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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 7406/2022

DIVYA CAPITAL ONE PRIVATE LIMITED (EARLIER KNOWN
AS DIVYA PORTFOLIO PRIVATE LIMITED) Petitioner

Through: Mr.Ved Jain, Mr. Nischay Kantoor
and Ms. Richa Mishra, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 7(1)
DELH & ANR. Respondents

Through: Mr.Sanjay Kumar with Mr.Easha
Kadian , Advocates for Revenue.

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Date of Decision: 12th May, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

MANMOHAN, J (Oral):

C.M.No.22640/2022

Exemption allowed, subject to all just exceptions.

Accordingly, the application stands disposed of.

W.P.(C) No.7406/2022 & C.M.No.22639/2022

1. Present Writ Petition has been filed challenging the Notice dated 17th March, 2022 issued under Section 148A(b) of the Income Tax Act, 1961

(‘the Act’) as well as the Order dated 04th April, 2022 passed by the Assessing Officer under Section 148A(d) and the consequential impugned notice dated 04th April, 2022 issued under Section 148 of the Act.

2. Learned counsel for the Petitioner contends that the impugned Order dated 04th April, 2022 under Section 148A(d) has been passed without considering the replies dated 24th March and 31st March, 2022 filed by the Petitioner to the show cause notice. He states that the petitioner filed a preliminary response to the above said show cause notice whereby the petitioner objected to the legal validity of the notice under Section 148A(b) on the ground that there was no information that suggested that income had escaped assessment. The petitioner further requested respondent No.1 to provide the information/documents, relied upon for assuming jurisdiction, which suggest that income had escaped assessment and further requested a week’s time from date of sharing such information so that the petitioner could file a detailed para wise response. Although the information requested for was not shared with the petitioner, yet the petitioner filed a detailed para wise response dated 31st March, 2022 in respect of each of the transaction stated by the respondent in the show cause notice dated 17th March, 2022. The petitioner further submitted voluminous documentary evidences along with the said reply.

3. He further states that the impugned order is arbitrary, cryptic and without application of mind as a huge sum of Rs.10,07,05,88,04,543/- (Rupees One lakh seven hundred and five crores eighty-eight lakhs four thousand five hundred and forty-three only) is held to have escaped assessment without considering the return and business of the Petitioner. He states that there is no proper indication as to how income has escaped

assessment. In this regard, he relies upon a tabular chart capturing para-wise reasons recorded and the remarks in respect thereof as under:-

<i>Para no. of order u/s 148A(d)</i>	<i>Remarks</i>
<p><i>Para 2</i> <i>Under para 2, at page no. 1 to page no.3 of the order, a table is provided which captures the list of transactions entered into by the Petitioner such as purchase of shares, sale of futures, sale of shares, purchase of mutual funds, sale of options, etc. The total of such table is Rs.10,07,05,88,04,543</i></p>	<p><i>There is no allegation/comment as to what is wrong with such transactions. The Petitioner is a member of National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) and these transactions are routine transactions carried out in the ordinary course of business of the petitioner considering the fact that the Petitioner is carrying business of share brokers, depository participant and investment in securities and trade in derivatives.</i></p> <p><i>Further, all these transactions are duly accounted for in the profit and loss account and return filed by the Petitioner.</i></p>
<p><i>Para 3</i> <i>At para 3 page 3-4 of the order, a table is provided which captures some purchases made by the Petitioner to the tune of Rs.13,08,95,220.</i></p>	<p><i>This information is culled out from GST returns. There is no allegation/comment as to what is wrong with such transactions and how income has escaped assessment.</i></p> <p><i>In any case, these transactions are carried out in the ordinary course of business and duly accounted for in the profit and loss account and return filed by the Petitioner.</i></p>

<p>Para 4 <i>At para 4, a table is provide which captures details of certain receipts / payments/ receipts to the tune of Rs.20,95,64,704 on account of payments to contractors / professionals, payment of salary, interest income other than interest on securities etc.</i></p>	<p><i>These details have been culled out from TDS returns. There is no allegation/comment as to what is wrong with such transactions and how income has escaped assessment.</i> <i>In any case, these transactions are carried out in the ordinary course of business and duly accounted for in the profit and loss account and return filed by the Petitioner.</i></p>
<p>Para 5 <i>At para 5, it has been stated that assessee has made payment of salary for Rs.1,05,17,362 to its employees. A table under para 5 captures details of such payments.</i></p>	<p><i>These details have been culled out from TDS returns. There is no allegation/comment as to what is wrong with such transactions and how income has escaped assessment.</i> <i>In any case, these transactions are carried out in the ordinary course of business and duly accounted for in the profit and loss account and return filed by the Petitioner.</i></p>
<p>Para 6 <i>At para 6, it has been stated that assessee has made fictitious purchases of Rs.19,38,595/- with M/s Vagabound Tradex Private AY 2018-19.</i></p>	<p><i>Here, an allegation has been made that Petitioner has made Fictitious purchases with M/s Vagabound Tradex Private No information, etc. has been given to indicate the basis for such allegation. The observations are without any basis whatsoever. It is vehemently denied that no transaction was carried out with the said entity.</i></p>

4. He contends that the Respondents erred in not appreciating the peculiarity of the business of trading in derivatives. He states that in the

present case, out of Rs.10,07,05,88,04,543/- alleged to have escaped assessment, substantial amount of Rs.10,02,75,60,94,439 (around 99%) is stated to be on account of sale of equity share or equity oriented unit otherwise than by way of actual delivery (information code STT-03), sale of options (information code STT-04), sale of futures (information code STT-05). He states that this information is culled out by Respondent No. 1 from information furnished in Form 10DB by respective stock exchange. These transactions are subject to STT and are to be reported by Stock exchanges. However, this is not the actual turnover. To explain the same by way of example, he states that in cash segment trading, if one buys 100 shares for Rs. 100 per share (i.e. Rs. 10,000) and sell such shares for Rs. 102 per share (i.e. sale price 10,200), the bank is first debited by Rs. 10,000/- and then credited by 10,200/-. However, for the same transaction in the future segment, the credit is for Rs 200/- only (i.e. the net amount of gain); and if the sale was for Rs. 97 per share, then the debit would be for 300/- only (i.e the net loss). Thus, the total value is not relevant in these segments; only the net gain/loss is credited/debited and it is such net gain/loss which is accounted for as income in the profit and loss account and return. According to him, under Form 10DB, only sale from futures is to be reported whereas the purchases are not to be reported thus leading to the gap. Thus, he states that the impugned order has been passed without any application of mind whatsoever and without appreciating the nature of business of the Petitioner.

5. He lastly states that the approval obtained in the present case is mechanical in nature as though the Assessing Officer had mentioned incorrect details in the impugned order, such as name of the directors and

the exact amount of escaped income, yet the same had been granted by the higher authority.

6. Issue notice. Mr.Sanjay Kumar, learned standing counsel accepts notice on behalf of the Respondents/Revenue. He states that the Assessing Officer had considered the reply dated 24th March, 2022, while passing the impugned order, as the same was only filed by the Petitioner within the stipulated time period, as provided in the notice under Section 148A(b) of the Act. He states that the detailed reply dated 31st March, 2022 filed by the Petitioner was not considered by the Assessing Officer as the same had not been filed within the stipulated time of seven days.

COURT'S REASONING

NEW RE-ASSESSMENT SCHEME WAS INTRODUCED BY THE FINANCE ACT, 2021 WITH THE INTENT OF REDUCING LITIGATION AND TO PROMOTE EASE OF DOING BUSINESS.

7. This Court is of the view that the new re-assessment scheme (vide amended Sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business. In fact, the legislature brought in safeguards in the amended re-assessment scheme in accordance with the judgment of the Supreme Court in *GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC)* before any exercise of jurisdiction to initiate re-assessment proceedings under Section 148 of the Act.

8. This Court is further of the view that under the amended provisions, the term “information” in Explanation 1 to Section 148 cannot be lightly resorted to so as to re-open assessment. This information cannot be a

ground to give unbridled powers to the Revenue. Whether it is “information to suggest” under amended law or “reason to believe” under erstwhile law the benchmark of “escapement of income chargeable to tax” still remains the primary condition to be satisfied before invoking powers under Section 147 of the Act. Merely because the Revenue-respondent classifies a fact already on record as “information” may vest it with the power to issue a notice of re-assessment under Section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under Section 148 post an order under Section 148A(d).

IMPUGNED NOTICE DATED 17th MARCH, 2022 AS WELL AS THE ORDER DATED 4th APRIL, 2022 ARE CRYPTIC.

9. In the present case, this Court finds that the impugned notice dated 17th March, 2022 as well as the order dated 4th April, 2022 are cryptic as is evident from the fact that information culled out from Petitioner’s own return and records (namely Form 10DB, GST return, Form 26AS) have been used to issue notice under Section 148A(b) of the Act without mentioning as to what is wrong in these transactions, what are the apprehensions of the Assessing Officer and what are the points on which clarification is required. It is not understood as to how expenditure incurred by the Petitioner on salaries, payment of professional fees and purchases can amount to income having escaped assessment without there being any allegation that the employees/professionals to whom salaries and fees had been paid are dummies or fictitious entities.

10. In fact, perusal of para 9 of the impugned notice dated 17th March, 2022 suggests that reassessment in the present case was sought to be initiated merely for verification. This Court is of the view that even if the

re-assessment was being done for verification in accordance with Explanation 1 to Section 148, nothing prevented the Assessing Officer from conducting an enquiry with respect to the said information in accordance with Section 148A(a) of the Act. In any event, it was all the more necessary in the present case for the Assessing Officer to thoroughly scrutinise the contentions and submissions advanced by the petitioner-assessee before passing an order under Section 148A(d) of the Act.

PETITIONER HAS BEEN DENIED AN EFFECTIVE OPPORTUNITY TO FILE A REPLY AS THE INFORMATION / MATERIAL STATED IN THE IMPUGNED SHOW CAUSE NOTICE HAD NOT BEEN SHARED WITH THE PETITIONER.

11. This Court further finds that the information/material stated in the impugned show cause notice dated 17th March, 2022 issued under Section 148A(b) of the Act have not been shared with the Petitioner, despite specific request made by the Petitioner vide letter dated 24th March, 2022, thereby denying the Petitioner an effective opportunity to file a response/reply. The non-sharing of the information is violative of the rationale behind the judgment of this Court in ***Sabh Infrastructure Ltd. vs. Asst. CIT, 398 ITR 198 (Del)***.

PETITIONER WAS NOT GIVEN REASONABLE TIME TO FILE A REPLY.

12. This Court is also of the view that the petitioner-assessee has a right to get adequate time in accordance with the Act to submit its reply. In the present case, the impugned order under Section 148A(d) of the Act has been passed in great haste and in gross violation of principle of natural justice as the Petitioner was not given reasonable time to file a reply. In a matter where on the basis of Tax Deducted at Source/Goods and Services

Tax/Service Tax/ Securities Transaction Tax returns updated by the stock exchange and other stock holders on the Income Tax Portal all the payments and receipts of an assessee have been clubbed together as income having escaped assessment totalling to Rs.10,07,05,88,04,543/- (Rupees One lakh seven hundred and five crores eighty-eight lakhs four thousand five hundred and forty-three only) as against petitioners' revised and rectified income tax return for the assessment year 2018-19 declaring an income of Rs.3,76,71,690/- (Rupees Three Crores Seventy Six Lakhs Seventy One Thousand and Six Hundred Ninety only), this Court is of the view that the respondent-revenue should have granted extension of time to the Petitioner to file a detailed reply.

13. It is pertinent to mention that Section 148A(b) permits the Assessing Officer to suo moto provide up to thirty days period to an assessee to respond to the show cause notice issued under Section 148A(b), which period may in fact be further extended upon an application made by the Assessee in this behalf, and such period given to the assessee is excluded in computing the period of limitation for issuance of notice under Section 148 of the Act in terms of the third proviso to Section 149 of the Act.

THE MANDATE OF SECTION 148A(c) HAS BEEN VIOLATED AS THE IMPUGNED ORDER UNDER SECTION 148A(d) OF THE ACT HAD BEEN PASSED WITHOUT CONSIDERING THE DETAILED REPLY FILED BY THE PETITIONER DATED 31ST MARCH, 2022.

14. In any event, as the impugned Order under Section 148A(d) of the Act had been passed on 04th April, 2022 i.e. after receipt of the detailed reply by the Petitioner dated 31st March, 2022, the Assessing Officer should have considered the same as it was available on record. By not considering the reply of the Petitioner dated 31st March, 2022, the mandate of Section

148A(c) has been violated as it casts a duty on the Assessing Officer, by using the expression 'shall', to consider the reply of the Petitioner/assessee in response to notice under Section 148A(b) before making an order under Section 148A(d) of the Act.

15. In fact, this Court in *Fena Pvt. Ltd. vs. ACIT Circle 7-1 & Anr. In W.P.(C) 6553/2022* had quashed the order passed under Section 148A(d) of the Act in similar circumstances i.e. where Assessing Officer had not taken into consideration the replies along with the documents/evidences filed by the assessee before passing the order under Section 148A(d).

SIGNIFICANCE OF ISSUANCE OF A SHOW CAUSE NOTICE AT A STAGE PRIOR TO ISSUANCE OF A REASSESSMENT NOTICE UNDER SECTION 148 OF THE ACT HAS BEEN LOST ON THE RESPONDENTS.

16. This Court is of the opinion that significance of issuance of a show cause notice at a stage prior to issuance of a reassessment notice under Section 148 of the Act has been lost on the Respondents. This Court takes judicial notice that in a majority of reassessment cases post 1st April, 2021, the orders under Section 148A(d) of the Act use a template / general reason to reject the defence of the assessee on merits, namely, "*found devoid of any merit because the assessee company has failed to produce the relevant documents in respect of transactions mentioned in show cause notice.....it is established that the assessee has no proper explanation.....*" Consequently, this Court is of the opinion that a progressive as well as futuristic scheme of re-assessment whose intent is laudatory has in its implementation not only been rendered nugatory but has also had an unintended opposite result.

RELIEF

17. Consequently, the impugned order dated 04th April, 2022 issued under Section 148A(d) of the Act and the notice dated 04th April, 2022 issued under Section 148 of the Act are quashed and the matter is remanded back to the Assessing Officer for a fresh determination. The Assessing Officer is directed to pass a fresh reasoned order under Section 148A(d) of the Act after considering the Petitioner's detailed reply dated 31st March, 2022 in accordance with law within eight weeks. In the event the Assessing Officer wants certain clarifications or would like the Petitioner's response to any specific information received by the revenue, it shall be at liberty to give a supplementary notice.

18. With the aforesaid directions, present writ petition along with pending application stands disposed of. The learned counsel for the Respondent-revenue is directed to forward a copy of this order to the CBDT for necessary information and action.

MANMOHAN, J

DINESH KUMAR SHARMA, J

MAY 12, 2022/KA/AS