Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICION
APPELLATE SIDE

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 9982 of 2024

Vishal Jhajharia
Versus
The Assessment Unit, Income Tax Department
Faceless Assessment Centre & Ors.

For the petitioner	:	Mr. Abhratosh Majumdar, Sr. Adv. Mr. Avra Mazumder Ms. Alisha Das Mr. Samrat Das Mr. K .Ray
For the respondents	:	Mr. Aryak Dutt
Heard on	:	27th June, 2024
Judgment on	:	**27th June, 2024**

Raja Basu Chowdhury, J:

1. Affidavit of service filed in Court today is taken on record.

2. The present writ petition has been filed, *inter alia*, challenging the order dated 20th March, 2024, passed under Section 147 read with Section 144 and 144B of the Income Tax Act, 1961 (hereinafter referred to as the "said Act").

3. It is the petitioner's case that the petitioner was served with a notice dated 21st February, 2024 in respect of the Assessment Year 2016-17, calling upon the petitioner to show cause as to why a sum of Rs.1,50,45,00,000/- should not be added back to the total income of the petitioner, as unexplained cash credits under Section 68 of the said Act. The petitioner had duly responded to the said notice by a communication in writing dated 23rd February, 2024 and ultimately the above proceeding culminated in an assessment order dated 20th March, 2024, whereunder a sum of Rs.1,50,45,00,000/- was added back to the petitioner's income for the aforesaid Assessment Year on account of unexplained money under Section 69A of the said Act.

4. Mr. Majumder, learned senior advocate representing the petitioner, by drawing attention of this Court to the show cause notice and the assessment order submits that although, in the show cause notice the variation proposed indicated that the amount of Rs.1,50,45,00,000/-should be added back to the total income of the petitioner as unexplained cash credits under Section 68 of the said Act, however, despite the fact that the petitioner had explained the circumstances as to why such addition should not be made, the Faceless Assessing Unit by its order which is impugned in the present writ petition has added back the aforesaid amount as "unexplained money" under Section 69A of the said Act. By referring to the provisions of

Section 68 and 69A of the said Act, it is submitted that the provisions stand independent of one another. The respondents having issued a show cause for adding back to the petitioner's income for a sum of Rs.1,50,45,00,000/-as 'unexplained cash credits' under Section 68 of the said Act, could not have passed the final order by adding back the said amount as an 'unexplained money' under Section 69A of the said Act, without affording the petitioner an opportunity to explain. According to Mr. Majumder, the aforesaid constitutes violation of principles of natural justice and as such, the statutory remedy in the form of an appeal cannot stand as a bar for this Court to entertain the present writ petition. By placing reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***New Delhi Television Ltd. v. Deputy Commissioner of Income Tax,*** reported in **(2020) 116 taxmann.com.151 (SC)**, he submits that in a similar set of facts, the Hon'ble Supreme Court taking note of the failure on the part of the revenue authorities to notify an assessee in respect of the grounds on which variation was being proposed had been pleased to quash the same; though, opportunity to the revenue authorities was provided to issue fresh notice, if otherwise permissible in law. In the facts noted hereinabove, it is submitted that the order impugned cannot be sustained and the same should be set aside.

5. Mr. Dutt, learned advocate enters appearance on behalf of the revenue authorities. He acknowledges the fact that although the show cause notice was issued by treating Rs.1,50,45,00,000/-as unexplained cash credits under Section 68 of the said Act, the final order was passed by treating the aforesaid sum as unexplained money under Section 69A of the said Act. According to him the above does not have the effect of vitiating the entire order. Since, the petitioner has an alternative remedy in the form of an appeal, no interference is called for.

6. Heard the learned advocates appearing for the respective parties and considered the materials on record. It is noticed that in this case, the respondents proposing variation in the return of income filed by the petitioner for the Assessment Year 2016-17 had issued a show cause notice and had, *inter alia*, called upon the petitioner to explain as to why a total amount of Rs.1,50,45,00,000/-should not be added back to the total income of the petitioner for the year under consideration as unexplained cash credits under Section 68 of the said Act. Records reveal that in the order of assessment, the Faceless Assessment Unit upon taking into consideration the explanation given by the petitioner has added back the aforesaid sum as unexplained money under Section 69A of the said Act. To morefully appreciate the contention of the petitioner that the provisions of Section 68 and

69A of the said Act are independent provisions, the same are extracted hereinbelow:-

> ***"68. Cash credits.—****Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year.*
>
> *Provided that where the sum so credited consists of loan or borrowing or any such amount, by whatever name called, any explanation offered by such assessee shall be deemed to be not satisfactory, unless,—*
>
> *(a) the person in whose name such credit is recorded in the books of such assessee also offers an explanation about the nature and source of such sum so credited; and*
>
> *(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*
>
> *Provided further that where the assessee is a company, (not being a company in which the public are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*
>
> *(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
>
> *(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*
>
> *Provided also that nothing contained in the 1600[first proviso or second proviso] shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23-FB) of Section 10.***"**

> ***"69-A. Unexplained money, etc.—****Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery, or other valuable article may be deemed to be the income of the assessee for such financial year.****"***

7. It would appear from the above, the two provisions are entirely independent provisions. While under Section 68, if sum is found credited in the books of an assessee maintained for the previous year in absence of any explanation about the nature and source thereof or if the explanation is found to be not satisfactory, the sum so credited may be charged by the income tax as the income of the assessee for the previous year, while in the case of Section 69A, if it is found that the assessee is the owner of any money, jewellery or other valuable articles and the same is not recorded in the books of accounts, if any, maintained by him for any source of income and in absence of any explanation about the nature and source of acquisition of the same or in absence of satisfactory explanation, the above would be deemed to be income of the assessee for such financial year. In this case although, the notice to show cause clearly identified that the amount proposed to be added back was by invoking the

provisions of Section 68 of the said Act and the petitioner on such premise had responded to the same, the final assessment order was passed by treating the same to be an "unexplained money" under Section 69A of the said Act.

8. I find that the language used in Section 69A of the said Act clearly required the assessee to be afforded with an opportunity to explain. As such, even if the respondents were of the opinion that in this case Section 69A of the said Act ought to be invoked, in my view the respondents ought to have at least prior to passing of the assessment order granted an opportunity to the petitioner to explain as to why the aforesaid sum of Rs.1,50,45,00,000/-should not be added back as an unexplained money under Section 69A of the said Act. In absence of any notice, the petitioner was obviously taken by surprise and was denied the opportunity to appropriately explain. The petitioner may or may not have any explanation to offer but the same is not for this Court to decide, nor could the respondents prejudge the same. I find that the Hon'ble Supreme in the case of ***New Delhi Television*** (supra) in somewhat similar set of facts was of the view that although, the department may not be prevented from raising fresh ground which did not find place in the show cause notice, however, before a final decision is taken for the grounds which are not reflected in the show cause, the assessee must be put on notice and the assessee cannot be taken by surprise. To

morefully appreciate the observations made by the Hon'ble Supreme Court, the relevant paragraphs from the aforesaid judgment are extracted hereinbelow:

> ***"41.*** *In our view this is not a fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the revenue relied upon the second proviso. The assessee must be put to notice of all the provisions on which the revenue relies upon. At the risk of repetition, we reiterate that we are not going into the merits of the case but in case the revenue had issued a notice to the assessee stating that it relies upon the second proviso, the assessee would have had a chance to show that it was not deriving any income from any foreign assets or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The assessee cannot be deprived of this chance while replying to the notice.*
>
> ***42.*** *Therefore, even if we do not fall back on the reason given by the High Court that the revenue cannot take fresh ground, we are clearly of the view that the notice and reasons given thereafter do not conform to the principles of natural justice and the assessee did not get a proper and adequate opportunity to reply to the allegations which are now being relied upon by the revenue.*
>
> ***43.*** *If the revenue is to rely upon the second proviso and wanted to urge that the limitation of 16 years would apply, then in our opinion in the notice or at least in the reasons in support of the notice, the assessee should have been put to notice that the revenue relies upon the second proviso. The assessee could not be taken by surprise at the stage of rejection of its objections or at the state of proceedings before the High Court that the notice is to be treated as a notice invoking provisions of the second proviso of Section 147 of the Act. Accordingly, we answer the third question by holding that the notice issued to the assessee and the*

> *supporting reasons did not invoke provisions of the second proviso of section 147 of the Act and therefore at this stage the revenue cannot be permitted to take benefit of the second proviso.*
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> ***44.*** *We accordingly allow the appeal by holding that the notice issued to the assessee shows sufficient reasons to believe on the part of the assessing officer to reopen the assessment but since the revenue has failed to show non-disclosure of facts that notice having been issued after a period of 4 years is required to be quashed. Having held so, we make it clear that we have not expressed any opinion on whether on facts of this case the revenue could take benefit of the second proviso or not. Therefore, the revenue may issue fresh notice taking benefit of the second proviso if otherwise permissible under law. We make it clear that both the parties shall be at liberty to raise all contentions with regard to the validity of such notice.***"**

9. It is seen that although, the revenue authorities had invoked the provisions of Section 69A of the said Act to add back Rs.1,50,45,00,000/- to the petitioner's income as unexplained money, no notice in this regard had been served prior to taking a decision.

10. In view thereof, the determination made by the respondents as is reflected in the assessment order dated 20th March, 2024 stands vitiated by reasons of failure on the part of the revenue authorities to put the petitioner on notice in respect of addition under Section 69A of the said Act. Since, the above is violative of the principles of natural justice, the order impugned becomes unenforceable in law and is declared as such. However, since, the petitioner is now put on notice, I am of the view that the

respondents should afford an opportunity to the petitioner to explain prior to taking a final decision in the matter.

11. In view thereof, the order impugned dated 20th March, 2024 be treated as a show cause. This, however, shall not prevent the respondents from taking any additional point or raising any additional grounds if so advised. In such case, however, a notice would be required to be served as an addendum to the show cause notice, to the petitioner. Such addendum, if any, must be served within a period of 15 days from date. The petitioner shall respond to the aforesaid assessment order dated 20th March, 2024, by treating the same as show cause within a period of two weeks from date. If, however, any addendum is served, the petitioner will get additional seven days time to respond to the same. For the aforesaid purpose the Faceless Assessing Unit is directed to ensure that the portal is activated for the petitioner to submit its appropriate response. Needless to note, before finally deciding the matter the Faceless Assessing Unit shall afford an opportunity of personal hearing by sharing video link on the portal. The entire exercise in this regard must be completed by the respondents within a period of eight weeks from date of communication of this order.

12. With the above observations and directions, the writ petition is disposed of.

13. There shall be no order as to costs.

14. Since, no affidavit-in-opposition has been called for, the allegations made in the petition are deemed not to have been admitted by the respondents.

15. Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)

Saswata
Assistant Registrar (Court)