IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3130 OF 2024

Deven Arunkumar Asha, LH of Late Shri Arunkumar J. Ashar	…Petitioner
Versus	
Asstt. Commissioner of Income Tax, Circle -7(2), Mumbai & Ors.	…Respondents

Mr. Satish Modi a/w. Mr. Jitendra Singh and Ms. Shivali Mhatre for the petitioner.

Mr. Suresh Kumar for the respondents.

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

DATE : 2 September, 2024

PC :

1. This petition under Article 226 of the Constitution of India is filed praying for the following reliefs:

> a) that this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction order or a writ including a writ in the nature of 'Certiorari' to call for the records of the Petitioner's case and after verifying thelegality of the same, quash and set aside the order dated 25th July 2022 passed under section 148A(d) of the Act (being Exhibit-'G'), subsequent notice dated 26th July 2022 issued under section 148 of the Act (being Exhibit-'H') as the same are without

jurisdiction and bad in law and the reassessment order dated 25th March 2023 passed under section 147 r.w.s. 144 of the Act (being Exhibit-'M'). notice dated 25th March 2023 under section 156 or the Act (being Exhibit -'N')and notice dated 25th March 2023 issued for initiating the penalty proceedings (being Exhibit 'O ') in pursuance to the above notice issued under section 148 of the Act as the same are void-ab-initio. Also quash the Instruction No. 01/2022, dated 11th May, 2022 issued by the Respondent No.4 being ultravires and contrary to the provisions of law.

b) that the Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India appropriate writ or order or direction including a writ in the nature of 'Mandamus' directing the Respondent No. 1 to withdraw the order dated 25th July 2022 passed under section 148A(d) of the Act (being Exhibit - 'G'), the notice dated 26th July 2022 issued under section 148 of the Act (being Exhibit - 'H') as the same are bad in. law and also the reassessment order dated 25th March 2023 passed under section 147 r.w.s. 144 of the Act (being Exhibit - 'M'), notice dated 25th March 2023 issued under section 156 of the Act (being Exhibit -'N')and notice dated 25th March 2023 issued for initiating the penalty proceedings (being Exhibit -'O')in pursuance to the above notice issued under section 148 of the Act as the same is void-ab-initio.

c) that this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction order or a writ including a writ in the nature of 'Prohibition' restraining the Respondent No. 1 from proceeding pursuance to the reassessment order dated 25th March 2023 passed under section 147 r.w.s. 144 of the Act (being Exhibit - 'M') in pursuance to the notice issued under section 148 of the Act as the same is void-ab-initio till the disposal of this petition."

2. The challenge as raised in this petition is to the notice under Section 148 on the ground that the impugned notice would be required to

be held to be illegal in view of the law as laid down in the decision in *Hexaware Technologies Limited Vs. Assistant Commissioner of Income Tax & 4 Ors.*[1] ***(Hexaware)***. We are fairly informed at the bar that a final assessment order has already been passed on 25 March, 2023, and such order has been appealed against by the Petitioner, and such appeal is pending.

3. Our attention is drawn to a decision of this Court in ***Rajan Pradeepkumar Dubey vs. Income Tax Officer Ward 3-2, Kalyan & Ors.*** in Writ Petition No. 11166 of 2024 decided on 12 August, 2024 wherein in similar circumstances, when an appeal filed by the assessee was pending, we had not entertained the writ petition and had permitted the petitioner to pursue the appeal. The following observations of the Court in such order are required to be noted:-

> "4. At the outset, Mr. Walve would submit that the impugned assessment order dated 22 May 2023 as also the impugned notice under Section 148 dated 18 July 2022 would stand covered by the decision of this Court in **Hexaware Technologies Limited Vs. Assistant Commissioner of Income Tax & Ors.** as also the decision of the division Bench in ***Siemens Financial Services Pvt. Ltd. Vs. Deputy Commissioner of Income Tax, Circle 8 (2)(1), Mumbai & Ors.,***("***Siemens***") in regard to the applicability of Section 151 of the provisions of the Act as the sanction has not been granted by the appropriate authority as specified under the said provisions.

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5. However, Mr. Walve has fairly submitted that the petitioner has come before the Court after the petitioner had already filed an appeal against the impugned assessment order, as also the petitioner has filed a Review Application before the Principal Chief Commissioner under Section 264 of the Income Tax Act. Mr. Walve has stated that both the proceedings are pending namely the appeal before the CIT(A), as also the Review proceedings before the Principal Chief Commissioner of Income Tax. He, however, submits that considering the decision of this Court being of the jurisdictional High Court in Hexaware (supra) and Siemens (supra), the present petition has been filed despite the petitioner's appeal and revision remaining pending.

6. Mr. Sharma, learned counsel for revenue would submit that much prior to the decisions of this Court in Hexaware as also in Siemens (supra), the petitioner in the present case has availed of an alternate remedy. It is hence submitted that in the facts of the case it would be appropriate that the statutory remedy which is already availed by the petitioner, be pursued by the petitioner and not invoke the extraordinary jurisdiction of this Court under Article 226 by filing this petition, merely because as the aforesaid decisions are rendered by this Court. In other words, Mr. Sharma's submission is that the decision of this Court in Hexaware and Siemens (Supra) are bound to be taken into consideration by the Appellate Authority as also by the Revisional authority in the adjudication of the pending proceedings.

7. We find much substance in the contention as urged by Mr. Sharma on behalf of the revenue. Once the petitioner has availed of an alternate remedy as provided under the Income Tax Act, namely of a substantive appeal being filed, and if the assessment order as also the notices issued to the petitioner prior thereto under Section 148A and under Section 148 are contrary to the substantive provisions of Section 151A and Section 151 of the Act, as interpreted by this Court in Hexaware and Siemens (supra), the Appellate Authority as also the Revisionary Authority being bound by the said decisions of the jurisdictional High Court, need to consider such legal position. Thus, the petitioner is not precluded from raising all such contentions, as raised before us in the present proceedings, before the said authority.

8. Accordingly, we are of the opinion that the proceedings which are pending before the CIT(A) as also the Revisionary proceedings, be decided considering the contentions of the petitioner namely as to whether the impugned assessment order as also the notice under Section 148 of the Act is illegal when tested on the law as declared by this Court in the aforesaid decisions.

9. We are of the opinion that an approach ought not to be followed that when the appellate authority is already seized with the proceedings, we entertain writ petitions to adjudicate, what can certainly be adjudicated by the appellate authority, considering the said decisions of this Court. As rightly pointed by Mr. Sharma an approach otherwise, would create a situation that all matters which are pending before the Appellate Authority and which are supposed to be decided in accordance with law involving issues on applicability of the decisions of this Court, in disposing of the proceedings would be required to be entertained by this Court. Certainly, such approach cannot be adopted by the Court. We are hence of the opinion that it would be appropriate that the assessees's pursues such pending proceedings as already filed before the appropriate Appellate Authority or Revisionary Authority.

10. Accordingly, we are not persuaded to entertain the present proceedings which assail the assessment order when appeal is already filed by the petitioner as also the revision proceedings are pending.

11. However, we find substance in Mr. Walve's contention that if *prima facie* the petitioner is correct that the impugned assessment order as also the notice issued under Section 148 if it is illegal and contrary to the law laid down by this Court in Hexaware and Siemens (supra), the same ought not to be given effect, till the appellate proceedings and revisionary proceedings are decided. In the aforesaid circumstances, we dispose of this petition by the following order:

ORDER

i) The petitioner shall pursue the proceedings before the CIT(A) against the impugned assessment order as also the proceedings before the Revisionary

> Authority. It is open to the petitioner to raise contentions in regard to the illegality of the notice issued to the petitioner under Section 148, in the light of the decisions of this Court in Hexaware and Siemens (supra).
>
> ii) Till the proceeding before the Appellate Authority or Revisionary Authority are decided, the impugned assessment order shall remain stayed.
>
> iii) All contentions of the petitioner on the pending proceedings are expressly kept open."

4. In light of the aforesaid observations, we need to be consistent in our approach. We may observe that the appellate authority is bound by the decisions of the Jurisdictional High Court. Thus, in the facts and circumstances of this case, it is open to the petitioner to raise in the appellate proceedings, all such pleas as raised in the present petition. Certainly, the appellate authority would consider all the pleas which the petitioner intends to urge including that the notice under Section 148 issued is itself illegal in view of what has been held in the decision of this Court in ***Hexaware***.

5. The justification of the petitioner to pursue this petition is that the appeal would take many years to be adjudicated and the sword of litigation would remain hanging over the head of the petitioner, despite

the law having been declared in ***Hexaware***. We are hesitant to accept such plea as urged on behalf of the petitioner for the reason that since the petitioner intends to contend in the appellate proceedings that the proceedings stand covered by the authoritative pronouncement of this Court, such plea certainly needs to weigh with the appellate authority. On such plea being made, the appellate authority is bound to consider the same and pass appropriate orders. Even this Court in several cases in which appeals were not filed, entertaining such plea, have disposed of the petitions considering the binding decision of this Court in ***Hexaware*** and in other decisions involving the issues as arising under Section 144B, 151A, 148A and 148 of the Income Tax Act, 1961. We may also observe that in such proceedings, the Revenue had fairly taken a position that the proceedings stand covered by such decisions of this Court.

6. In the aforesaid circumstances, we are inclined to dispose of this petition by the following order:

ORDER

i) The petitioner shall pursue its appeal already filed before the Commissioner of Income-tax, Appeals, against the impugned assessment order. It is open to the petitioner to raise contentions on the impugned notice and the order having become untenable, in the light of the decision of this Court in ***Hexaware***.

ii) We also permit the petitioner to file an application before the appellate authority praying that the appeal itself be disposed of in view of the decision of this Court in ***Hexaware***. If such an interim application is made, certainly the appellate authority shall expeditiously consider the petitioner's application and all contentions raised thereon.

iii) Until the proceedings before the appellate forum are decided, the impugned assessment shall not be acted upon.

iv) All contentions of the parties on the pending proceedings are expressly kept open.

7. Disposed of in the above terms. No costs.

[SOMASEKHAR SUNDARESAN, J.] **[G. S. KULKARNI, J.]**