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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 31458 OF 2024

Sanjay Patel
Sunrise, 91 Walkeshwar Road,
Mumbai-400006

...Petitioner

Versus

1. The Assistant Commissioner of
Income Tax Circle 19(3)
Room No.513, 5th floor,
Piramal Chamber, Lalbaug,
Parel, Mumbai-400012.
2. Chief Commissioner of Income Tax,
Mumbai-5
Room No.339, 3rd floor,
Aaykar Bhavan, M.K.Road,
Mumbai-400020.
3. Union of India
through its Finance Secretary
Department of Revenue,
Ministry of Finance, 3rd floor,
Jeevan Deep Building
Sansad Marg, New Delhi-100001

...Respondents

Mr. Sham V. Walve a/w Mr. Abhishek Khandelwal and Mr. Bhavik Chheda, for the Petitioner.

Ms. Mamta R. Omle, for the Respondent.

CORAM

M.S. Sonak &

Jitendra Jain, JJ.

RESERVED ON:

24 February 2025

PRONOUNCED ON :

26 February 2025

JUDGMENT (Per Jitendra Jain, J.) :-

1. This petition is instituted by the petitioner challenging an order passed under Section 148A(d) and

notice under Section 148 of the Income Tax Act, 1961 ('the Act'), both dated 28 March 2024 for the assessment year 2017-18.

Brief facts :-

2. The petitioner is an individual and has filed his return of income for assessment year 2017-18 on 3 August 2017. The said return of income was selected for scrutiny by issuing a notice under Section 142(1) of the Act for examining the claim of deduction under Section 57 of the Act. In the petition at Exhibit 'C', there is a copy of the email response submitted by the petitioner during the course of original assessment proceedings in which reference is made to evidence in support of the nexus between the income from other sources and deduction against that income. However, surprisingly, the enclosures to this Exhibit 'C' are not annexed in the present petition.

3. On 24 December 2019, an assessment order under Section 143(3) of the Act came to be passed accepting the returned income. The said assessment order does not refer to the response filed by the petitioner at Exhibit 'C' to the petition. Still, it states that the income is assessed after verification details are submitted.

4. On 16 March 2024, a notice under Section 148A, clause (b) of the Act for the assessment year 2017-18 was issued to the petitioner requesting the petitioner to submit his reply along with supporting documents on or before 25 March 2024 electronically @ www.income.tax.gov.in. Along with the said notice, in the annexure, information based on which the

notice was issued was also furnished to the petitioner. The information referred to in the annexure states that while auditing the case of the petitioner, the audit had raised objections concerning deduction under Section 57 of the Act. The annexure states that there is no documentary evidence on record or a bank statement to prove that the said interest expenses are incurred to earn relevant income. The annexure relies upon Explanation-1 to Section 148 of the Act, which defines information suggesting income having escaped assessment to reopen the case.

5. The petitioner neither filed the reply on or before 25 March 2024 nor sought any adjournment on or before the said date. However, on 27 March 2024, an email was sent to the respondent submitting his reply to the notice issued under Section 148A(b) of the Act. The said email refers to 7 attachments, but again, none of these attachments are annexed to the present petition. It is also important to note that at pages 52 and 53 is a typed copy of the letter, which is transcribed in the email, but surprisingly, the same is undated, or the date is missed.

6. On 28 March 2024, an order under Section 148A (d) of the Act came to be passed, and along with the said order, notice under Section 148 of the Act was also issued for reopening the case for the assessment year 2017-18. In the order under Section 148A(d) of the Act, it is stated that the time allowed for submitting the reply had expired on 25 March 2024. The petitioner had neither filed any reply nor requested for adjournment; therefore, the order is passed on

the premise that the petitioner has no explanation to offer.

7. Against the above backdrop, the petitioner is before us, challenging the impugned proceedings.

8. Mr. Walve, learned counsel for the petitioner, submits that the issue for which the opening is sought was examined during the regular assessment proceedings and, therefore, any attempt to reopen the case based on the audit objection would amount to a change of opinion, which is not permissible under the Act.

9. Mr. Walve in support of his submission relied upon the following three decisions :-

i. *Mira Bhavin Mehta Vs Income-tax Officer*¹

ii. *Knight Riders Sports Pvt. Ltd Vs Assistant Commissioner of Income Tax*²

iii. *Dilip Laximan Powar Vs Income-tax Officer*³

10. Mr. Walve, therefore, prayed for quashing of the notice issued under Section 148 of the Act. No other submission has been canvassed before this Court.

11. Ms. Omle, learned counsel for the respondents defended the impugned proceedings by relying on Explanation-1 to amended Section 148 of the Act. She further submitted that the judgments relied upon by the petitioner are distinguishable on facts. In any event, she submitted that the decisions have not examined whether post amendment, audit objection can be the basis for reopening the case moreso in the light of Explanation-1 to Section 148 of the Act.

12. Ms. Omle further submitted that the petitioner did

1 (2024) 161 taxmann.com 572 (Bombay)

2 Writ Petition No.2269 of 2023 dated 26 September 2023

3 (2024) 167 taxmann.com 109 (Bombay)

not file reply to the show cause notice on or before 25 March 2024 and, therefore, no grievance can be raised after the expiry of time given for filing of the reply. She further submitted that none of the attachments or annexures to the emails or letters filed during the course of the assessment proceedings or to the belated reply filed to the show cause notice u/s 148A(b) of the Act have been annexed to the present petition. She submitted that whether there is any nexus or not is a factual issue which cannot be gone into by this court in this proceeding. She submitted that the various annexures have also been suppressed and such a petition may not be entertained. She submitted that this is moreso because the petitioner has alternate remedies under the IT Act should any adverse orders be made in the assessment proceedings.

13. We have heard the learned counsel for the petitioner and the respondents.

14. At the outset, we wish to state that the show cause notice under Section 148 A(b) of the Act was due on or before 25 March 2024. The petitioner neither sought an extension for filing the response nor submitted any reply by 25 March 2024. The petitioner should have at least requested an extension if, for any reason, the reply could not be filed by that date. There seems to be no such request. Even if 25 March 2024 fell on a holiday, the petitioner should have been able to submit the reply the following day. It is important to note that no physical presence was required, but a reply was to be filed electronically. It is not even the petitioner's case that the system was not accepting the reply, even though the petitioner

tried to file it.

15. The email dated 27 March 2024 sent by the petitioner stating to be the reply to the show cause notice under Section 148A(b) of the Act was forwarded after the expiry of the time given by the respondents and request for extension of the same, not having been filed by the petitioner, the petitioner cannot without making an application for extension raise any grievance of non-consideration of the reply by the respondents, moreso when the reply is filed after the expiry of the returnable date. Therefore, the respondents were justified in stating in the impugned order that no reply was filed on or before 25 March 2024, nor was any request made for an extension. However, this would not preclude the petitioner from relying upon the objections before the Appellate Authority.

16. The email dated 27 March 2024 refers to 7 attachments in support of the petitioner's reply to the show cause notice, but surprisingly, none of the attachments are annexed to the petition. Yet the Petitioner insists upon this Court adjudicating the matter. In the absence of any attachments, this Court cannot examine the issue raised by the petitioner in the reply, which reply was also filed after the expiry of the returnable date. It was incumbent upon the petitioner to have annexed these attachments if the petitioner desired this Court to exercise extraordinary jurisdiction. The petitioner cannot suppress documents or exhibit truncated documents like notices sans the annexures or enclosures and still expect this court to exercise its extraordinary,

discretionary, and equitable jurisdiction.

17. The petitioner at Exhibit 'C' relied upon the email uploaded to the respondents' portal during the regular assessment proceedings to show the nexus between income and expenditure. In the present petition at Exhibit 'C,' the petitioner has only enclosed a copy of the acknowledgement of the email that was sent. Although this electronic uploading refers to various attachments, no such attachments are annexed to the petition. Therefore, in the absence of any attachments being annexed in the present petition, this Court cannot examine whether the issue for which reopening is sought, details of which were filed during the regular assessment proceedings or not. If the petitioner relied on the same email, it was incumbent upon him to annex the attachments to Exhibit C'. Therefore, even on this count, the petitioner cannot invoke the extraordinary jurisdiction of this Court in support of his submission.

18. In the assessment order, the officer has stated that the income was assessed after verification of the details. At least prima facie, there is no indication of the details. Therefore, this would require examination and investigation of the facts as to what details were filed, and in the absence of any attachments to Exhibit 'C', this Court cannot exercise its discretionary and equitable jurisdiction to investigate such factual issues. The information furnished to the petitioner states that the revenue audit could not find any documentary evidence on record to show nexus. Therefore, this would require the Court to go into facts of what was filed or not, and

such an exercise certainly cannot be carried out in writ proceedings.

19. The petitioner has relied upon various decisions of this Court in support of his submission that even after the amendment to Section 148 of the Act, audit opinion cannot be the basis for reopening the case. For the reasons stated above, in the absence of any attachment to the letters filed during the assessment proceedings and to the belated reply to show cause notice under Section 148A(b) of the Act, we cannot factually determine whether this issue was examined in the regular assessment proceedings. Furthermore, none of these judgments were relied upon in the belated reply to the show cause notice under Section 148A(b) of the Act, although these judgments were available. In the absence of foundational facts and documents not annexed, the decisions relied upon cannot be said to support the petitioner's case. In any case, we propose to deal with the decisions briefly.

20. The Goa Bench of this Court in the case of *Dilip Pawar (Supra)* observed that it is not necessary to go into the scope and import of Explanation 1(ii) to Section 148 of the Act in the present facts and the same is left open to be examined in an appropriate case. The said Explanation deals with audit objection. Since the Co-ordinate Bench has expressly kept the issue Explanation 1 (ii) open, the petitioner is not justified in relying upon the said decision in support of his submission that the audit objection cannot be the basis to reopening the case post an amendment to Section 148 of the Act.

21. The second decision relied upon by the petitioner in the case of *Mira Bhavin Mehta (Supra)* is also not applicable to the facts of the present case. In the case before us, reopening is initiated based on audit objection by relying upon Explanation 1 to Section 148 of the Act. In the case of *Mira Mehta (Supra)* reopening was not based on audit objections. Therefore, the reliance placed by the learned counsel for the petitioner on the decision of *Mira Mehta (Supra)* is prima face misplaced. The said decision does not apply to the facts of the present case, and the same is distinguishable.

22. The third decision relied upon by the petitioner is in the case of *Knight Riders Sports Pvt. Ltd (Supra)*. The Co-ordinate Bench of this Court in the case of *Knight Riders (Supra)* has relied upon the decision in the case of *Siemens Financial Services Pvt. Ltd.*⁴ and observed that once a query has been raised, reassessment cannot be initiated because it will amount to a change of opinion. The Co-ordinate Bench relied upon the decisions rendered under the erstwhile scheme of Section 148 of the Act which contained the phrase 'reasons to believe'. There is no finding in the said decision on whether post amendment to Section 148 of the Act, based on audit objections by relying upon the definition of "information", reopening can be done. Therefore, this decision does not apply to the facts of the present case.

23. We may point out that none of the parties have brought to our attention the decision of the Kerala High Court in the case of *Sree Narayana Guru Memorial Educational and Cultural Trust Vs ACIT*⁵ which has observed that post-amendment reopening can be done based on audit opinion even if query was raised during assessment proceedings.

4 Writ Petition No.4888 of 2022 dated 25 August 2023

5 (2024) 160 taxmann.com 727

24. In any event, given the facts in the present case and the petitioner's failure to provide the entire material on which he alleges a change of opinion, we do not deem it appropriate to decide the legal contention of whether post-amendment reopening can be done based on an audit opinion even if a query was raised during assessment proceedings. The necessary factual foundation for deciding this issue is simply not evident in this case. Merely relying upon precedents but not demonstrating how they apply to the fact situation at hand or not placing the entire material before the Court renders it quite unsafe to decide this issue one way or the other in this case. Our observations are, therefore, prima facie.

25. For all the above reasons, we deem it fit not to exercise discretionary and extraordinary jurisdiction to entertain the present petition but to give the petitioner liberty to raise the issue of the validity of the reassessment proceeding before the Appellate Authority if and when the reassessment order is challenged pursuant to the notice under Section 148 of the Act.

26. The petition is dismissed with no order regarding costs.

(Jitendra Jain, J)

(M.S. Sonak, J)