IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7703 OF 2024

Sushila Sureshbabu Malge ...Petitioner
Vs.
Income Tax Officer Ward 3(4), Thane & Anr. ...Respondents

Ms. Ayesha Ansari i/b. ACE Legal for Petitioner.
Mr. Akhileshwar Sharma for Respondents.

CORAM: G. S. KULKARNI & SOMASEKHAR SUNDARESAN, JJ.

DATE: 02 JULY, 2024.

Oral Judgment (Per G. S. Kulkarni, J.):-

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally.

2. This petition under Article 226 of the Constitution of India, in the context of the impugned notice re-opening the petitioner's assessment, has prayed for the following reliefs:-

> "a. To issue writ of Mandamus or direction or order in the nature of Mandamus or writ of Certiorari or any other writ under Article 226 of the Constitution of India declaring the notice dated 23/03/2023 u/s. 148A(b) being "Exhibit C" containing alleged "information" as invalid and thereby quashing the subsequent proceedings.
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> b. To issue writ of Mandamus or direction or order in the nature of Mandamus or writ of Certiorari or any other writ under Article 226 of the Constitution of India declaring that approval dated 06/04/2023 granted by Respondent no.2 u/s. 151 as invalid.

> c. To issue writ of Mandamus or direction or order in the nature of Mandamus or writ of Certiorari or any other writ under Article 226 of the Constitution of India declaring order dated 06/04/2023 passed u/s. 148A(d) of the Act being "Exhibit F" as invalid.
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> d. To issue writ of Mandamus or direction or order in the nature of Mandamus or writ of Certiorari or any other writ under Article 226 of the Constitution of India declaring that the consequent notice dated 06/04/2023 issued u/s. 148 being "Exhibit G" as invalid."

3. It is the petitioner's case that she is regularly assessed to income tax. She had undertaken a project by name "Green World" at Dighe, Navi Mumbai which was in progress in which she was the co-developer along with one M/s. Akshar Space Private Limited. The petitioner was following the project completion method of accounting. It is also contended that the ITAT, Mumbai while passing the orders for assessment years 2012-13, 2016-17 and 2017-18, had accepted that the petitioner was following project completion method of accounting and accordingly, advances were received by the petitioner from customers.

4. It is contended that for the assessment year 2016-17, the petitioner had filed her return of income on 30 March, 2016 under Section 139 of the Income Tax Act, 1961 (for short, "the Act") declaring total income as 'Nil'. The return of income was processed under Section 143(1) of the Act on 08 June, 2018.

5. The petitioner has stated that subsequent assessment years i.e. 2017-18 and 2018-19 were subjected to scrutiny under Section 143(3) of the Act. The assessment orders dated 24 December, 2019 and 23 June, 2021 for assessment years 2017-18 and 2018-19 respectively were passed by the Assessing Officer, who assessed and taxed a profit rate of 8% on closing work in progress by applying percentage completion method. The petitioner had shown the following advances received from customers in the balance sheet as under:-

Asst. Year	Closing WIP as at year end	Profit @ 8% on Closing WIP
AY 2017-18	Rs.109,02,26,300/-	Rs.8,72,18,104/-
AY 2018-19	Rs112,12,53,800/-	Rs.8,97,00,304/-

6. On the above backdrop, the Income Tax Officer, Ward 3(4), Thane claiming jurisdiction on the petitioner's case, initiated proceedings under Section 148A of the Act by issuing a notice dated 23 March, 2023 and thereafter passed an order dated 06 April, 2023 under Section 148A(d) of the Act. Pursuant to such order, the impugned notice dated 06 April, 2023 under Section 148 of the Act came to be issued to the petitioner.

7. Respondent no.2/Principal Chief Commissioner of Income Tax, Pune had granted approval for issuance of the said notice under Section 148A(b) and for passing of the order under Section 148A(d) of the Act.

8. It is contended by the petitioner that just before the expiry of six years from the relevant assessment year, respondent no.1 issued such notice dated 23 March, 2023 under Section 148A(b) which was accompanied by an annexure containing "information" from the insight portal in regard to the details of sale of flats and TDS under Section 194IA deducted on the said sales total aggregating to Rs.1,22,11,14,228/-, hence, there was an undisclosed income of Rs.27,08,18,862/-. It was *inter alia* stated that the petitioner's income was not commensurate with the returned income. Accordingly, the petitioner was called upon to file reply to the said notice. The petitioner filed a detailed reply on 30 March, 2023 contesting the notice stating that the petitioner was following 'project completion method' and accordingly, no income on transaction of sale of immovable property on which TDS was deducted under Section 194IA of the Act, as set out in the notice, was offered to tax. It was also pointed out that the advance received from the customers was disclosed in balance sheet as on 31 March, 2016. In so far as the undisclosed income as asserted by the department was concerned, it was stated that the details in that regard were not furnished to the petitioner.

9. The petitioner has contended that however without considering the petitioner's reply and the petitioner's case, respondent no.1 passed the impugned order dated 06 April, 2023 under Section 148A(d) to hold that income chargeable to tax has escaped assessment and accordingly, issued the impugned notice dated 06 April, 2023 under Section 148 of the Act. It is on such premise, the petitioner is before the Court praying for reliefs as noted hereinabove.

10. The contentions as urged on behalf of the petitioner in supporting the prayers is that the order passed by the assessing officer under Section 148A(d) of the Act is invalid for the reason that the Assessing Officer has failed to deal with the objections which were filed by the petitioner. It is submitted that it was incumbent on the part of the Assessing Officer to do so as per the guidelines dated 01 August, 2022 issued by CBDT bearing F. No. 299/10/2022 which makes it mandatory for a speaking order to be passed under Section 148A(d), in disposing of the objections as raised by the assessee. The learned counsel for the petitioner has contended that the Assessing Officer, without application of mind, has recorded in the impugned order that 'the assessee did not make any effort to explain why the income arose out of sale transactions made by her proprietary concern was not offered for taxation and that the assessee's reply was evasive, insufficient and not satisfactory'. It is submitted that perusal of the reply itself indicates that the petitioner had furnished detailed reasons in reply to the notice and such reasons as attributed in the impugned order are mechanical and could not have been given. It is next contended that the petitioner was not supplied the documents on the basis of which an opinion was formed and the impugned order [under Section 148A(d)] was passed. Hence, without providing material documents to the petitioner, a conclusion was reached that Rs.27,08,18,862/- was the undisclosed income of the petitioner. All this is contended to be in the teeth of the CBDT guidelines dated 01 August, 2022 as also contrary to the law laid down by the Supreme Court in **Union of India & Ors. vs. Ashish Agarwal**[1].

11. It is also the petitioner's submission that the impugned notice under Section 148A(b) of the Act needs to be set aside on the ground that the same is not in accordance with the provisions of Section 151A of the Act as brought into effect on 01 November, 2020 for the reason that by virtue of such amendment, the Jurisdictional Assessing Officer (JAO) had no authority to issue notice outside the Faceless Assessment Scheme, which was introduced under the provisions of Section 151A of the Act. It is hence submitted that the impugned notice being not issued in a faceless manner and/or not under the faceless scheme, the same is required to be held to be illegal as held by the Division Bench of this Court in **Hexaware Technologies Limited V/s. Assistant Commissioner of Income Tax, Circle 15(1)(2), Mumbai & Ors.**[2]. There are other grounds on which the impugned notices and the impugned order have been challenged, however, considering the aforesaid grounds, the same are not required to be gone into.

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1 (2022) 4441TR1 (SC)

2 [2024] 162 taxmann.com 225 (Bom)(HC)

12. Mr. Sharma, learned counsel for the revenue has opposed the petition. He has drawn our attention to the reply affidavit filed on behalf of the respondents. Mr. Sharma would fairly submit that insofar as the impugned notice not being issued under the faceless assessment mechanism, the issue would stand squarely covered by the decision of the Division Bench in **Hexaware Technologies Limited** (supra). Insofar as the merits of the matter are concerned, Mr. Sharma is also not in a position to demonstrate that the contentions as urged on behalf of the petitioner need to be rejected.

13. We have heard learned counsel for the parties and perused the impugned order and the impugned notices. We find much substance in the contention as urged on behalf of the petitioner that the Jurisdictional Assessing Officer could not have issued a notice under Section 148A(b) of the Act, outside the Faceless Assessment Scheme. In the context of the contentions as urged on behalf of the petitioner, at the outset, we may note the provisions of Section 151A of the Act, which was inserted by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions), Act, 2020 (for short, "**TOLA**") with effect from 01 November, 2020 providing for 'faceless assessment of income escaping assessment'. The said provision reads thus:-

> "**151A. Faceless assessment of income escaping assessment.**
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> (1) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of

assessment, reassessment or re-computation under section 147 or issuance of notice under section 148 10[or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A] or sanction for issue of such notice under section 151, so as to impart greater efficiency, transparency and accountability by—

(a) eliminating the interface between the income-tax authority and the assessee or any other person to the extent technologically feasible;

(b) optimising utilisation of the resources through economies of scale and functional specialisation;

(c) introducing a team-based assessment, reassessment, re-computation or issuance or sanction of notice with dynamic jurisdiction.

(2) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (1), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

Provided that no direction shall be issued after the 31st day of March, 2022.

(3) Every notification issued under sub-section (1) and sub-section (2) shall, as soon as may be after the notification is issued, be laid before each House of Parliament."

14. A bare perusal of Section 151A indicates that the Central Government was empowered to make a scheme, by publication of a notification in the Official Gazette, for the purposes of assessment, reassessment or re-computation of income under section 147 or for issuance of notice under section 148 or for conducting enquiries or issuance of show-cause notice or for passing of order under section 148A or sanction for issue of such notice under section 151, so as to impart greater efficiency, transparency and accountability in the manner as provided for in clauses (a),

(b) and (c) of sub-section (1) of the Act. Sub-section (2) provides that the Central Government may, for the purpose of giving effect to the scheme made under sub-section (1), by notification in the Official Gazette, direct that any of the provisions of the Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification. The proviso below sub-section (2) makes it explicitly clear that such direction shall not be issued after the 31 March, 2022. Sub-Section (3) provides that every notification which would be in the nature of a sub-ordinate legislation to be issued under sub-section (1) and sub-section (2) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.

15. In pursuance of Section 151A, the Central Government by notification dated 29 March, 2022 notified a scheme in regard to faceless assessment *inter alia* providing that the assessment, reassessment or re-computation of income under section 147 of the Act as also the issuance of notice under Section 148 of the Act, shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act for issuance of notice and in a faceless manner. Section 144B of the Act is a provision which ordains faceless assessment. Perusal of Section 144B indicates the entire procedure to be followed in undertaking assessment in a faceless manner involving the

National Faceless Assessment Center. Section 144B of the Act although was inserted by the TOLA, it has been brought into effect from 01 April, 2021.

16. We may observe that in **Hexaware Technologies Limited** (supra), the implications as brought about by Section 151A and the ancillary provisions in regard to faceless procedure were subject matter of consideration, when the Court framed issue no.4 as one of the questions being examined namely whether the notice as impugned in the said proceedings dated 27 August, 2022 was valid and bad in law being issued by the JAO as the same not being issued in accordance with Section 151A of the Act. The Division Bench considering the provisions as noted by us above, held that the impugned notice in the said proceedings being issued by the JAO and not as per the faceless assessment procedure, as envisaged under the scheme notified by the Central Government by notification dated 29 March 2022 was illegal and invalid. It was held that the JAO had no jurisdiction to issue such notice, as it was not issued as per the requirements of Section 151A read with Section 144B of the Act. The relevant observations of the Court required to be noted which read thus:-

> "32. **As regards issue no.4,** Section 151A reads as under:
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> Faceless assessment of income escaping assessment.
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> "Section 151A of the Act gives the power to the Central Board of Direct Taxes ("CBDT") to notify the Scheme for :
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> (i) the purpose of assessment, reassessment or recomputation under Section 147; or
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> (ii) issuance of notice under Section 148; or

(iii) conducting of inquiry or issuance of show cause notice or passing of order under Section 148A; or

(iv) sanction for issuance of notice under Section 151;

so as to impart greater efficiency, transparency and accountability by inter alia eliminating the interface between the Income Tax Authorities and assessee. Sub-section 3 of Section 151A of the Act also provides that every notification issued under sub-section (1) and (2) of Section 151A of the Act shall be laid before each House of Parliament.
In exercise of the powers conferred by sub-sections (1) and (2) of Section 151A of the Act, CBDT issued a notification dated 29th March, 2022 [Notification No.18/2022/F. No.370142/16/2022-TPL and formulated a Scheme. The Scheme provides that -
(a) the assessment, reassessment or recomputation under Section 147 of the Act,
(b) and the issuance of notice under Section 148 of the Act, shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act for issuance of notice and in a faceless manner, to the extent provided in Section 144B of the Act with reference to making assessment or reassessment of total income or loss of assessee. The impugned notice dated 27th August, 2022 has been issued by respondent no.1 (JAO) and not by the NFAC, which is not in accordance with the aforesaid Scheme.

Section 151A of the Act gives the power to the Central Board of Direct Taxes ("CBDT") to notify the Scheme for :

(i) the purpose of assessment, reassessment or recomputation under Section 147; or

(ii) issuance of notice under Section 148; or

(iii) conducting of inquiry or issuance of show cause notice or passing of order under Section 148A; or
(iv) sanction for issuance of notice under Section 151;
so as to impart greater efficiency, transparency and accountability by inter alia eliminating the interface between the Income Tax Authorities and assessee. Sub-section 3 of Section 151A of the Act also provides that every notification issued under sub-section (1) and (2) of Section 151A of the Act shall be laid before each House of Parliament.
In exercise of the powers conferred by sub-sections (1) and (2) of Section 151A of the Act, CBDT issued a notification dated 29th March, 2022 [Notification No.18/2022/F. No.370142/16/2022-TPL and formulated a Scheme. The Scheme provides that -
(a) the assessment, reassessment or recomputation under Section 147 of the Act,

(b) and the issuance of notice under Section 148 of the Act, shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act for issuance of notice and in a faceless manner, to the extent provided in Section 144B of the Act with reference to making assessment or reassessment of total income or loss of assessee. The impugned notice dated27th August, 2022 has been issued by respondent no.1 (JAO) and not by the NFAC, which is not in accordance with the aforesaid Scheme.

35 Further, in our view, there is no question of concurrent jurisdiction of the JAO and the FAO for issuance of notice under Section 148 of the Act or even for passing assessment or reassessment order. When specific jurisdiction has been assigned to either the JAO or the FAO in the Scheme dated 29th March, 2022, then it is to the exclusion of the other. To take any other view in the matter, would not only result in chaos but also render the whole faceless proceedings redundant. If the argument of Revenue is to be accepted, then even when notices are issued by the FAO, it would be open to an assessee to make submission before the JAO and vice versa, which is clearly not contemplated in the Act. Therefore, there is no question of concurrent jurisdiction of both FAO or the JAO with respect to the issuance of notice under Section 148 of the Act. The Scheme dated 29th March 2022 in paragraph 3 clearly provides that the issuance of notice "shall be through automated allocation" which means that the same is mandatory and is required to be followed by the Department and does not give any discretion to the Department to choose whether to follow it or not. That automated allocation is defined in paragraph 2(b) of the Scheme to mean an algorithm for randomised allocation of cases by using suitable technological tools including artificial intelligence and machine learning with a view to optimise the use of resources. Therefore, it means that the case can be allocated randomly to any officer who would then have jurisdiction to issue the notice under Section 148 of the Act. It is not the case of respondent no.1 that respondent no.1 was the random officer who had been allocated jurisdiction.

37 When an authority acts contrary to law, the said act of the Authority is required to be quashed and set aside as invalid and bad in law and the person seeking to quash such an action is not required to establish prejudice from the said Act. An act which is done by an authority contrary to the provisions of the statue, itself causes prejudice to assessee. All assessees are entitled to be assessed as per law and by following the procedure prescribed by law. Therefore, when the Income Tax Authority proposes to take action against an assessee without following the due process of law, the said action itself results in a prejudice to assessee. Therefore, there is no question of

> petitioner having to prove further prejudice before arguing the invalidity of the notice."
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> (emphasis supplied)

17. In so far as the other issues are concerned, we find substance that the order passed by the Assessing Officer requires interference as it is clear from reading of the impugned order that the submission which was made on behalf of the petitioner before the assessing officer that the petitioner was following the project completion method, has not been taken into consideration while issuing the impugned notice and in coming to a conclusion to re-open the assessment.

18. In the light of the aforesaid discussion, we are certain that the petition needs to succeed. It is accordingly allowed in terms of prayer clause (d), which reads thus:-

> "d. To issue writ of Mandamus or direction or order in the nature of Mandamus or writ of Certiorari or any other writ under Article 226 of the Constitution of India declaring that the consequent notice dated 06/04/2023 issued u/s. 148 being "Exhibit G" as invalid."

19. Rule is made absolute accordingly. No costs.

(SOMASEKHAR SUNDARESAN, J.) **(G. S. KULKARNI , J.)**