

15.05.2024
Item No.
ML-14
Court No.5
Saswata

W.P.A. 9244 of 2024

**Dinesh Khaitan
Versus
Union of India & Ors.**

Mr. Subir Sanyal
Mr. Rajesh Kumar Mishra
Mr. Sutirtha Das
Mr. Sourojit Mukherjee

...For the petitioner

Ms. Smita Das De

...For the respondents

1. The present writ petition has been filed, inter alia, challenging the assessment order dated 7th March 2024 passed under Section 147 read with Section 144B of the Income Tax 1961 (hereinafter referred to as the “said Act”) and the demand notice dated 7th March 2024 issued under Section 156 of the said Act.
2. It is the petitioner’s case that the petitioner was served with the show cause notice dated 9th March, 2022 issued under Section 148A(b) of the said Act. The petitioner had duly responded to the said notice and in his response, the petitioner had highlighted the fact that inasmuch as the authorities had relied on the evidence collected from third parties, unless the petitioner is given an opportunity to controvert the evidence of such third parties, no reliance ought to be placed on such evidence from such third parties. The said notice under Section 148A(b) of the said Act,

ultimately culminated in an order dated 20th April 2022 issued under Section 148A(d) of the said Act.

3. Mr. Sanyal, learned advocate appearing for the petitioner by drawing attention of this Court to paragraph 8 of the aforesaid order submits that the authorities had bluntly refused the petitioner an opportunity to cross examine Amit Kumar Agarwal of Amit Agarwal Group, whose books of accounts have purportedly led the authorities to conclude that the petitioner had given out of books cash loans and received back payments in cash from the said Amit Kumar Agarwal. On such ground, the aforesaid order stands vitiated. According to him subsequently, a notice under Section 148 of the said Act was issued and later the same culminated in the final order dated 7th March 2024 under Section 147 read with Section 144B of the said Act.
4. Although, the petitioner had filed his response and had represented pursuant to the notice of enquiry before assessment, under Section 142(1) and 143(2) of the said Act and had once again highlighted, the requirement of being afforded with an opportunity to cross examine the said third party, the assessing officer by glossing over the same, had finally decided the proceeding by passing an order under Section 147 of the said Act. According to Mr. Sanyal, failure to afford the petitioner with an opportunity to cross examine the said Amit Kumar Agarwal goes to the very root of the matter. Although, the order under

Section 147 of the said Act is an appealable order, yet by reasons of failure on the part of the authorities to afford the petitioner with an adequate opportunity to defend the proceeding by cross examining the third party from whom, evidence had been collected by the assessing officer, the remedy in the form of appeal has become otiose. As such there can be no bar for the petitioner to invoke the extra ordinary jurisdiction of this Hon'ble Court, as the proceeding also stands vitiated on the ground of violation of principles of natural justice.

5. By placing reliance on an unreported judgment delivered by the Hon'ble Division Bench of this Court presided over by the Hon'ble the Chief Justice delivered in the case of ***Gee Bee Nirman Co. Private Limited v. Income Tax Officer, Ward-5(1), Kolkata & Ors.*** in **MAT 1667 of 2023**, on 2nd January, 2024, Mr. Sanyal submits that in the identical set of facts, the Hon'ble Division bench of this Court taking note of the request made by the assessee for cross examination and the failure on the part of the authorities to permit such cross examination, has set aside the order of assessment and had remanded back the order to the assessing officer for its fresh consideration. He submits that in the facts of the case, this Hon'ble Court may be pleased to entertain the writ petition and while setting aside the order passed by the assessing officer, remand back the matter to the authorities for reconsideration

upon giving opportunity to the petitioner to cross examine Amit Kumar Agarwal.

6. Ms. Dey, learned advocate appearing for the respondents on the other hand submits that the present writ petition ought not to be entertained by this Hon'ble Court inasmuch as the order dated 7th March 2024 passed under Section 147 of the said Act read with Section 144B of the said Act is an appealable order. She submits that if the petitioner proceeds to file an appeal, the entire grievance of the petitioner can be appropriately redressed.
7. In support of her contention she places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***ITO v. M. Pirai Choodi*** reported in **(2010) 15 SCC 283**.
8. Heard the learned advocates appearing for the respective parties and considered the materials on record.
9. It would appear that in the instant case, a notice under Section 148A(b) of the said Act was issued. From the show cause notice dated 9th March 2022 it would transpire that the findings of the assessing officer was made on the basis of the search and seizure conducted at Amit Agarwal Group, Kolkata and during the post-search enquiry, it had come to light that the petitioner had given out of books cash loans and received back repayment in cash from the said Amit Kumar Agarwal. In the factual backdrop as aforesaid the petitioner while

responding to the said show cause notice by his response dated 29th March 2022 had, inter alia, claimed that an opportunity should be provided to the petitioner to confront the said Amit Kumar Agarwal to unearth the truth so as to controvert the evidence. By placing reliance on the said response, Mr. Sanyal submits that the petitioner, in effect, sought permission to cross examine the said Amit Kumar Agarwal. This apart, Mr. Sanyal has also attempted to argue that the previous proceedings initiated under Section 148A of the said Act in respect of the assessment year 2017-18 has since, been stayed by an order dated 31st March 2022 passed by a Coordinate Bench of this Court in WPA 5203 of 2022 and the above notice also covers the said period. He, however, could not demonstrate as to how the present assessment order covers the previous period, as the previous show-cause notice is not on record. The petitioner also could not produce the same.

10. It would appear from the order passed under Section 148A(d) of the said Act on 20th April 2022, that the authorities had categorically come to a finding that there is no scope under the provisions of the said Act to provide any opportunity to the petitioner to confront Amit Kumar Agarwal at that stage. Since, then a notice under Section 148 of the said Act was issued on 20th April 2022, and subsequently on 22nd June, 2023 notice under Section 143(2) of the said Act and on 25th August, 2023 notice under Section 142(1) of the said

Act were issued, which the petitioner had duly responded to and had also participated in the proceeding. Ultimately, the aforesaid culminated in an assessment order dated 7th March, 2024 under Section 147 read with Section 144B of the said Act.

11. I have considered the said order. From the aforesaid order or from the documents relied on by the petitioner, it does not appear that the petitioner had made any specific request before the assessing officer, inter alia, praying for issuance of summons on Amit Kumar Agarwal for him to be produced for the purpose of cross examining him. Although, Mr. Sanyal has strenuously argued that failure on the part of the authorities to afford opportunity to the petitioner to cross examine the said Amit Kumar Agarwal has the effect of vitiating the order passed under Section 148A(d) of the said Act as also the entire assessment proceeding, I am of the view that the petitioner having not approached this Court earlier and having not made any specific prayer for cross examining the said Amit Kumar Agarwal before the assessing officer at the stage of the proceeding under Section 147 of the said Act, the present writ petition cannot be entertained on such ground.

12. It may be noted that the Hon'ble Division Bench of this Court presided over by the Hon'ble the Chief Justice in the case of **Gee Bee Nirman Co Private Limited** (supra) taking note of the specific prayer made

by the assessee and the department despite having issued summons, and no hearing having taken place by reasons of technical difficulties on the appointed date, the cross-examination was not possible, the subsequent request made by the assessee for production of the witness having been turned down in the facts of the case, was pleased to interfere with the assessment order by observing as follows:-

“6. Thus, the assessing officer proceeded on the basis of the statements recorded by Mukesh Banka without affording an opportunity to cross-examine the said person by the assessee. It would have been a different case had the department rejected the request for cross-examination at the first instance and the matter would have been dealt with in a different manner by the assessee. However, the request made by the assessee for cross-examination was considered and granted and merely because Mukesh Banka refused to co-operate with the department by not responding to the summons cannot prejudice the assessee and simultaneously, the assessing officer cannot proceed on the basis of the statement recorded from Mukesh Banka, which remains uncontroverted.

7. There are two ways by which the department can resolve the issue. Firstly, by issuing fresh summons to Mukesh Banka and fixing a fresh date for cross-examination or the second methodology that can be adopted is to ignore the statements recorded by Mukesh Banka by affording a fresh opportunity to the assessee by way of personal hearing through video conferencing or in person and thereafter, consider the materials placed by the assessee and proceed to take a decision in accordance with law. Therefore, by not providing an opportunity to cross-examine Mukesh Banka, the authority is precluded from relying upon the statement recorded from the said person.

8. For the above reasons, we are inclined to interfere with the order impugned in the writ petition dated 24th May, 2023.

9. Accordingly, the appeal is allowed and the application (I.A. No. CAN 1 of 2023) is disposed of. The order passed in the writ petition is set aside and consequently, the assessment order dated 24th May, 2023 is set aside and the matter stands remanded back to the assessing officer for fresh consideration. The assessing officer is directed to issue fresh summons to Mukesh Banka and ensure his presence and permit the appellant to cross-examine the said person and thereafter, afford an opportunity to the assessee to submit additional reply and take a final decision in the matter in accordance with law. In the event, Mukesh Banka refuses to cooperate with the department by not responding to the summons, then the department cannot rely upon the statements recorded from Mukesh Banka and a fresh decision be taken by the assessing officer after affording an opportunity of fresh hearing to the appellant and take a decision based on the materials available on record except the statements of Mukesh Banka.”

13. Admittedly, in this case the petitioner did not make any such request for issuance of summons, despite participating in the proceeding. It may be noted that in a proceeding before the assessing officer not only an opportunity to respond, but an opportunity of hearing is also provided. Given the nature of enquiry, mere making of a statement in the response that the order under Section 148A(d) of the said Act was decided without affording the petitioner the right to cross-examine, without applying for issuance of summons for production of Amit Kumar Agarwal cannot vitiate the entire assessment order on such ground. Admittedly, there is an alternative remedy in the form of appeal, though the petitioner submits that the time to prefer an appeal by reasons of pendency of the writ petition has expired. Taking note of the fact that the writ petition was filed on 1st April 2024, I am of the view that the petitioner

should be permitted to approach the appellate authority under the said Act.

14. If the petitioner approaches the appellate authority within a period of 15 days from date and files appeal along with the server copy of this order with an application under Section 5 of the Limitation Act, 1963 explaining the delay, the appellate authority shall consider the same and having regard to the pendency of the writ petition, condone the delay and shall hear out and dispose of the appeal on merits.
15. It shall be open to the petitioner to apply before the appellate authority in terms of the observation made by the Hon'ble Supreme Court in the case of ***ITO v. M. Pirai Choodi (supra)*** for an opportunity to cross examine the said Amit Kumar Agarwal. If such request is made, the appellate authority shall consider the same having due regard to the judgment delivered by the Hon'ble Supreme Court in the case of ***ITO v. M. Pirai Choodi (supra)***.
16. With the above observations and directions, the writ petition being WPA 9244 of 2024 is disposed of without any order as to costs.
17. All parties shall act on the basis of the server copy of the order duly downloaded from this Court's website.

(Raja Basu Chowdhury, J.)