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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO/8/2023
IA NO. GA/1/2022
BRIGHTMOON SUPPLY PRIVATE LIMITED
VS.
UNION OF INDIA AND ANR.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 24th March, 2023

Appearance :
Ms. Arati Agarwal, Adv.
Mr. Rosy Banerjee, Adv.
...for appellant
Mr. Tilak Mitra, Adv.
...for respondent

The Court : - This intra-Court appeal by the writ petitioner is directed against the order dated 23.11.2022 in WPO No. 2927 of 2022.

The appellant had filed a writ petition challenging the order passed by the respondent under Section 148A(d) of the Income Tax Act, 1961 (the Act) dated 29.07.2022 and the consequential notice issued under Section 148 of the Act dated 29.07.2022. The learned Single Bench by the impugned order dismissed the writ petition on the ground that the impugned order is not a financial assessment nor it is a demand and the petitioner has scope of making out a case during the reopening proceedings under Section 148 of the Act.

Aggrieved by the same, the appellant has filed this appeal.

Heard Ms. Arati Agarwal, learned Advocate duly assisted by Ms. Rosy Banerjee, learned Advocate for the appellant and Mr. Tilak Mitra, learned Advocate appearing for the respondent.

The appellant/assessee was issued notice under Section 148A(d) of the Act dated 25.5.2022. In the said notice, it was alleged that the information was received from the Directorate of Income Tax Investigation at Mumbai through insight portal that the assessee company has made high value transaction rooted through accounts of other non individual entities and non genuine profits/losses on illiquid derivatives of BSE and NSE total amounting to Rs.757,83,92,472/- during the year under consideration (2015-16). In the light of the said allegation, the assessee was granted two weeks time that is, till 8.6.2022 to respond to the show-cause notice. In a note at the bottom of the show-cause notice, it has been stated that the materials relied upon is more than specified space available in the system and hence the same has been sent to the appellant in e-mail. The assessee submitted their objection dated 7.6.2022. Firstly, by pointing out that no information is provided as directed by the Hon'ble Supreme Court in the case of *Union of India & Ors. Vs. Ashish Agarwal* (Civil Appeal No. 3005/2022) [2022] 138 taxmann.com 64(SC). Further it has been stated that in the show-cause notice, case information and several documents are mentioned which are relied upon to support the allegation of the show-cause notice, however, none of the documents have been provided to the assessee which is in complete violation of the directions issued by the Hon'ble Supreme Court in the case of *Ashis Agarwal* (supra). Further it has been submitted that the case information provided does not reflect even a fraction of the alleged amount of Rs.757,83,92,472/-. Further the assessee stated that as no reasons have been given as to why profits/losses from illiquid derivatives are non genuine or non permissible, they are not in a position to reply to the allegation. A specific request was made to provide the working of the amount of Rs.66,80,700/- as shown in information sheet attached along with notice. Further it was contended that the reopening was bad in law as the information, if any, based on which assessing officer has reopened the assessment do not satisfy the requirement as required under

Explanation I to Section 148 as amended since the information was neither flagged in accordance with risk management strategy formulated by the board based objection raised by CAG. Therefore, it was contended that based on the alleged information received from the DIT, Mumbai reopening is non-permissible as per the amended provisions of the Act. Further it was contended that as per amended Section 149 of the Act, notice for reopening can be issued beyond three years only if the assessing officer has in his possession, books of accounts or other documents or evidence which reveal that income chargeable to tax represented in the form of asset, which has escaped assessment amounts to or is likely to amount to Rs.50 lakhs or more for that year. Therefore, it was contended that the reopening having been initiated for the purpose of disallowing claim of loss, the same is bad in law, since the alleged escapement is in not in the form of asset. Without prejudice to the aforementioned preliminary objections and seeking for necessary information, the assessee stated that the assessee is NDFC and regularly doing derivative transactions and shares investments with NSE and BSE and incur profits/losses due to market fluctuation. All the transactions carried out on the derivative segment are traded on stock exchange and contract notices and all other documentary evidences are duly available and all the transactions have been duly recorded in the books of the assessee. Further it was stated that the assessee has not come to advert notice of SEBI for any irregularities in derivatives transactions done by them. With the above submission, the assessee requested the assessing officer to drop the reopening proceedings.

The assessing officer had received the reply and proceed to pass the order dated 29.7.2022 impugned in the writ petition. The order is a two-page order consisting of six paragraphs. If the assessee's contention is purported to have been dealt with in paragraph 5 which reads as follows :-

“Assessee’s submission as well as details available on record have been perused. However assessee had no reply regarding the transaction of derivative loss of Rs.66.80,700/- during the year under consideration. Moreover, on the basis of statement of Atul Sareen, Bharat Bansal, Avdhesh Kumar Gupta, etc. the assessee had made no reply regarding fictitious BSE/Equity/Derivative loss. The data available indicates that there was non-genuine/loss on illiquid derivatives. The treatment of such loss in the accounts could not be verified for lack of supportive documents. From the face of the return, the modus operandi of the assessee also could not be ascertained.”

From the above, it is seen that the assessing office did not take into consideration the preliminary objection raised by the assessee in their reply dated 7.6.2022. Firstly, the assessee had contended that the case related information ought to have been provided to them in terms of directions issued by the Hon’ble Supreme in the case of Ashish Agarwal (supra). That apart, they have also mentioned certain discrepancies in the figures and specifically sought for information based on which the reopening proceedings were initiated. That apart, the assessee contended that the reopening is bad in law by referring to the explanation I of the amended Section 148 and amended Section 149 of the Act. These aspects have never been dealt with by the assessee. More importantly, the order passed under Section 148A(d) proceeds entirely on a different footing than what was alleged in the notice dated 25.05.2022. Thus the present case appears to be a rare classical case to demonstrate as to why proceedings under Section 148A(d) of the Act should not be done. The assessing officer has lost sight of the rudimentary principle that the assessee should have adequate opportunity to make the allegations based on which the reopening is proposed. Thus, without furnishing adequate information and without dealing with the contentions raised by the

assessee in their rely, the order could have been passed by the assessing officer. In more or less similar circumstances this Court in *Kashinath & Co. Pvt. Ltd. Vs. Union of India* in APO 5 of 2023 dated 19.01.2023, the reopening of the assessment was quashed on the ground of total non application of mind. For all the above reasons, we are of the clear view that the assessing officer abdicated his jurisdiction while passing the order dated 29.07.2022 calling for interference.

In the result, the appeal is allowed and the order passed in the writ petition is set aside and consequently the writ petition is allowed and the order dated 29.07.2022 passed under Section 148A(d) of the Act and the consequential notice issued under Section 148 of the Act dated 29.07.2022 are quashed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)