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

WRIT PETITION (L) NO. 15289 OF 2024

CapitalG LP … Petitioner

Versus

Assistant Commissioner of Income Tax, Int. Tax, Circle 2(1)(1), Mumbai & Ors. … Respondents

Mr. J.D. Mistry, Senior Advocate a/w. Mr. Mrunal Parekh, Mr. Rishabh Malhotra and Mr. Soumya Singh, Fereshte Sethna i/b. DMD Advocates for the petitioner.
Mr. Prathmesh Bhosle for the respondents.

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.

DATE 6 August, 2024

ORAL JUDGMENT (Per G.S. Kulkarni, J.)

1. Rule. Rule made returnable forthwith. Learned counsel for the respondents waives service. By consent of the parties, heard finally.

2. This Writ Petition under Article 226 of the Constitution of India is filed praying for the following reliefs:

> "a) that this Hon'ble Court be pleased to issue a writ of certiorari/mandamus or any other appropriate writ, order or direction in the nature of certiorari/mandamus, under Article 226 of the Constitution of India, quashing the impugned show cause notice dated 16 March, 2023 under Section 148A(b) of the Act; impugned order dated 29 March, 2023 under Section 148A(d) of the Act; impugned notice dated 29 March, 2023 under Section 148 of the

Act issued/passed by respondent no. 1, initiating the reassessment proceedings for AY 2019-20;

b) that this Hon'ble Court be pleased to issue a writ of certiorari/mandamus or any other appropriate writ, order or direction in the nature of certiorari/mandamus, under Article 226 of the Constitution of India, quashing the impugned Draft Assessment Order dated 13 March, 2024 under Section 144C(1) of the Act; Impugned Assessment Order dated 18.04.2024 under Section 147 r.w.s. 144 of the Act along with Impugned Demand Notice dated 18.04.2024 under Section 156 of the Act, Impugned Penalty Notice no. 1 dated 18.04.2024 under Section 274 r.w.s. 270A of the Act and Impugned Penalty Notice No. 2 dated 19.04.2024 under Section 274 r.w.s. 272A(1)(d) of the Act issued/passed by Respondent no. 1 for AY 2019-20.

c) that this Hon'ble Court be pleased to issue a writ of certiorari/mandamus or any other appropriate writ, order or direction in the nature of certiorari/mandamus, under Article 226 of the Constitution of India, ordering and directing the respondents to withdraw the impugned notices and impugned orders issued/passed by respondent no. 1 for AY 2019-20.

d) that this Hon'ble Court be pleased to issue a writ of certiorari/mandamus or any other appropriate writ, order or direction in the nature of certiorari/mandamus, under Article 226 of the Constitution of India, to desist the respondents from taking any further steps pursuant to the impugned notices and impugned orders issued/passed by respondent no. 1 for AY 2019-20.

e) Pending the hearing and final disposal of the writ petition, for an order restraining the respondents, its officers, sub-ordinates, agents from relying upon and/or taking any steps in furtherance or in connection with impugned assessment order, impugned Demand notice and impugned penalty notice for AY 2019-20. "

3. At the outset. Mr. Mistry, learned senior counsel for the petitioner has submitted that the impugned notice dated 29 March, 2023 issued under section 148 of the Income-tax Act, 1961 (for short **"the Act"**) would be required to be held as illegal and invalid considering the provisions of Section

151A of the Act and as interpreted by this Court in the decision of ***Hexaware Technologies Limited Vs. Assistant Commissioner of Income Tax & 4 Ors.***[1] taking into consideration the applicability of provisions of Section 144B of the Act. Mr. Mistry's contention is that the impugned notice is issued outside the faceless mechanism as per the requirement of Section 151A of the Act read with notification dated 29 March, 2022 issued by the Central Government providing for a faceless mechanism for any action to be taken leading to the issuance of a notice under Section 148 of the Act on the ground that income has escaped assessment. It is submitted that, hence the Jurisdictional Assessing Officer (for short **"JAO"**) had no authority to issue the impugned notice. It is also Mr. Mistry's submission that prior to issuance of impugned notice under section 148 of the Act, the JAO has also issued notice under section 148A(b) dated 16 March, 2023 and an order on the same was passed immediately on 29 March, 2023. It is his submission that considering the applicability of the provisions of Section 151A(1) read with faceless scheme as notified and made applicable under the notification dated 29 March, 2022, such notice as also the order passed under section 148A(b) also would be required to be held to be illegal.

4. In the context of the impugned notice issued to the petitioner under section 148, Mr. Mistry has drawn our attention to the facts of the case, which

1 (2024) 464 ITR 430

according to him are quite gross. It is Mr. Mistry's contention that the petitioner is a limited partnership incorporated under the laws of United States of America which had invested an amount equivalent to INR 34,99,78,225/- in Compulsory Convertible Preference Shares (CCPS) issued by an Indian Company, namely, Girnar Software Private Ltd. in the Financial Year 2018-19.

5. It is contended that respondent no. 1 had initiated reassessment proceedings for the assessment year 2019-20, under which notices under section 148A (a) and (b) of the Act were issued to the petitioner seeking information in regard to the source of investment. It is the petitioner's case that these notices, in fact, were not served on the petitioner. It is also the petitioner's case that the order under section 148A(d) although was passed, the same was not served on the petitioner. It is also the petitioner's contention that thereafter a draft assessment order under section 144C(1) of the Act was passed to add Rs.34,99,78,225/- to the income of the petitioner, although the petitioner has not earned any money and/or received the said amount, as the petitioner had invested such amounts. It is contended that the said order was also not served on the petitioner. It is on such backdrop, a final reassessment order under section 147 read with section 144 of the Act was passed against the petitioner imposing a demand of Rs.26,41,70,100/-. Although not served, all such orders had come to the knowledge of the petitioner, through the consultant of the group company, and it is in these circumstances, the

petitioner is before the Court contending that none of such notices and orders are passed in accordance with the provisions of the Act as also without following a lawful procedure. The petitioner has also contended that none of such proceedings could be initiated against the petitioner, considering the fact that no income was earned by the petitioner for the assessment year in question, as the petitioner was merely investor having invested in the CCPS issued by Girnar Software Private Ltd.

6. We have heard learned counsel for the parties and with their assistance, we perused the record and more particularly the notice issued to the petitioner under section 148A(a) and (b) and the order passed under section 148A(d) and the impugned notice dated 29 March, 2023 issued under section 148.

7. At the outset, we may observe that the present proceedings were moved before the co-ordinate Bench of this Court on 9 May, 2024 when the Court passed the following order:

> "1. Mr. Bhosle undertakes to file vakalatnama within two weeks from today.
>
> 2. Reply to be filed and copy served by 11th June 2024. Rejoinder, if any, to be filed and copy served by 21st June 2024.
>
> 3. Stand over to 1st July 2024.
>
> 4. Until 31st July 2024, there shall be ad-interim in terms of prayer clause (e), which reads as under:
>
> "(e) Pending the hearing and final disposal of the writ petition,

> for an order restraining the Respondents, its officers, sub-ordinates, agents from relying upon and/or taking any steps in furtherance or in connection with Impugned Assessment Order, Impugned Demand Notice and Impugned Penalty Notice for A. Y. 2019-20;"
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> 5. The impugned assessment order and demand notice are dated 18th April 2024 and the penalty notice is dated 19th April 2024."

8. It is clear from the aforesaid order that reply affidavit was to be filed on or before 11 June, 2024 and rejoinder, if any, was required to be filed by 21 June, 2024. Today we are almost 2 months ahead of the time granted to the respondents to file reply affidavit, having been expired. We also find that there is no application filed on behalf of the respondents seeking extension of time to file reply affidavit, much less, a reply affidavit being prayed to be filed. Thus, Mr. Mistry would be correct in his contention that the respondents have not complied with the order dated 9 May, 2024. He would also submit that considering the gross facts of the case, possibly the respondents are not inclined to file reply affidavit.

9. On such issue, we may observe that the order dated 9 May, 2024 passed by the Division Bench of this Court is certainly not complied by the respondents. It also appears that there is no intention to file reply, as there is no application filed seeking to file a reply or praying for extension of time to file reply affidavit. If at all the same was to be filed in the fact situation, it would be the discretion of the Court whether to grant any extension to file a

reply after considering the reasons which could have been set out by the respondents. However, such circumstance does not arise, as it is clear that the respondents do not intend to file a reply affidavit. Moreover, the order passed by this Court cannot receive such casual approach from respondent no. 1. We are, therefore, inclined to accept the petitioner's case that the Court ought to proceed to adjudicate this petition on the ground that the proceedings would stand covered by the decision of this Court in ***Hexaware Technologies Limited*** (supra), as the impugned notice is issued contrary to the provisions of Section 151A of the Act and hence being illegal.

10. Mr. Bhosle, learned counsel for the respondents would not deny as to what has been held by this Court in ***Hexaware Technologies Limited*** (supra) and the applicability of the provisions of Section 151A(1) to any notice issued under section 148 or even to the proceedings initiated under section 148A of the Act. He would however submit that the present case is required to be made an exception considering the order dated 31 March, 2021 issued by Central Board of Direct Taxes under Section 144B(2) of the Act. To examine such contention, we may note the contents of the said order so as to ascertain whether the same is required to be considered, so as to exclude the applicability of Section 151A(1) read with Section 144B to the case in hand, which relate to a foreign entity and more particularly, when the order provides that all

assessment proceedings pending as on 31 March, 2021 and the assessment proceedings initiated on or after 1 April, 2021 (other than those in the Central Charges and International Taxation charges) falling under the class as specified in (a) to (d) of such order would not attract the provisions of Faceless mechanism. The said order reads thus:

F.No. 187/3/2020-ITA-1
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Direct Taxes)

North Block, New Delhi – 110001
Dated the 31 March, 2021

Order under sub-section (2) of Section 144B of the Income-tax Act, 1961 for specifying the scope/cases to be done under the Act – regarding

In pursuance of sub-section (2) of Section 144B of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), the Central Board of Direct Taxes hereby specifies that all the assessment proceedings pending as on 31.03.2021 and the assessment proceedings initiated on or after 01.04.2021 (other than those in the Central Charges and International Taxation charges) which fall under the following class of cases shall be completed under section 144B of the Act.

a. where the notice under section 143(2) of the Act was/is issued by the (erstwhile) NeAC or by the NaFAC;

b. where the assessee has furnished her/his return of income under section 139 or in response to a notice issued under section 142(1) or section 148(1); and a notice under section 143(2) of the Act, has been issued by the Assessing Officer or the Prescribed Income-tax Authority, as the case may be;

c. where the assessee has not furnished her/his return of income in response to a notice issued under section 142(1) of the Act by the Assessing officer;

d. where the assessee has not furnished her/his return of income under section 148(1) of the Act and a notice under section 142(1) of the Act has been issued by the Assessing Officer.

2. This order shall come into force with effect from the 1st day of April, 2021.

Sd/-
(Gulzar Ahmad Wani)
JCIT(OSD)(ITA-1)"

11. From a bare reading of the aforesaid order, we are not inclined to accept the case of respondents that the provisions of Section 144B read with the provisions of Section 151A(1) would not be applicable to the case in hand. The reason being the challenge in the present proceedings is to a notice issued under section 148 of the Act and the prior proceedings as initiated against the petitioner under section 148A(a) & (b). We cannot read the order to mean that it would cover the proceedings under Section 148A and Section 148 of the Act so as to fall within the ambit of the said order, as it is only the assessment proceedings which would be required to be conducted as an exception to the faceless mechanism. In this context, Mr. Mistry has drawn our attention to the observations of the Division Bench in the decision of ***Hexaware Technologies Limited*** (supra) wherein the contentions as urged on behalf of the revenue was noted in paragraph 36 and the same has not been accepted and/or were negatived. We note the observations of the Division Bench, which reads thus:

"36. With respect to the arguments of the Revenue, i.e., the notification dated 29th March 2022 provides that the Scheme so framed is applicable only 'to the extent' provided in Section 144B of the Act and Section 144B of the Act does not refer to issuance of notice under Section 148 of the Act and hence, the notice cannot be issued by the FAO as per the said Scheme, we express our view as follows:-

Section 151A of the Act itself contemplates formulation of Scheme for both assessment, reassessment or recomputation under Section 147 as well as for issuance of notice under Section 148 of the Act. Therefore, the Scheme framed by the CBDT, which covers both the aforesaid aspect of the provisions of Section 151A of the Act cannot be said to be applicable only for one aspect, i.e., proceedings post the issue of notice under Section 148 of the Act being assessment, reassessment or recomputation under Section 147 of the Act and inapplicable to the issuance of notice under Section 148 of the Act. The Scheme is clearly applicable for issuance of notice under Section 148 of the Act and accordingly, it is only the FAO which can issue the notice under Section 148 of the Act and not the JAO. The argument advanced by respondent would render clause 3(b) of the Scheme otiose and to be ignored or contravened, as according to respondent, even though the Scheme specifically provides for issuance of notice under Section 148 of the Act in a faceless manner, no notice is required to be issued under Section 148 of the Act in a faceless manner. In such a situation, not only clause 3(b) but also the first two lines below clause 3(b) would be otiose, as it deals with the aspect of issuance of notice under Section 148 of the Act. Respondents, being an authority subordinate to the CBDT, cannot argue that the Scheme framed by the CBDT, and which has been laid before both House of Parliament is partly otiose and inapplicable. The argument advanced by respondent expressly makes clause 3(b) otiose and impliedly makes the whole Scheme otiose. If clause 3(b) of the Scheme is not applicable, then only clause 3(a) of the Scheme remains. What is covered in clause 3(a) of the Scheme is already provided in Section 144B(1) of the Act, which Section provides for faceless assessment, and covers assessment, reassessment or recomputation under Section 147 of the Act. Therefore, if Revenue's arguments are to be accepted, there is no purpose of framing a Scheme only for clause 3(a) which is in any event already covered under faceless assessment regime in Section 144B of the Act. The argument of respondent, therefore, renders the whole Scheme redundant. An argument which renders the whole Scheme otiose cannot be accepted as correct interpretation of the Scheme. The phrase "to the extent provided in Section 144B of the Act" in the Scheme is with reference to

> only making assessment or reassessment or total income or loss of assessee. Therefore, for the purposes of making assessment or reassessment, the provisions of Section 144B of the Act would be applicable as no such manner for reassessment is separately provided in the Scheme. For issuing notice, the term "to the extent provided in Section 144B of the Act" is not relevant. The Scheme provides that the notice under Section 148 of the Act, shall be issued through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act and in a faceless manner. Therefore, "to the extent provided in Section 144B of the Act" does not go with issuance of notice and is applicable only with reference to assessment or reassessment. The phrase "to the extent provided in Section 144B of the Act" would mean that the restriction provided in Section 144B of the Act, such as keeping the International Tax Jurisdiction or Central Circle Jurisdiction out of the ambit of Section 144B of the Act would also apply under the Scheme. Further the exceptions provided in sub-section (7) and (8) of Section 144B of the Act would also be applicable to the Scheme."
>
> [Emphasis Supplied]

12. Thus, the contention as urged on behalf of the Revenue in regard to the applicability of the order dated 31 March, 2021 (supra) would be required to be held to be a contention contrary to the view taken by the Division Bench in ***Hexaware Technologies Limited*** (supra). This apart we are inclined to accept the petitioner's contention that the challenge as raised by the petitioner would stand squarely covered by the decision of this Court in ***Hexaware Technologies Limited*** (supra) inasmuch as the impugned notices under section 148A as also section 148 have been issued by the JAO and not under the Faceless mechanism.

13. In the light of the aforesaid observations, the petition would be required to be allowed. It is allowed in terms of prayer clauses (a) and (b).

14. Rule is made absolute in the above terms. No costs.

(SOMASEKHAR SUNDARESAN, J.) (G. S. KULKARNI , J.)

Signed by: Vidya S. Amin
Designation: PS To Honourable Judge
Date: 08/08/2024 17:20:37