



2023-DRC-5401-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 16280/2023 & CM APPLs.65559-655560/2023

TRIVENI ENTERPRISES LIMITED Petitioner
Through: Mr. Nishit Gandhi, Advocate
versus
INCOME TAX OFFICER - 25(3) & ANR. Respondents
Through: Mr. Aseem Chawla with
Ms. Pratishtha Chaudhary, Mr. Aditya
Gupta, Advocates for Revenue

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+ W.P.(C) 16286/2023 & CM APPL.65583-65584/2023

TRIVENI ENTERPRISES LIMITED Petitioner
Through: Mr. Nishit Gandhi, Advocate
versus
INCOME TAX OFFICER - 25(3) & ANR. Respondents
Through: Mr. Aseem Chawla with
Ms. Pratishtha Chaudhary, Mr. Aditya
Gupta, Advocates for Revenue

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+ W.P.(C) 16287/2023 & CM APPLs.65587-65588/2023

TRIVENI ENTERPRISES LIMITED Petitioner
Through: Mr. Nishit Gandhi, Advocate
versus
INCOME TAX OFFICER - 25(3) & ANR. Respondents
Through: Mr. Aseem Chawla with
Ms. Pratishtha Chaudhary, Mr. Aditya
Gupta, Advocates for Revenue

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Date of Decision: 18th December, 2023

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MINI PUSHKARNA



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JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. Present writ petitions have been filed challenging the orders dated 25th July, 2022 passed under Section 148A(d) of the Income Tax Act, 1961 (for short 'Act') for the Assessment Years 2015-16, 2016-17, 2017-18 and further challenging the notices dated 25th July, 2022 issued under Section 148 of the Act. The petitioner further challenges the constitutional validity of Section 115BBE of the Act.
2. Learned counsel for the Petitioner states that the notices issued under Section 148 of the Act have been issued after three years from the end of the relevant Assessment Years and that too could have been issued after obtaining the sanction from the Principal Chief Commissioner of Income Tax and not from the Principal Commissioner of Income Tax as has been done in the present cases.
3. Learned counsel for the Respondents-Revenue, who appears on advance notice, states that in the present cases, after passing of the order under Section 148A(d) of the Act, final assessment orders have been passed on 9th May, 2023, 27th April, 2023 and 18th May, 2023 for the Assessment Years 2015-16, 2016-17, 2017-18 respectively. He further states that the issue of limitation, being a mixed question of fact and law in the present batch of matters, should be raised before the Appellate Authorities.
4. At this stage, learned counsel for the petitioner states that the issue of constitutional validity of Section 115BBE of the Act cannot be adjudicated upon by the Appellate Authority. In support of his submission, he refers to ground T of one of the paper books. The same is reproduced hereinbelow:-



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“T. The Petitioner further submits that the invocation of section 115BBE in the present case is grossly unfair. The Petitioner seeks the indulgence of our Hon'ble Court in determining the Constitutional vires of section 115BBE of the Act in as much as the same is violative of Article 14, Article 19 as also the fundamental Economic Justice guaranteed in the Constitution. In the humble submission of the Petitioner the section is prone to abuse based on a subjective exercise of discretion whereby it will completely depend on the subjective opinion and subjective satisfaction of the Assessing Officer as to whether in a particular case sections 68 to 69D should be invoked or not. Admittedly, the very sections 68 to 69D are discretionary in nature and not mandatory [Ref. CIT v/s P.K. Noorjahan – (1999) 237 ITR 670 (SC)] and because of that they are prone to the vice of perversity in exercise thereof. This may lead to a situation where similarly placed assesseees may be subjected to differential treatment under the Act based on the discretion of the Assessing officer. The very section 115BBE is prone to mischief. It can be manifested by way of a simple illustration. Suppose two different assesseees in the very same business earning the very same nature of income are assessed before the same Assessing Officer wherein income from business earned in cash is disclosed by both the Assesseees. The said income is taxable u/s 28 of the Act. It needs to be mentioned that even incomes to which sections 68 to 69D apply have to be classified under one of the specific heads as per section 14. Now, if the Assessing Officer chooses to apply section 68 to business income earned in cash in the case of one assessee and chooses not to do so in the case of another assessee, it will lead to absolutely unfair levy of tax because the Assessee in whose case the said section 68 is applied would end up being charged with more than double the tax liability [since from AY 2017-18 tax u/s 115BBE is 60% plus 25% surcharge and further penalty and interest]. In an even worse situation like the present one, the Assessing Officer could simply invoke section 68 simply to safeguard his invalid action and consequently subject the Assessee to the rigours of section 115BBE simply because the exercise of discretion was inappropriate. It is with utmost respect submitted that the Act, does not provide a safeguard against a biased mind. It is for this reason, the Petitioner seeks indulgence of this Hon'ble Court in redressing the grievance of the injustice caused by section 115BBE of the Act, just as has happened in the present case. The issue becomes even more serious when there is opaqueness in the manner of framing assessments (due to faceless assessments). A true copy of Section 115BBE is annexed herewith and marked as Annexure P16.”



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5. It is settled law that Statutory Acts and their provisions are not to be declared unconstitutional on the fanciful theory that power would be exercised in an unrealistic fashion or in a vacuum or on the ground that there is an apprehension of misuse of Statutory Provision or possibility of abuse of power. It must be presumed, unless the contrary is proved, that administration and application of a particular law would be done “*not with an evil eye and unequal hand*”. In ***Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay & Ors., (1974) 2 SCC 402***, the Supreme Court has held as under:-

“15..... Administrative officers, no less than the courts, do not function in a vacuum. It would be extremely unreal to hold that an administrative officer would in taking proceedings for eviction of unauthorised occupants of Government property or Municipal property resort to the procedure prescribed by the two Acts in one case and to the ordinary civil court in the other. The provisions of these two Acts cannot be struck down on the fanciful theory that power would be exercised in such an unrealistic fashion. In considering whether the officers would be discriminating between one set of persons and another, one has got to take into account normal human behaviour and not behaviour which is abnormal. It is not every fancied possibility of discrimination but the real risk of discrimination that we must take into account. This is not one of those cases where discrimination is writ large on the face of the statute. Discrimination may be possible but is very improbable.....”

(emphasis supplied)

6. In ***Collector of Customs v. Nathella Sampathu Chetty, 1962 SCC OnLine SC 30***, the Supreme Court has held as under:-

“34....This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:

“If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably”
and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [1960 AC 490 at pp. 520-521] :



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“It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute.”

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity.....”

7. Consequently, at this stage, Section 115BBE of the Act cannot be held unconstitutional on the ground that there is an apprehension of misuse of the said provision.

8. Further, it is settled law that the Act provides a complete machinery for assessment/re-assessment of tax and the assessee is not permitted to abandon that machinery to invoke jurisdiction of the High Court under Article 226 of the Constitution [See : ***Commissioner of Income Tax & Ors. vs. Chhabil Dass Agarwal, (2014) 1 SCC 603***].

9. Consequently, the present writ petitions and pending applications are dismissed.

10. However, the petitioner is given liberty to raise all its contentions and submissions before the Appellate Authority in accordance with law.

ACTING CHIEF JUSTICE

MINI PUSHKARNA, J

DECEMBER 18, 2023
AS