IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

M.A.T. 162 of 2023

With

IA No: CAN 1 of 2023

Rajesh Kumar Dugar

Vs.

Union of India & Ors.

For the Appellant	: Mr. Dhiraj Lakhotia, Adv. Ms. Radhika Agarwal, Adv. Ms. Meghana Joshi, Adv.
For the Respondents	: Mr. Sudipto Kumar Mazumder, DSGI Mr. Ajoy Kumar Singhania, Adv.
Hearing Concluded on	: November 30, 2023
Judgement on	: December 19, 2023

DEBANGSU BASAK, J.:-

1. The appeal has been preferred by an assesse as the writ petitioner and is directed against the order dated August 14, 2023 passed by the learned Single Judge in WP 1705 of 2023 by which, the learned Single Judge dismissed the writ petition.

2. Learned advocate appearing for the appellant has submitted that, the appellant filed his income tax return for the assessment year 2015-2016 on March 29, 2016. The appellant had suffered a notice under Section 148 of the Income Tax Act, 1961 in respect of such assessment year on April 30, 2021. Such notice had been challenged by the writ petitioner in WPA 2276 of 2021. By an order dated February 22, 2022 the High Court had squashed such notice in view of the amendment introduced to Sections 147 to 151 of the Act of 1961 with effect from April 1, 2021.

3. Learned advocate appearing for the appellant has submitted that, the Supreme Court in ***2023 (1) SCC 617 (Union of India and Others vs. Ashish Agarwal)*** revived the reassessment of assesses for the period from April 1, 2021 and June 30, 2021 which had been struck down by several High Courts. He has pointed out that, the appellant had suffered a notice under Section 148 A (b) of the Act of 1961 on May 23, 2022. Appellant had filed a reply thereto on June 5, 2022. Appellant had suffered an order under Section 148 A (b) of the Act of 1961 on July 28, 2022. The Income Tax Department had issued notices under Section 142 (1) of the Act of 1961 on January 10, 2023 and April 6, 2023 seeking information from the appellant. The appellant had submitted his response dated April 6, 2023 on April 11, 2023.

4. Learned advocate appearing for the appellant has submitted that, show-cause notice was issued to the appellant on February 6, 2023 against which the appellant sought an adjournment. Subsequently, on April 28, 2023 another show-cause notice had been issued against the appellant to which the appellant did not furnish any response. The department had passed an order dated May 11, 2023 under Section 147/144/144B of the Act of 1961 demanding a sum of Rs. 94,78,928 for the Assessment Year 2015-2016, on May 11, 2023. Penalty proceedings had also been initiated as against the appellant.

5. Learned advocate appearing for the appellant has submitted that, the jurisdictional notice issued under Section 148 of the Act of 1961 and the order dated July 28, 2022 and all proceedings undertaken thereafter, had been challenged by the appellant in the writ petition. He has contended that, re-opening assessment for the Assessment Year 2015-2016 was barred by limitation under the first proviso of Section 149 (1) of the Act of 1961 and therefore, the assessing officer had no jurisdiction to re-open such assessment.

6. Learned advocate appearing for the appellant has contended that, the learned Single Judge had mis-construed and mis-applied the provisions of the Act of 1961 particularly with regard to the issue of limitation. He has also contended that, the learned Single Judge failed to apply the ratio of ***Ashish Agarwal (supra)*** correctly.

7. Learned advocate appearing for the appellant has contended that, the impugned notice dated July 28, 2022 was issued by the assessing officer and not by the National Faceless Assessment Centre (NFAC) which was in contravention of Central Board of Direct Taxes (CBDT) Notification No. 18/2022 dated March 29, 2022 which notified the e-Assessment of Income Escaping Assessment Scheme, 2022 with effect from March 29, 2022.

8. Learned advocate appearing for the appellant has contended that, the order of the assessment officer suffered from breach of principles of natural justice inasmuch as the objection raised by the appellant was not considered. He has contended that, limitation was a jurisdictional issue and that, such jurisdictional issue was incorrectly decided by the assessing officer. Consequently, a writ petition was maintainable in view of the jurisdictional issue raised.

9. In support of his contentions, learned advocate appearing for the appellant has relied upon ***AIR 1961***

Supreme Court 372 (Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta and Another), ***2021 (6) Supreme Court Cases 771 (Radha Krishan Industries vs. State of Himachal Pradesh and Others)***, ***2007 (1) Supreme Court Cases 732 (Arun Kumar and Others vs. Union of India and Others)***, ***2004 Volume 3 Supreme Court Cases 48 (ITW Signode India Ltd. vs. Collector of Central Excise)***, **2023 SCC OnLine Cal 1243 (Kunal Daga vs. Union of India)**, unreported decision of the Single Bench in ***WPA 491 of 2023 (RPC Commercial LLP vs. Assistant Commissioner of Income Tax & Ors)*** on June 15, 2023 and an unreported Decision of the Single Bench rendered *in* ***WPO 2814 of 2022 (Dilip Bhikhalal Desai vs. DCIT)*** on January 13, 2023.

10. Learned advocate appearing for the respondent has submitted that, the department received information about the appellant that high value cash transactions to the tune of Rs. 1.34 crore which was uploaded in the Insight Portal by DDIT (INV) Siliguri. The appellant had made a transaction of Rs. 1,34,00,000 in a bank account maintained with ICICI bank but failed to file return of income for the relevant assessment year although his total income exceeded the maximum amount which is not chargeable to tax. Consequently, notice under Section 148 of the Act of 1961 was issued, after recording the reasons of re-opening with prior approval of the competent authority.

11. Learned advocate appearing for the respondent has drawn the attention of the Court to the pronouncement in ***Ashish Agarwal (supra)*** and contended that, the Supreme Court did not debar issuance of notice under Section 148 of the Act of 1961. He has contended that, in compliance of ***Ashish Agarwal (supra)*** and in terms of the Instruction No. 1/2022 dated May 11, 2022 of CBDT and the information and materials proceedings had been initiated. The notice was duly served upon the appellant to which the appellant had replied. He has contended that, the reply submitted by the appellant was considered and found not tenable. He has contended that, during the relevant financial year, a deposit of Rs. 1,34,84,500 was made by the appellant and that the appellant failed to support such deposit with documentary evidence. The entire amount was therefore, considered as an asset as laid down under the provisions of Clause b of Section 149 (1) of the Act of 1961. He has contended that, an order passed under Section 148 A (d) of the Act of 1961 does not automatically becomes an assessment order or a demand and that the appellant has ample scope and opportunity to make out a case before the assessing officer for dropping the proceedings. He has contended that, no case has been made out by the appellant for interference by the writ Court.

12. The appellant had been served with a notice under Section 148 of the Act of 1961 on April 30, 2021. Such notice had been assailed before the High Court in a writ petition at the behest of the appellant being WPA 2276 of 2021. In view of the amendment to the Act of 1961 such notice had been quashed by the High Court by an order dated February 22, 2022.

13. Sections 147 to 151 of the Act of 1961 had been amended by the Finance Act 2021 with effect from April 1, 2021. Relevant to the facts of the present case is the limitation regime which had been introduced under Section 149 of the Act of 1961.

14. In ***Ashish Agarwal (supra)*** the Supreme Court has considered the changes brought about by the substituted provisions of Section 147 to 149 of the Act of 1961 with effect from April 1, 2021. It has held that, Section 148 notices issued under the un-amended Section 148 of the Act of 1961 shall be deemed to have been issued under Section 148 A of the Act of 1961 and construed or treated to be show-cause notices in terms of Section 148A (b) of the Act of 1961. It has issued several directions which are as follows :-

> *"28.1. The impugned Section 148 notices issued to the respective assessees which were issued under unamended Section 148 of the IT Act, which were the subject-matter of writ petitions before the various respective High Courts shall be deemed to have been issued under Section 148-A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be show-cause notices in terms of Section 148-A(b). The assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assessees can reply to the show-cause notices within two weeks thereafter.*
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> *28.2. The requirement of conducting any enquiry, if required, with the prior approval of specified authority under Section 148-A(a) is hereby dispensed with as a one-time measure vis-à-vis those notices which have been issued under Section 148 of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High Courts.*
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> *28.3. Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the assessing officers concerned to hold any enquiry, if required.*
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> *28.4. The assessing officers shall thereafter pass orders in terms of Section 148-A(d) in respect of each of the assessees concerned; Thereafter after following*

the procedure as required under Section 148-A may issue notice under Section 148 (as substituted).

28.5. All defences which may be available to the assessees including those available under Section 149 of the IT Act and all rights and contentions which may be available to the assessees concerned and Revenue under the Finance Act, 2021 and in law shall continue to be available.

29. The present order shall be applicable PAN INDIA and all judgments and orders passed by the different High Courts on the issue and under which similar notices which were issued after 1-4-2021 issued under Section 148 of the Act are set aside and shall be governed by the present order and shall stand modified to the aforesaid extent. The present order is passed in exercise of powers under Article 142 of the Constitution of India so as to avoid any further appeals by the Revenue on the very issue by challenging similar judgments and orders, with a view not to burden this Court with approximately 9000 appeals. We also observe that the present order shall also govern the pending writ petitions, pending before various the High Courts in which similar notices under Section 148 of the Act issued after 1-4-2021 are under challenge."

15. Supreme Court has decided ***Ashish Agarwal (supra)*** on May 4, 2022. It has directed that notices issued under Section 148 shall be treated and construed to have been issued under Section 148A of the Act of 1961. It has made the directives applicable pan India and directed that notices issued after April 1, 2021 shall be governed by the directions issued. This direction has been issued under Article 142 of the Constitution as noted in paragraph 29 and binds the appellant herein.

16. CBDT has taken into account the directions of ***Ashish Agarwal (supra)*** and issued instructions for implementation of the same by Instruction No. 01/2022 dated May 11, 2022.

17. In view of ***Ashish Agarwal (supra)*** and the fact that the notice under Section 148 dated April 30, 2021 had been quashed by the High Court on February 22, 2022, the same has to be treated and construed to be under Section 148 of the Act of 1961, for the appellants.

18. In terms of ***Ashish Agarwal (supra)*** and the instructions dated May 11, 2022, a notice dated May 23, 2022 had been issued to the appellant giving the materials based on which the proceedings under Section 148 had been initiated. Appellant had submitted a response thereto dated June 5, 2022. An order under Section 148A (d) of the Act of 1961 had been passed and a notice under Section 148 of the Act of 1961 was issued as against the appellant.

19. The impugned order dated July 28, 2022 had been passed under Section 148A (d) of the Act of 1961 and relates to the Assessment Year 2015-2016. The issue of limitation has been dealt with in the impugned order. It has been held that the case of the appellant would fall under definition of asset as laid down under the provision of Clause b of Section 149 (1) of the Act of 1961.

20. The impugned order has found that, for the relevant financial year a sum of Rs. 1,34,84,500 had been deposited with ICICI bank by the appellant in his account and that the appellant had failed to produce any supporting documentary evidence to explain such deposit. Such deposit has not been reflected in the relevant assessment year. Therefore, by the impugned order, the authorities had come to a finding that, there was an escapement of income tax chargeable to tax for the relevant assessment year. Consequently, the authorities, by the impugned order have decided that it was a fit case to issue a notice under Section 148 of the Act of 1961 for the relevant assessment year.

21. Issue of limitation had been taken by the appellant before the authorities. Appellant had also taken the point of limitation and contended that the authorities wrongly assumed jurisdiction by deciding the issue of limitation erroneously before the learned Single Judge. Contention of the appellant with regard to lack of jurisdiction has revolved around the new regime of limitation that had been introduced with effect from April 1, 2021 by the substituted provisions of Sections 147 to 151 particularly Section 149 of the Act of 1961 by the Finance Act, 2021.

22. ***Ashish Agarwal (supra)*** has noted the new regime of limitation and issued directions with regard to events happening prior to April 1, 2021 and subsequent thereto. CBDT has noted the directions issued in ***Ashish Agarwal (supra)*** and instructions bearing No. 01/2022 dated May 11, 2022 issued thereon. Nothing has been placed on record before us to establish that, the authorities had acted beyond the period of limitation prescribed in respect of the Assessment Year 2015-2016 as against the appellant.

23. ***Calcutta Discount Co. Ltd. (supra)*** has held that, existence of statutory alternative remedy is not a bar to the exercise of writ jurisdiction under Article 226 of the Constitution of India.

24. ***Radha Krishan Industries (supra)*** has observed that, a writ petition is maintainable where there is no appeal provision in respect of an action taken under a statute. It has also spoken about the maintainability of a writ petition where there exists an alternative remedy. It has observed that the High Court has the discretion not to entertain a writ petition if there is an effective alternative remedy available to the aggrieved party.

25. ***Arun Kumar and Others (supra)*** has discussed what would constitute a jurisdictional fact. It has observed that, a jurisdictional fact is a fact which must exist before a Court, Tribunal or an Authority assumes Jurisdiction over a particular matter. If the jurisdictional fact does not exist, the Court, Authority or officer cannot act. If a Court or authority wrongly assumes the existence of such a fact, the order can be questioned by a writ of certiorari. It has also observed that, the underlining principle is that, by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess. The existence of jurisdictional fact is thus a condition precedent for exercise of power by a Court of limited jurisdiction.

26. ***ITW Singnode India Ltd. (supra)*** has observed that, the question of limitation involves a question of jurisdiction. The finding of fact on the question of limitation would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both facts and law involved therein.

27. ***RPC Commercial LLP (supra)*** is an interim order. So also is ***Dilip Bhikhalal Desai (supra)***. None of them have decided the issue raised in this proceedings finally.

28. ***Kunal Daga (supra)*** has considered an order passed under Section 148 A (d) of the Act of 1961. In the facts of that case, the writ petitioner had questioned an order under Section 148A (d) on the ground that no enquiry was conducted by the enquiry officer independently and the assessment could not have been proposed to be re-opened. In the facts of that case, the Court has found that there was a violation of the principles of natural justice at different stages of the matter. Since re-opening of an assessment is a very serious matter and if such course is resorted to, the assesse has to be given an adequate opportunity to put forth his submission, which in the facts of that case was not done, the Court directed the re-assessment proceedings to be re-done.

29. In the facts of this case, the appellant had suffered a notice under Section 148 of the Act of 1961 on April 30, 2021. Such notice had been set aside by the High Court on February 22, 2022. The appellant and the department are governed by the directions of ***Ashish Agarwal (supra)*** which had issued directions relating to all notices issued under Section 148 after April 1, 2021. The department by a letter dated May 23, 2022 had provided the materials based on which the proceedings had been initiated. To that the appellant had submitted a response dated June 5, 2022. The impugned order dated July 28, 2022 passed under Section 148A (d) of the Act of 1961 had dealt with the response of the appellant dated June 5, 2022 in extensor. In fact, the impugned order dated July 28, 2022 of the Authorities had set out the entirety of the response of the appellant dated June 5, 2022 in its body and arrived at the finding that, the reply given was not tenable. The impugned order has also ascribed reasons why the reply of the appellant was not found to be tenable.

30. The impugned order of the authorities under Section 148A (d) of the Act of 1961 cannot be said to be vitiated by breach of principles of natural justice. The appellant had been heard before passing of the order. Appellant had submitted a response to the show-cause notice and filed written submissions which were considered by the Authorities. The impugned order, as noted above, cannot be said to without reasons for arrival at the decision recorded.

31. Learned Single Judge has exercised discretion not to entertain the writ petition. Learned Single Judge has proceeded to hold that there was no violation of the principles of natural justice or that there was any procedural defect in arriving at the impugned decision dated July 20, 2022 of the Authorities.

32. In such circumstances, we find no ground to interfere in the appeal. M.A.T. 162 of 2023 along with IA No: CAN 1 of 2023 are dismissed without any order as to costs.

[DEBANGSU BASAK, J.]

33. I agree.

[MD. SHABBAR RASHIDI, J.]