IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2023

CORAM :

The HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P. No.11083 of 2022
and
WMP Nos.10675, 34581 of 2022 and 214 of 2023

M/s.Avinashilingam Institute for Home Science
and Higher Education for Women
Represented by its Registrar
S. Kowsalya ... Petitioner

vs

ACIT, Exemptions, Coimbatore
May Flower Mid City Building,
1510, Trichy Road,
Coimbatore,
Tamil Nadu - 641 018. ... Respondent

Prayer : Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records on the file of the respondent and quash the impugned order in ITBA/AST/F/148A/2021-22/104211250(1), dated 30.03.2022 under Section 148A(d) of the Income Tax Act, 1961 passed by the respondent for the Assessment Year 2015-16 as illegal and not in accordance with law.

For Petitioner : Mr.Raghav Rajeev Menon

For Respondent : Mr.V. Mahalingam,
Sr. Standing counsel

ORDER

This writ petition has been filed challenging the order dated 30.03.2022 passed by the respondent under Section 148A(d) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") in respect of the Assessment Year 2015-16.

2. The respondent has re-opened the assessment of the petitioner for the Assessment Year 2015-16 on the alleged ground that the income for the said Assessment Year has "escaped assessment". A notice under Section 148A(b) of the Act, was sent to the petitioner and the same was replied by the petitioner and thereafter an order dated 30.03.2022 was passed by the respondent as per the provisions of Section 148A(d) of the Act, which is the subject matter of challenge in this writ petition.

3. The petitioner is a Society registered under the Tamil Nadu Societies Registration Act, 1975 and is a Deemed University, approved by the University Grants Commission. The petitioner claims that being a Deemed University and an educational institution, they fall within the purview of Section 10(23C)(iiiab) of the Act and they are exempted from furnishing return of income till the Assessment Year 2015-16 and

therefore, they did not file any returns for the impugned Assessment Year 2015-16.

4. The petitioner has also filed returns for the Assessment Year from 2016-17 upto date, pursuant to the amendment to the provisions of Section 139(4C)(e) of the Act and the respondent has also duly passed Assessment Orders under Section 143(3) of the Income Tax Act for the Assessment Years 2016-17, 2017-18 and 2018-19 accepting the income tax return filed by the petitioner for the Assessment Years. In all the Assessment orders, the respondent has accepted that the petitioner is a Section 10(23C)(iiiab) institution. Therefore, according to the petitioner, the respondent is aware of the activities of the petitioner and is a non-profit motive educational institution. According to the petitioner by total non application of mind to the fact that even though for the subsequent Assessment years 2016-17, 2017-18 and 2018-19, the respondent has accepted that the petitioner is a Section 10(23C)(iiiab) institution, the respondent has reopened the assessment and has passed the impugned order under Section 148A(d) of the Income Tax Act, which is arbitrary and illegal.

5. A counter affidavit has been filed by the respondent denying the contentions of the petitioner. According to them only by following the due procedure as contemplated under Sections 148A and 148 of the Act, the impugned order has been passed under Section 148A(d) of the Act. According to them huge fixed deposits are maintained by the petitioner institution. According to them, the impugned order was passed only after duly verifying all the financial statements and the submissions made by the petitioner. It is their case that the petitioner failed to prove that it is substantially financed by the Government and it is covered by the provisions of Section 10(23C)(iiiab) of the Act. According to them only based on materials available on record, they have found the income chargeable to tax as "escaped assessment" and only for the said reason, notice under Section 148 of the Act has been issued to the petitioner for the Assessment Year 2015-16. However, they admit that insofar as the Assessment Year 2015-16 is concerned, there is no necessity for the petitioner to file its Income Tax return. According to them, the information received by them is sufficient for them to re-open the assessment of the petitioner for the Assessment Year 2015-16 in accordance with the provisions of Sections 147-151 of the Act.

6. The respondent categorically contends that the provisions of Sections 148A(b), 148A(c) and 148A(d) were duly followed by them before passing orders under Section 148A of the Act and issuing the notice under Section 148 of the Act. The respondent also contends that the petitioner was unable to prove that it is substantially financed by the Government in order to claim exemption under Section 10(23C)(iiiab) of the Act. It is also their case that the order under Section 148A(d) is only a preliminary order on the basis of prima facie case and the petitioner will have ample opportunity to prove its claim for exemption during further proceedings under Section 147 of the Act. They also contend that the reply of the petitioner was duly considered and only thereafter the impugned order dated 30.03.2022 came to be passed under Section 148A(d) of the Act with the prior approval of the Principal Chief Commissioner of Income Tax (Exemption), New Delhi.

7. Heard Mr.Raghav Rajeev Menon, learned counsel for the petitioner and Mr.V. Mahalingam, learned Senior Standing counsel appearing for the respondent.

8. The learned counsel for the petitioner drew the attention of this Court to the following :

a) Section 10(23C)(iiiab) of the Income Tax Act which enables an educational institution running without profit to claim exemption.

b) Section 139(4C) (e) of the Income Tax Act, which came into the existence only with effect from 01.04.2016 and would submit that only from the Assessment Year 2016-17 there was a requirement to file Annual Return for Section 10(23C)(iiiab) institution.

c) the Assessment Orders passed in favour of the petitioner for the subsequent Assessment Years viz., Assessment Year 2016-17, 2017-2018 and 2018-19, where the respondent has accepted that the petitioner is a Section 10(23C)(iiiab) institution entitled for exemption.

9. The learned counsel for the petitioner also drew the attention of this Court to a decision of the Hon'ble Supreme Court in the case of ***Red Chilli International Sales v Income Tax Officer & Anr. reported in 2023 LiveLaw (SC) 16*** and would submit that as per the aforesaid

decision, it is clear that an order under Section 148A(d) can also be challenged.

10. Per contra, learned Senior Standing Counsel appearing for the respondent would reiterate the contents of the counter affidavit filed by the respondent before this Court. He would submit that only by following the procedure contemplated under Section 148-A and 148 of the Income Tax Act, 1961 the impugned order has been passed under Section 148A(d) of the Act.

11. He drew the attention of this Court to the income and expenditure statement filed by the petitioner and would submit that huge amounts in the form of fixed deposits are maintained by the petitioner without submitting a convincing explanation to the respondent with regard to the sources for the same and that is the reason as to why the impugned order under Section 148A(d) of the Act and a consequential notice under Section 148 of the Act were issued. Since no proper explanation was submitted in the reply, he would submit that after getting prior approval from the Principal Chief Commissioner of Income Tax (Exemption), New Delhi, the order dated 30.03.2022 was passed

against the petitioner under Section 148A(d) of the Act. Further, he would submit that even before an Assessment Order could be passed, the petitioner has challenged the impugned order passed under Section 148A(d) of the Act, which is not maintainable. In support of the said submissions, the learned Senior Standing Counsel appearing for the respondent drew the attention of this Court to a judgment of the Hon'ble Supreme Court in the case of ***Anshul Jain v. Principal Commissioner of Income Tax reported in 2022 143 taxmann.com 38 (SC)*** and would submit that the present writ petition is not maintainable as no Assessment Order has been passed pursuant to the re-opening of assessment made by the respondent, whereas the petitioner has challenged only an order passed under Section 148A(d) of the Act.

Discussion :

12. The petitioner is an educational institution and is a Deemed University. The petitioner University is in existence since 1957. Admittedly, there was no necessity for the petitioner to submit its Annual Return till the Assessment Year 2015-16. The same is also admitted in the counter affidavit filed by the respondent. The subject transaction which culminated in the passing of the impugned order, dated

30.03.2022 under Section 148A(d) of the Act, pertains to the Assessment Year 2015-16, when there was no necessity for the petitioner to submit its Annual Return as per the provisions of Section 139 of the Act. The necessity for an educational institution coming within the purview of Section 10(23C)(iiiab) of the Income Tax Act, which is entitled for exemption to file return came into existence only from the Assessment year 2016-17 as per the amendment to Section 139(4c)(e) of the Income Tax Act. The same is also not disputed by the respondent as seen from the counter affidavit filed in this writ petition. The respondent has also accepted that the petitioner institution is entitled for exemption as it is a Section 10(23C)(iiiab) institution in respect of the subsequent Assessment Years 2016-17, 2017-18 and 2018-19. The Assessment Orders in respect of those Assessment Years have also been filed as documents along with this writ petition. The Assessment Orders passed in respect of the subsequent Assessment Years accepting the petitioner institution as a Section 10(23C)(iiiab) institution have also not been disputed by the respondents in the counter affidavit filed by the respondent before this Court. The only allegation levelled against the petitioner is that they are holding huge amount of Fixed Deposits for which they have not a given proper explanation to the respondent and only in those circumstances, the respondent was constrained to pass the impugned order under Section 148(A)(d) of the Act. Any educational institution for that matter will hold Fixed Deposits. Further as seen from the subsequent Assessment Years, the same Fixed Deposits running to several crores of Rupees held by the petitioner was also considered and the petitioner institution was also granted an exemption. When in the subsequent Assessment Years viz., Assessment Years 2016-17, 2017-18 and 2018-19, the respondent has accepted that the petitioner is a Section 10(23C)(iiiab) institution entitled for exemption, arbitrarily and by total non application of mind to the said Assessment Orders passed for the subsequent Assessment Years, the respondent has issued the impugned order, dated 30.03.2022 under Section 148A(d) of the Income Tax Act in respect of the Assessment Year 2015-16. Being a very old institution, where several students are studying and huge investments are required for its infrastructure, holding Fixed Deposits running to several crores of Rupees cannot be a ground for re-opening the assessment that too when the respondent themselves have treated the petitioner institution as a Section 10(23C)(iiiab) institution entitled for exemption in respect of the subsequent Assessment Years 2016-17, 2017-18 and 2018-19.

13. The reasons given for passing of the impugned order dated 30.03.2022 under Section 148(A)(d) of the Income Tax Act are as follows :-

> *"the petitioner failed to substantiate the claim towards its compliance with the two conditions, imposed in Section 10(23C)(iiiab), viz.,*
>
> *a. The university or educational institution shall exist solely for educational purposes and not for the purpose of profits.*
>
> *b. and substantially financed by the Government"*

14. When the respondent themselves have accepted that the petitioner is a Section 10(23C)(iiiab) institution entitled for exemption in respect of the subsequent Assessment Years 2016-17, 2017-18 and 2018-19, they cannot now contend that the petitioner has not been able to establish that they are an educational institution solely for the purpose of education and not for the purpose of making profits.

15. Admittedly, the petitioner is a Deemed University in existence from 1957 onwards which is catering to the needs of several lakhs of students and is having a huge infrastructure. Therefore, the reasons

given by the respondent for passing the order under Section 148A(d) of the Act are arbitrary and illegal and has been passed by total non application of mind.

16. The learned Senior Standing Counsel appearing for the respondent has relied upon a judgment of the Hon'ble Supreme Court in the case of ***Anshul Jain v. Principal Commissioner of Income Tax reported in 2022 143 taxmann.com 38 (SC).*** In the said case, admittedly orders were passed under Section 148A(d) of the Act after considering the objections raised by the petitioner therein. But here is the case, where, by total non application of mind to the fact that in respect of subsequent Assessment Years 2016-17, 2017-18, 2018-19, it has been accepted by the respondent that the petitioner is a Section 10(23C)(iiiab) institution and is entitled for exemption, the impugned Assessment Order has been passed. However, the re-opening of the assessment pertains to the Assessment Year 2015-16, which is arbitrary and illegal. Therefore, the aforesaid decision relied by the learned Standing counsel for the respondent has no applicability for the facts of the instant case.

17. The learned counsel for the petitioner relied upon a recent decision of the Hon'ble Supreme Court in the case of ***Red Chilli***

International Sales v Income Tax Officer & Anr. reported in 2023 LiveLaw (SC) 16 and as per the said judgment it is very clear that this Court is having the power to consider a challenge being made to an order passed under Section 148 A(b) of the Income Tax Act.

18. For the foregoing reasons, the impugned order dated 30.03.2022 passed under Section 148A(d) of the Income Tax Act, 1961 and the consequential notice dated 31.03.2022 have to be quashed and the writ petition will have to be allowed. Accordingly, the impugned order dated 30.03.2022 passed under Section 148A(d) of the Income Tax Act, 1961 and the consequential notice dated 31.03.2022 are hereby quashed and the writ petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

21.02.2023

Index:Yes/No
Neutral Citation:Yes/No
vsi2

ABDUL QUDDHOSE, J.

vsi2

To
ACIT, Exemptions, Coimbatore
May Flower Mid City Building,
1510, Trichy Road,
Coimbatore,
Tamil Nadu - 641 018.

W.P. No.11083 of 2022

21.02.2023