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

% Judgment delivered on: 21.05.2015

\+ **W.P.(C)5229/2014 & CM No.10401 /2014**

FERROUS INFRASTRUCTURE PVT. LTD. & ANR. ....Petitioners

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr S.Krishnan, Advocate
For the Respondent : Mr Rohit Madan, Advocate.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT
21.05.2015

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the notice dated 30.08.2012 issued by the DCIT, Circle 11(1), New Delhi, under Section 148 of the Income Tax Act, 1961. The writ petition is also directed against the order dated 30.03.2014 passed by the Assessing Officer re-assessing the income of the assessee in respect of the Assessment Year 2008-2009.

2. When this matter came up for hearing on the first occasion, i.e., 19.08.2014, we had recorded that the learned counsel for the petitioners had raised two points in this petition. The first point was that the petitioners came to know, after the re-assessment order, that the purported reasons for initiating reassessment proceedings had been recorded after the issuance of notice under Section 148. It was submitted that the clear

position in law is that the reasons have to be recorded prior to the issuance of notice under Section 148. The second point urged by the learned counsel for the petitioners was that the objections furnished by the petitioners to the Section 148 notice had not been disposed of by a separate speaking order prior to the re-assessment order dated 30.03.2014. He submitted that this was in clear contradiction to the Supreme Court decision in the case of ***G.KN Driveshafts (India) Ltd. v. ITO*** : **259 ITR 19(SC)**.

3. The counter-affidavit has been filed on behalf of the Revenue and a very surprising stand has been taken. In reply to paragraph No.1 of the petition on merits, the counter-affidavit reads as under:-

> "1. With respect to the content of Paragraph no. 1 it is respectfully submitted that the factual position in the matter is that the notice u/s.148 of the Act dated 30.08.2012 was issued and duly served upon the assessee company. The notice u/s.148 was issued after recording the reasons for issuance of notice u/s.l48 however, in the lower portion of the reasons recorded; the date was inadvertently mentioned as 18/09/2012. Thus the contentions and grounds of challenge made by the Petitioner are denied as being frivolous and baseless.".
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> (underlining added)

In the above statement an impression is sought to be created that the date mentioned as 18.09.2013 was incorrectly recorded. No reasons have been given or explanation offered as to how such a circumstance could, at all, have arisen. We asked the learned counsel for the Revenue to produce the relevant file and on examining the same, we find that the reasons for issuance of the notice under Section 148 of the said Act which

have been recorded bears the date 19.09.2012. The said date is printed. It is, first of all, inconceivable that when a document is being typed on or before 30.08.2012 (the date on which the notice under Section 148 was issued) that a future date of 19.09.2012 would be typed. Secondly, what is even more shocking is the fact that the printed date 19.09.2012 has been corrected in hand to read 18.09.2012. In other words, if there was a mistake in the printing of the date, the same has been corrected to read 18.09.2012. Therefore, it cannot be said that the date mentioned in the reasons, i.e., 18.09.2012 was an inadvertent mistake. The date had been consciously corrected. That being the position, the factual situation is that the reasons were recorded on 18.09.2012, they were also furnished to the petitioners on 18.09.2012, but the notice under Section 148 had already been issued on 30.08.2012. It is evident that the notice was issued prior to the recording of the reasons.

Section 148(2) of the Income-Tax reads as under:-

> **"148.** (2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

It is absolutely clear from the said provision that the Assessing Officer is required to record his reasons before he issues the notice under Section 148.

4. This aspect has been dealt with by a Division Bench of this Court in ***Haryana Acrylic Manufacturing Co. v. Commissioner of Income-tax:*** **308 ITR 38(Delhi).**

> "32. Secondly, let us assume for the sake of argument that the actual reasons were those as noted in the said

form. Then why did the Assessing Officer communicate a different set of reasons to the petitioner? Did he think that the supplying of reasons and the inviting of objections were mere charades? Did he think that it was a mere pretence or a formality which had to be gotten over with? At this point, it would be well to remember that the Supreme Court in GKN Driveshafts (supra) had specifically directed that when a notice under Section 148 of the said Act is issued and the noticee files a return and seeks reasons for the issuance of the notice, the Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the reasons, the noticee is entitled to file objections to the issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. These are specific directions given by the Supreme Court in all cases where notices under Section 148 of the said Act are issued. Surely, the Assessing Officer could not have construed these specific directions to be a mere empty formalities or dead letters? There is a strong logic and purpose behind the directions issued by the Supreme Court and that is to prevent high-handedness on the part of Assessing Officers and to temper any action contemplated under Section 147 of the said Act by reason and substance. In fact, even Section 148(2) stipulates that the Assessing Officer shall, before issuing any notice under the said Section, record his reasons for doing so. The Supreme Court has only carried forward this mandatory requirement by directing that the reasons which are recorded be communicated to the assessee within a reasonable period of time so that at that stage itself the assessee may point out any objections that he may have with regard to the initiation of action under Section 147 of the said Act. The requirement of recording the reasons, communicating the same to the assessee, enabling the assessee to file objections and the

> requirement of passing a speaking order are all designed to ensure that the Assessing Officer does not reopen assessments which have been finalized on his mere whim or fancy and that he does so only on the basis of lawful reasons. These steps are also designed to ensure complete transparency and adherence to the principles of natural justice. Thus, a deviation from these directions would entail the nullifying of the proceedings…..”
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> (underlining added)

5. Furthermore in the decision of the High Court of Karnanataka – ***Commissioner of Income Tax, (Exemptions) v. Baldwin Boys High School:*** **364 ITR 637(Karnataka)** - this very question of whether a notice under Section 148 of the said Act could be issued without recording reasons came up for consideration. The Karnataka High Court observed as under:-

> “6. Section 148 of the Act provides for issue of notice where the income has escaped assessment. Sub-section (2) of section 148 of the Act provides that the Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so. In view of this provision, no dispute was raised before us about the procedure contemplated under this provision. From a bare perusal of section 148 of the Act, it is clear as crystal that the Assessing Officer is obliged to record reasons before issuing notice under section 148 of the Act….”
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> (underlining added)

6. The decision sought to be relied upon by Mr Madan on behalf of the Revenue in the case of ***Adobe Systems Software Ireland Ltd. v.***

***Assistant Dirctor of Income Tax*, 2014(7) AD 244**, is not at all relevant for the present discussion**.** That was a case which dealt with the furnishing of the reasons to the assessee. The issue which had arisen was whether the assessee was entitled to the reasons without even filing a return. That is not the question before us. The only question here is whether reasons could at all be recorded after issuance of the notice under Section 148 of the Act. And, secondly, that as the reasons were recorded after the issuance of Section 148 notice, whether the proceedings were not vitiated.

7. We have seen from the provisions of Section 148(2) as also the decisions of this Court in ***Haryana Acrylic****(supra),* and that of the Karnataka High Court in ***Baldwin Boys High School*** *(supra),* that the reasons have to be recorded prior to the issuance of notice under Section 148. If they are not so recorded, then the notice under Section 148 and proceedings pursuant thereto are without authority of law. In the present case, it is evident that the reasons were recorded only on 18.09.2012, i.e., after the notice under Section 148 had been issued on 30.08.2012. Clearly, the statutory provisions, as explained by judicial decisions, indicate that the notice under Section 148 would be invalid and consequently all proceedings pursuant thereto would also be vitiated.

8. We may also point out that the second issue raised by the learned counsel for the petitioners also deserves some consideration. In ***GKN Driveshafts*** *(supra),* the Supreme Court had directed as under:-

> "However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing

> notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."
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> (underlining added)

8. On going through the same, it is evident that the Assessing Officer has to pass a speaking order disposing of the objections "before proceeding with the assessment". In the present case, a separate speaking order has not been passed and the objections have been dealt with, if at all, in the re-assessment order itself. On this ground also, the petitioner is liable to succeed.

9. For all the reasons indicated above, the petition is allowed. The notice under Section 148 dated 30.08.2012 is quashed so also all proceedings pursuant to the said notice under Section 148 including the order dated 30.03.2014.

10. The writ petition is allowed on the above terms.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

MAY 21, 2015
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