

(2022) 07 CHH CK 0066
In the Chhattisgarh High Court
Case No : Writ Petition (T) No. 186 Of 2022

Barbrik Projects Ltd

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 28-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Income Tax Act, 1961 — Section 44AB, 143(3), 147, 148, 148A, 148A(b), 148A(d), 149

Citation : (2022) 07 CHH CK 0066

Hon'ble Judges : Narendra Kumar Vyas, J

Bench : Single Bench

Advocate : S. Rajeswarara Rao, Manoj Kumar Sinha, Ramakant Mishra, Anju Sharma, Naushina Afrin Ali, Ajay Kumarani

Final Decision : Dismissed

Judgement

1. By way of present writ petition filed under Article 226 of the Constitution of India, the petitioner seeks quashment of order (Annexure P/1(a) passed under Clause (d) of Section 148A of the Income Tax Act, 1961 (for short, "the Act, 1961") and notice issued under Section 148 of the Act, 1961.

2. The brief facts as reflected from the record are that the petitioner is a domestic company and engaged in execution of civil construction works. It has filed income tax return for assessment year 2018-2019 on 26-3-2019 declaring the total income at Rs.43,14,13,840/-. It has also been stated that the company is maintaining regular books of account as per Companies Act, 2013 and also under Section 44AB of the Act, 1961 through independent auditor wherein the financial statement is also prepared. It has been contended that regular assessment for assessment year 2018-2019 was completed under Section 143 (3) of the Act, 1961 and total income was determined as per return determining demand payable at Rs. Nil. Thereafter, respondent No.4 has issued notice under Clause (b) of Section 148A of the Act 1961 on 24-3-2022 (Annexure P/5)

wherein the Assessing Authority has mentioned about the credible information which is extracted below.

"Consequent to the information under High Risk CRIU/VRU cases obtained from insight portal, this office is in possession of information that M/s Panveen Trading Private Limited has certain transaction with you. Ms. Panveen Trading Private Limited has shown sale of Rs.2,20,00,275/- to Barbik Project Limited during the financial year 2017-2018.

However, on the basis of credible information is received that M/s Valeska Trading Private Limited, M/s Panveer Trading Private Limited & M/s Shwetpuship Commercial Private Limited were found indulging generating and selling tax invoices to various entities without physical supply of underlying goods/services for passing regular input tax credit to other business entities and for doing this they have also availed and utilized input Tax Credit (ITC) against fake invoices issued by others.

As per detailed information available with this office, you are a beneficiary of transaction for an amount of Rs.2,20,00,275/- made during the financial year 2017-2018 relevant to the AY 2018-2019 in the form of accommodation entry.

In view of the above discussion, it is evident that income chargeable to tax amounting to Rs.2,20,00,275/- has escaped assessment for AY 2018-19 and this is a fit case for issue of notice to show cause u/s 148A (b) of the Income Tax Act, 1961. You are therefore requested to show cause as to why a notice u/s 148 should not be issued on the basis of the above flagged information."

3. The petitioner has submitted reply to the notice vide Annexure P/6 denying the allegations made in the notice contending that the notice was issued for providing opportunity of hearing being heard with respect to income chargeable to tax has escaped assessment as denied that any fake invoices that was used the same and the same is utilized for input tax credit. The petitioner prayed for supply of credible information along with copy of the fake invoices and copy of approval of the specified authority. The Assessing Authority considering the submissions has passed the order under Section 148A(d) (Annexure P/1) on 31-3-2022 wherein the Assessing Authority has observed as under.

"1. Credible information has been received from the Investigation Wing, Kolkata that the assessee has certain transactions with M/s Panveer Trading Private Limited during the financial year 2017-18.

2. During investigation, it is observed that M/s. Panveer Trading Private Limited has been incorporated on 05-10-2016 ie after the introduction of GST in indirect tax system.

3.Huge business transactions made by the entry is not in commensuration with its financial profile, as submitted before the income tax authority. Summary of income tax return filed by the entry is tabled".

4. The Assessing Authority has passed the order that income chargeable to tax Rs.2,20,00,275/- is escaped assessment for the year under consideration within the meaning of Section 147 read with Section 148 of the Act, 1961 and recorded a finding that it is a fit case to issue notice under Section 148 of the Act, 1961. In pursuance of the order passed under Section 148A and after recording a finding that there is escaped amount, the Assessing Authority has issued notice under Section 148 of the Act, 1961 on 31-3-2022 by giving the petitioner 30 days' time from service of this notice to submit reply. The aforesaid notice issued under Section 148 of the Act, 1961 and order passed under Section 148A(d) of the Act, 1961 are being challenged by filing the instant writ petition under Article 226 of the Constitution of India.

5. Learned counsel for the petitioner would submit that as per Section 148A(d) of the Act, 1961, it is incumbent on the Assessing Authority to consider the reply of the assessee furnished, if any, in response to the show cause notice referred to in Clause (b), to decide on the basis of material available on record including the reply of the assessee, it is a fit case to issue notice under Section 148 of the Act, 1961 by passing an order with approval of the assessing authority within a period of one month in which reply is referred to it. He would further submit that the Assessing Authority without application of mind, without considering the material placed on record and reply, has mechanically passed the order. He would further submit that the writ petition is very much maintainable and accordingly notice issued under section 148 of the Act, 1961 be quashed. To bolster his arguments, he has relied upon the decisions of Hon'ble High Court of Allahabad in Writ Tax No 641 of 2022 (Dharmendra Kumar Singh versus Union of India and 2 others 2022 (5) TMI 1390) and Hon'ble High Court of Gujarat in Studio Virtues vs. Income Tax Officer Ward 5 (3) (1) or His successor in R/ Special Civil Application No 7169 of 2022 (6) TMI 520.

6. Per contra, learned counsel for respondents No. 2 to 4 would submit that the petition is premature at this stage as the petitioner has an opportunity to give reply to the show cause notice which has already been issued under Section 148A of the Act, 1961 wherein the petitioner can file all the materials and the Assessing Authority will examine the order and thereafter any order can be passed under Section 148A of the Act, 1961 which is also an appellable order before the Appellate Authority and thereafter, the Income Tax Tribunal, as such the petitioner has alternative efficacious remedy available to him under Income Tax Act, therefore, the writ petition at this juncture is premature and deserves to be dismissed on the count as it is a preliminary stage and no final conclusion has been drawn which can be assailed by filing this writ petition, therefore, she prayed for dismissal of this writ petition. To bolster her arguments, she relied upon the judgment of Hon'ble Supreme Court in Union of India and others vs. Ashish Agrawal AIR 2022 SCC 2781.

7. I have heard learned counsel for the parties and perused the documents including the notice and order annexed with the petition.

8. From the aforesaid submissions made by learned counsel for the parties, this court has to examine whether the writ petition challenging the order passed under Section 148A (d) and notice issued under Section 148 of the Act, 1961 is maintainable or not.

9. For better understanding the lis between the parties, it is expedient for this court to extract the relevant provisions of the Income Tax Act, 1961 which are applicable to the facts of the case. Section 148-A of the Act, 1961 has been made effective from 1-4-2021 by financial year 2021. Section 148A provides conducting inquiry, providing opportunity before issue of notice under Section 148 of the Act, 1961. Section 148-A and 149 of the Income Tax Act, 1961 read as under.

"148A. The Assessing Ofcer shall, before issuing any notice under section 148, -
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(a) conduct any enquiry, if required, with the prior approval of specifed authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;

(b) provide an opportunity of being heard to the assessee, by serving upon him a notice to show cause within such time, as may be specifed in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a); (

c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a ft case to issue a notice under section 148, by passing an order, with the prior approval of specifed authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:

Provided that the provisions of this section shall not apply in a case where,

" (a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or Advertisement

(b) the Assessing Ofcer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned

under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee; or (d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.

149. Time Limit for notice – (1) No notice under section 148 shall be issued for the relevant assessment year,”

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b); b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of” (i) an asset; (ii) expenditure in respect of a transaction or in relation to an event or occasion; or (iii) an entry or entries in the books of account, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more:

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if a notice under section 148 or section 153A or section 153C could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section or section 153A or section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021:

Provided further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:

Provided also that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:

Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less

than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.

Explanation: For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account. Section (2): The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151".

10. Section 148-A of the Act, 1961 has come for consideration before the Hon'ble Supreme Court in case of Union of India vs. Ashish Agrawal (supra) wherein the Hon'ble Supreme Court has examined the scheme in paragraphs 6.4 to 7 which are extracted as below.

6.4 However, by way of section 148A, the procedure has now been streamlined and simplified. It provides that before issuing any notice under section 148, the assessing officer shall (i) conduct any enquiry, if required, with the approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment; (ii) provide an opportunity of being heard to the assessee, with the prior approval of specified authority; (iii) consider the reply of the assessee furnished, if any, in response to the showcause notice referred to in clause (b); and (iv) decide, on the basis of material available on record including reply of the assessee, as to whether or not it is a fit case to issue a notice under section 148 of the IT Act and (v) the AO is required to pass a specific order within the time stipulated.

6.5 Therefore, all safeguards are provided before notice under section 148 of the IT Act is issued. At every stage, the prior approval of the specified authority is required, even for conducting the enquiry as per section 148A(a). Only in a case where, the assessing officer is of the opinion that before any notice is issued under section 148A(b) and an opportunity is to be given to the assessee, there is a requirement of conducting any enquiry, the assessing officer may do so and conduct any enquiry. Thus if the assessing officer is of the opinion that any enquiry is required, the assessing officer can do so, however, with the prior approval of the specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment.

6.6 Substituted section 149 is the provision governing the time limit for issuance of notice under section 148 of the IT Act. The substituted section 149 of the IT Act has reduced the permissible time limit for issuance of such a notice to three years and only in exceptional cases ten years. It also provides further additional safeguards which were absent under the earlier regime preFinance Act, 2021.

7. Thus, the new provisions substituted by the Finance Act, 2021 being remedial and benevolent in nature and substituted with a specific aim and object to protect the rights and interest of the assessee as well as and the same being in public interest, the respective High Courts have rightly held that the benefit of new

provisions shall be made available even in respect of the proceedings relating to past assessment years, provided section 148 notice has been issued on or after 1st April, 2021. We are in complete agreement with the view taken by the various High Courts in holding so”.

11. From the aforesaid provisions of the Act, 1961 as well as the law laid down by Hon’ble Supreme Court, it is quite vivid that complete mechanism for determination of escape amount has been provided under the statute and the Assessing Authority, in the present case, while considering the submissions, reply made by the petitioner, has applied its mind and passed the impugned order under Section 148A(d) of the Act, 1961. In fact, in the present writ petition, the petitioner has raised grounds denying the fact that the petitioner did not enter into any purchase or sale transaction with M/s Panveer Trading Private Limited and he has also not claimed any input tax credit with respect to goods and service tax purportedly paid by M/s Panveer Trading Private Limited and he has also not entered any transaction with M/s Panveer Trading Company, as such there is no question of escapement of income chargeable to tax by making claim of bogus expenditure in terms of bogus purchases. These facts are his defence which can be examined while conducting proceeding under Section 148A of the Act, 1961.

12. Hon’ble High Court of Madras has examined the scheme of Section 148-A of the Act, 1961 in M/s Tamil Nadu State Marketing Corporation Ltd vs Additional./ Joint/Deputy/Asst Commissioner of Income Tax/Income Tax Officer National e-Assessment Centre, Delhi and another WP No 21995 of 2021 decided on 21-3-2022 and has held in para 14 to 18 which read as under.

“14. Since the objections raised by the petitioner have been dealt with by the Revenue and it was pursuant to the same, the show cause notice along with draft assessment order was issued to the petitioner. Thus, it cannot be stated that the assessment order under challenge is without an order on the objections raised pursuant to the notice under Section 148 of the Income Tax Act. Rather, a detailed order was passed and finding no substance in the objections, a show cause notice along with the draft assessment order was sent to the petitioner, which remains without reply by the petitioner, and accordingly, before the expiry of the period for re-assessment, the assessment order was passed on 28-9-2021.

15. Thus, in view of the facts given above, we find that it is not such a case where a writ petition can be maintained directly challenging the assessment/ reassessment order. The judgment of the Hon’ble Apex Court in GKN Driveshafts (India) Ltd. vs. ITO (259 ITR 19 (SC) case has been applied. For ready reference, the relevant portion of the said judgment is extracted hereunder.

“5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within

reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed, by passing a speaking order before proceeding with the assessment in respect of the above said five assessment years.

In so far as the appeals against the assessment before CIT (A), we direct the appellate authority to dispose of the same, expeditiously.”

16. The aforesaid judgment shows that, when a notice under Section 148 of the Act, is given, the proper course of action for the assessee is to file a return and if he so desires, to seek reasons for issuing the notice, and the assessing authority is bound to furnish the reasons for reopening the assessment. On receipt of the issuance of the notice and the assessing officer is bound to dispose of the same by passing a speaking order.

17. In the present case, the allegation of the petitioner is that, pursuant to the notice under Section 148 of the Act, when an objection was submitted by the petitioner, no speaking order was passed on it, rather an assessment order was passed directly. The arguments have been raised without taking note of the fact that while sending the show cause notice and draft assessment order on 24-9-2021, the order on the objections was also sent, after dealing with the objections. When no response to the show cause notice along with the draft assessment order was received, the final assessment order was passed on 28-9-2021.

18. Accordingly, we do not find this as a fit case for maintaining a writ petition to challenge the assessment order. However, the petitioner can seek remedy by filing an appeal against the assessment order because, we have not touched the merits of the issue. Rather, the present order is only with reference to the maintainability of the writ petition in reference to the notice under Section 148 of the Income Tax Act and the objections thereon”.

13. Hon’ble High Court of Delhi in Gulmuhar Silk Pvt.Ltd vs. Income Tax Officer, Ward 10(3), Delhi WPC 5787 of 2022 & CM Appl. 17297/2022, decided on 7-4-2022, has held in para 6 & 7 which read as under.

“6. Though it is the petitioner’s case that the impugned order is erroneous on facts, yet this Court is of the opinion that the petitioner would have ample opportunity during the course of proceedings before different statutory forums to show that the finding of fact arrived at was erroneous. Moreover, at this stage, no assessment order has been passed and it has only been observed that it is a fit case for issuance of notice under Section 148 of the Act. In fact, the Supreme Court in Commissioner of Income Tax and Ors.Vs. Chhabil Das Agarwal, (2014) 1 SCC 603 has held that as the Income Tax Act, 1961 provides complete machinery for assessment / reassessment of tax, assessee is not permitted to abandon that machinery and invoke jurisdiction of High Court under Article 226.

Consequently, the present case does not fall under the exceptional grounds on which a writ petition is maintainable at the interim stage in tax matters. [See: Ghanashyam Mishra And Sons Private Limited Vs. Edelweiss Assetre Construction Company Limited, (2021) 9 SCC 657 and M/ S Radha Krishan Industries vs. State of Himachal Pradesh and Ors, (2021) 6 SCC 771].

7. Accordingly, the present writ petition along with pending application stands dismissed with liberty to the petitioner to raise all its grounds before the Assessing Ofcer and the subordinate forums”.

14. The grounds which have been taken by the petitioner in the writ petition is his defence that cannot be examined at the stage of issuance of notice under section 148 of the Act,1961 as the Assessing Authority before issuance of notice under Section 148 of the Act, 1961 has to rely upon credible information which in the impugned order under Section 148A (d) of the Act, 1961 has already been furnished and thereafter, considering the material it has recorded a finding that it is a fit case where notice under Section 148 of the Act, 1961 can be issued. Learned counsel for the petitioner is unable to point out that the findings which have been recorded by the Assessing Authority are contrary to the material on record and the Assessing Authority has not applied its mind or Assessing Authority has not considered the reply filed by the petitioner. Therefore, the writ petition, at this juncture is not maintainable and deserves to be dismissed.

15. Accordingly, the writ petition being devoid of merit is liable to be and is hereby dismissed. Consequently, application for interim relief also stands dismissed.

16. It is made clear that this court has not examined the contentions of the petitioner on merit, only taken note of the facts for examining the fact whether the writ petition filed under Article 226 of the Constitution of India is maintainable or not. It is for the Assessing Authority, while conducting the proceeding under Section 148 of the Act, 1961, to examine and decide the case as per the material available on record, without being influenced by any of the observations made by this court in foregoing paragraphs.