerned managed and controlled by the entry operator in lieu of commission, routed unaccounted fund through the assessee concerned. Further, on perusal of the balance sheet the assessing officer states that other current liabilities of the assessee have raised significantly and in the asset side of the balance sheet the non-current investment have increased and therefore opines that the transactions entered into by the assessee are required to be scrutinized in the light of the statement of Shri Dinesh Kumar Dhandhanania. As

could be seen from the reasons of reopening such was never the allegation against the assessee though there is a reference to the said entry operator on whom search and seizure operation was initiated. However, reference to the said entry operator was qua allegations of the share capital and share premium which was alleged to be nothing but unaccounted money brought back to the book of the beneficiary under the garb of Share Capital and Share Premium. The order passed under Section 148A(d) of the said Act is entirely a different issue which was never put to the assessee and did not form part of the reasons for reopening. If such be the case, the order impugned in the writ petition has to be held to suffer from total lack of jurisdiction. The assessing officer referred to some other material which did not form part of the reasons for reopening while taking a decision against the assessee and thus there had been violation of principles of natural justice. That apart

the assessing officer has also acted in contravention of the provisions of the said Act since Section 148A(b) of the said Act clearly states out as to what is the procedure to be followed and the same having not been followed and the order passed under Section 148A(d) of the Act based on certain extraneous material which were not put to the assessee, it has to be held that the order is in violation of the statutory provisions.

4. Learned senior counsel appearing for the revenue contended that whatever objections the assessee seeks to raise can always be raised in the reassessment proceeding. We are not persuaded to accept the said submission since when the action of the assessing officer is without jurisdiction and subjecting the assessee to the ordeal of reassessment proceeding would amount to harassment. That apart the reopening of assessment is a very serious matter and when the appellant is able to successfully points out that there

has been gross violation of the statutory requirement definitely the appellant is entitled to move this Court by way of writ petition challenging the order passed under Section 148(d) of the said Act.

5. The Hon'ble Supreme Court in the case of **Red Chilli International Sales vs. Income Tax Officer reported in (2023) 46 Taxmann.com 224 (SC)** though dismissing the appeal of the assessee therein held that when the assessee by way of a writ petition challenged the order passed under Section 148A(d) of the Income Tax Act along with a notice issued under Section 148 of the Income Tax Act the High Court was required to examine in depth the jurisdiction pre-conditions for issue of notice under Section 148 of the Income Tax Act and more or less in an identical and similar factual circumstances this Court in the case of **Excel Commodity and Derivative Pvt. Ltd. vs. Union of India & Ors. (APOT 132 of 2022)** quashed the reassessment order passed under Section

148A(d) of the Act in which the Court took into consideration the circular issued by the CBDT dated 22nd August, 2022 as well as the decision of the High Court at Delhi in Divya Capital One (P.) Ltd. vs. Assistant Commissioner of Income Tax reported in (2002) 139 taxmann.com 461 (Delhi). The operative portion of the judgment reads as follows.

“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 database/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 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 taxpayers 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 reassessment 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 reassessment scheme in accordance with the judgment of the Supreme Court in GKN Driveshafts (India) Ltd. vs. 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 reassessment under section 148A(b) but would certainly not vest it with the power to issue a reassessment 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.”

6. In the light of the above, we are of the view that the order passed by the assessing officer under Section 148A(d) of the Income Tax Act dated 31st July, 2022 is patently illegal and unsustainable in law. Consequently the notice issued by the assessing officer under Section 148 is also be declared as illegal.
7. In the result, both the appeal and the connected application filed by the assessee are **allowed** and the order passed in the writ petition is set aside and, hence, the

writ petition is allowed and the orders
impugned in the writ petition are quashed.

(T. S. SIVAGNANAM)
ACTING CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)