

GAHC010062712022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2324/2022

SHARDA LUNKAR
D/O LATE BHANWARLAL BHURA, R/O GROUND FLOOR, SAGAR
APARTMENT, S.J. ROAD, ATHGAON, GUWAHATI-781001, ASSAM

VERSUS

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, ROOM NO. 46,
NORTH BLOCK, NEW DELHI-110001

2:PRINCIPAL COMMISSIONER OF INCOME TAX
GUWAHATI-I
AAYAKAR BHAWAN
CHRISTIAN BASTI
GUWAHATI-781005

3:INCOME TAX OFFICER
WARD-2(1)
GUWAHATI
AAYAKAR BHAWAN
CHRISTIAN BASTI
GUWAHATI-781005

4:NATIONAL FACESLESS ASSESSMENT CENTRE
DELHI
INCOME TAX DEPARTMENT
ARA CENTRE
E-2
GROUND FLOOR
JHANDEWALA EXTENSION
NEW DELHI-11000

Advocate for the Petitioner : DR. A SARAF

Advocate for the Respondent : ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

Date : 31-03-2022

Heard Dr. A. Saraf, learned senior counsel assisted by Mr. Z. Islam, learned counsel for the petitioner, who submits that the impugned Notice dated 31.03.2021 under Section 148 of the Income Tax Act, 1961, by which the respondents have reopened the assessment year 2015-16, on the ground that the authority have reasons to believe that the income chargeable to tax for the assessment year 2015-16 had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961, should be set aside.

2. The petitioner has also challenged the consequential notices dated 29.11.2021, 29.12.2021, 17.01.2022 and the Order dated 21.03.2022 and show cause notice dated 25.03.2022, by which the petitioner has been given an opportunity to show cause as to why the proposed variation should not be made and assessment for the year 2015-16 should not be completed accordingly.

3. The petitioner's counsel submits that the petitioner submitted his income tax return along with the statement computing the total income. The Income Tax Department, after scrutinizing the income tax return of the petitioner issued the assessment order for the year 2015-16 vide Order dated 05.05.2017.

4. However, notice under Section 148 of the Income Tax Act, 1961 was issued to the petitioner on 31.03.2021, wherein it was stated that the authorities had reasons to believe that the petitioner's income chargeable to tax for the assessment year 2015-16 had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

5. The petitioner was thereafter asked to deliver a return in the prescribed form for the assessment year 2016-17. Subsequent to the above, the reasons for reopening the assessment year 2015-16 was given by the Income Tax Authorities and the petitioner filed his objection. The Income Tax Authorities thereafter filed a rebuttal to the objection and subsequently, the show cause dated 25.03.2022 was issued to the petitioner, asking the petitioner to show cause as to why the proposed variation should not be made and the assessment for the year 2015-16 should not be completed accordingly.

6. The learned Senior counsel for the petitioner submits that the reasons for issuing the notice under Section 148 of the Income Tax Act, 1961 has been reflected in the letter dated 27.10.2021 issued by the respondents, giving reasons for reopening the assessment for the year 2015-16. In the said letter dated 27.10.2021, the Income Tax Authorities have taken the ground that the assessee has earned a bogus profit of Rs. 95,34,584/- as unexplained credit under Section 68 of the Income Tax Act, 1961, which the assessee did not bring to the notice of the Department.

7. The learned Senior counsel submits that as per Section 68 of the Income Tax Act, 1961, the condition precedent for invoking Section 68 is that the assessee either fails to explain the nature and source of a credit in his books

of account or the explanation furnished by him is found to be unsatisfactory on an objective consideration of the same by the assessing officer. He submits that the law does not empower any authority to treat an amount as unexplained credit under Section 68 of the Income Tax Act, 1961, without allowing the assessee an opportunity to explain the same. He also submits that the power under Section 147 of the Income Tax Act, 1961 can be exercised only if the assessing officer has reasons to believe that any income is chargeable to tax for any assessment year. From the reasons recorded for reopening of the assessment as communicated to the petitioner, it is clear that the same has no material bearing on the question of escapement of the assessment of the petitioner. He submits that as the reasons recorded for reopening the assessment for the year 2015-16 has no nexus with the formation of belief that any income has escaped assessment, the issuance of notice under Section 148 of the Income Tax Act, 1961 is absolutely illegal and without jurisdiction.

8. The learned Senior counsel submits that in a similar matter, i.e., *WP(C) No. 2020/2022, "MV Realcon Private Limited Vs. Union of India & 4 Ors."*, this Court had stayed the reassessment proceeding initiated under Section 148 of the Income Tax Act and as such, this Court should also pass a similar stay order. The petitioner's counsel has also relied upon the judgment of the Supreme Court in the case of *M/S. Chhugamal Rajpal Vs. S.P. Chaliha and Others*, reported in *1971(1) SCC 453*, wherein the Apex Court has held that before issuing a notice under Section 148, the Income Tax Officer must have reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under Section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for

that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Further, the Income Tax Officer cannot come to a prima facie conclusion only on a vague feeling that there may be bogus transactions. He also submits that the Apex Court in the case of *Madhya Pradesh Industries Ltd., Kingsway, Nagpur Vs. Income Tax Officer, Special Investigation Circle 'B', Nagpur*, reported in (1965) 57 ITR 637 has held that an attempt to short-circuit the procedure provided by the Indian Income Tax Act for investigation of facts, which the Income Tax Officer alone is competent to investigate in the first instance, may also justify the High Court in rejecting a petition for the issue of a writ under Article 226. But where, as in the present case, the claim made is that the Income Tax Officer had no power to issue the notice under Section 34, and that the power is exercised not for any legitimate purpose for which it may be used, but for the purpose of making a fishing enquiry and to review a previous order passed in favour of the Company, show cause and an opportunity to accept or deny the facts alleged was at least called for.

9. Mr. H. Gupta, learned CGC, on the other hand submits that the petitioner has been given all the reasons required for reopening the assessment for the year 2015-16. He submits that subsequent to the objection submitted by the petitioner, which was rebutted by the Income Tax Authorities for reopening the assessment for the year 2015-16, the Income Tax Authorities have issued the show cause notice dated 25.03.2022, asking the petitioner as to why the proposed variation should not be made and assessment for the year 2015-16 be completed accordingly. He submits that the petitioner has not replied to the said

show cause notice and that the grievance of the petitioner and the points taken by him in this writ petition could have been considered by the Department at the time of consideration of his reply. He further submits that if the petitioner is ultimately aggrieved with the decision taken by the assessing officer, an appeal can be filed to the appellate authority under Section 246 (i)(b) of the Income Tax Act, 1961.

10. I have heard the learned counsels for the parties.

11. The notice under Section 148 of the Income Tax Act, 1961 had been issued to the petitioner, as the assessing officer had reasons to believe that the income chargeable to tax for the assessment year 2015-16 had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961. The reasons given for reopening of the assessment of the petitioner's Company is given vide letter dated 27.10.2021, wherein it has been stated in paragraph Nos. 2, 3, 4 & 5 as follows:-

2. Brief details of the information collected/received by the A.O: In this case the information has been received through "INSIGHT" portal. Through this portal a communication has been received from Addl. DIT (I & CI), Guwahati vide letter No. Addl. DIT (I & CI)/Ghy/SPP on Reversal trades/2020-21/85 dated 02.12.2020. The reverse trade carried out by the assessee with various counterparties in illiquid stock options of BSE during the period 17.03.2015 to 27.03.2015 are non-genuine and deceptive trades which have been entered into with the ulterior motive of manufacturing artificial profits in connivance with certain brokers which are then used to introduce unaccounted income into the books of the assessee without paying taxes thereon.

3. Enquiries made by the A.O as sequel to information collected/received: In this case information extracted from ITBA portal on ITS/360 degree profile and return of income.

4. Finding of the A.O: *The Addl. DIT (I & CI), Guwahati in his report has stated that it is required to initiate appropriate proceedings under the I.T. Act, 1961 in the assessee's case for AY 2016-17 to treat the bogus profit of Rs. 95,34,584/- as unexplained credit u/s 68 of the I.T. Act, 1961.*

5. Basis of forming reason to believe and details of escapement of income:- *In the facts and circumstances of the case narrated in Para No. 3 & 4 above and also I have gone through the information and verified with the return of income filed for the A.Y. 2015-16. On perusal of the above I am of the opinion that in this case the assessee has earned bogus profit of Rs. 95,34,584/- as unexplained credit u/s 68 of the Income Tax Act, 1961. During the scrutiny assessment u/s 143(3) of the Act, the assessee did not bring this fact before the department and it is found that this is new facts/information, which were not covered in earlier proceedings u/s 143(3) of the Act.*

In view of the above, I have reason to believe that income of at least Rs. 95,34,584/- has escaped assessment for the A.Y. 2015-16 in the case of Sharda Lunkar and this case is fit for reassessment u/s 147 of the Income Tax Act, 1961.

12. Subsequent to the letter dated 27.10.2021 issued by the respondent authorities, notices dated 29.11.2021, 29.12.2021, 17.01.2022 under Section 143 (2) read with Section 147 and under Section 142 (1) of the Income Tax Act were issued to the petitioner. Thereafter, the petitioner submitted his objection to the issuance of the notice under Section 148 of the Act for the assessment of the year 2015-16 and prayed for dropping the proceedings initiated under Section 147 of the Act vide letter dated 08.02.2022. The respondent authorities thereafter issued a rebuttal dated 21.03.2022, in reply to the objection raised by the petitioner.

13. The respondent authorities subsequently issued show cause notice dated 25.03.2022, asking him as to why the variations should not be made as per the draft assessment order. The petitioner was also given the opportunity of

submitting his response by 23.59 hours of 27.03.2022.

14. The relevant paragraph No. 19.4 (7) of the letter dated 25.03.2022 (Annexure-10), issued by the respondent authorities is reproduced below:-

*7. Accessed accordingly u/s 143(3) r.w.s. 147 and 144B of the Act, 1961 at Rs. 1,00,03,760/-. Demand Notice and Challan after giving credit for prepaid taxes is issued. Interest u/s 234A, 234B, 234C and 234D, as applicable is charged. **Notice for initiating penalty proceedings u/s 271(1)(c) is issued separately.***

You are hereby given an opportunity to show cause why proposed variation should not be made and the assessment should not be completed accordingly.

3. Kindly submit your response through your registered e-filing account at www.incometax.gov.in by 23:59 hours of 27.03.2022, whereby you may either:-

a. accept the proposed variation; or

b. file your written reply objecting to the proposed variation; or

c. If required, after filing written reply you may request for personal hearing so as to make oral submissions or present your case. The request can only be made by clicking the Seek Video Conferencing button available against the SCN, in the view notices of this proceeding in the e-proceedings tab on e-filing portal. The request can be made only before expiry of compliance date & time. On approval of request, personal hearing shall be conducted exclusively through video conference.

4. In case no response is received by the given time and date, the assessment shall be finalized as per the draft assessment order."

As can be seen from the above extract of the show cause notice dated 25.03.2022, the petitioner was to submit his response by 23:59 hours of 27.03.2022. However, the petitioner has apparently not filed his reply to the show cause notice and has instead filed the present writ petition on 28.03.2022,

which can be said to partake the character of an appeal, as the assessment is to be finalized as per the draft assessment order.

15. As an order passed under Section 147 of the Income Tax Act, 1961 is an appealable order, in terms of Section 246 (i)(b) of the Income Tax Act, 1961, it is the opinion of the Court that the petitioner can avail the alternative remedy available by approaching the appellate authority. However, keeping in view the fact that the petitioner has been given only 2 (two) days time to file a reply to the show cause notice dated 25.03.2022, this Court is of the view that the respondents should give the petitioner a further 10 (ten) days time from today, for filing his reply to the show cause notice dated 25.03.2022. Accordingly, the respondents are directed to give the petitioner a further 10 (ten) days time to file his reply to the show cause notice dated 25.03.2022.

16. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant