

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.10.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.Nos.34600 and 34601 of 2015  
MP.Nos.1,1,2 and 2 of 2015

M/s.Buhari Hotels and Motels P Limited  
represented by its Director Mumtaz Buhari  
Chennai-8  
WPs  
... Petitioner in both

Vs

The Deputy Commissioner of Income Tax  
Corporate Circle 1(2), Nungambakkam  
Chennai-34  
... Respondent in  
both WPs

Prayer:- These Writ Petitions are filed to issue a Writ of  
Certiorari to call for the records of the Respondent dated  
30.3.2015, relating to the assessment years 2008-2009 and  
2011-2012 issued under Section 148 of the Income Tax Act, 1961  
in PAN AAECB4681M, for reopening the assessment under Section  
147 of the Act and to quash the same, respectively.

For Petitioner : Mr.Murali Kumaran

For Respondent : Mr.T.Pramodkumar Chopda, Sr.SC

ORDER

In these Writ Petitions, the Petitioner seeks to quash  
the notice dated 30.3.2015 of the Respondent issued under  
Section 148 of the Income Tax Act, 1961 for the assessment  
years 2008-2009 and 2011-2012 in PAN AAECB4681M for reopening  
the assessment under Section 147.

2. The case of the Petitioner is as follows:

2.1. The Petitioner is a registered Private Limited  
Company and an assessee on the file of the Respondent. The  
Petitioner purchased the property measuring 36 grounds and 100  
sq.ft at Adyar by two registered sale deeds dated 12.11.1971  
and 17.11.1971. During the assessment year 2008-2009, the  
Petitioner entered into a joint development agreement dated  
16.08.2007 with M/s.Chaitanya Builders in respect of 18  
grounds, on 60:40 ratio and a general power of attorney was  
also executed in April 2010 in favour of the said Builder.

The construction commenced only in the year 2012 and it was completed in the month of December 2013.

2.2. For the assessment year 2008-2009, a notice was issued on 26.08.2015 for scrutiny, which was replied on 3.9.2015 and a further notice was issued on 14.9.2015. The reason given in the communication dated 5.10.2015, for reopening the assessment by the Department is that no return was filed during the said assessment year and there was capital gain on the joint venture agreement. According to the Petitioner, since there was no income at all during the said assessment year, no return was filed. However, no notice under Section 148 was not received, but a copy of the same was obtained on 14.10.2015.

2.3. For the assessment year 2011-2012, a notice was issued on 16.08.2013 for scrutiny under Section 143(2) of the Act and a further notice was issued on 1.10.2013 under Section 142(2) and replies dated 11.10.2013 and 17.2.2014 were given by the Petitioner. Thereafter, a scrutiny assessment under Section 143(3) was passed on 13.3.2014 and a notice for penalty was also issued on 13.3.2014, to which, a reply was given on 9.4.2014, accepting which, further proceedings were dropped. The appeal filed as against the assessment order for the assessment year 2011-2012 is pending before the Appellate Authority. While so, a notice dated 25.8.2015 under Section 143(2) was issued for the assessment year 2011-12, which was duly replied on 03.09.2015 and a communication dated 14.9.2015 was issued, stating that the case was reopened under Section 147 of the Act and a notice under Section 148 of the Act was also issued on 30.3.2015, stating that the income chargeable to tax for the assessment year 2008-2009 and 2011-2012 had escaped assessment. Since the said notice was not received, the Petitioner obtained the same on 26.10.2015. Challenging the said notices issued under Section 148, these Writ Petitions have been filed.

3. The learned Counsel for the Petitioner contended that once the proceedings are completed under Section 143(3) of the Act, in the absence of new material, the Assessing Officer is not vested with any power to reopen the assessment under Section 147 of the Act and that since there was no income during the assessment year 2008-09, no return was filed. The learned Counsel for the Petitioner further contended that as per the joint venture agreement, 40% of the land area to be transferred to the nominees of the builder was sold in the assessment year 2011-12 and they were offered for capital gain for the assessment year 2011-2012 and the balance area was sold in the subsequent assessment year 2012-2013, for which return was filed. The learned Counsel for the Petitioner further contended that there was no proper sanction obtained before issuing the impugned notices.

4. The learned Senior Standing Counsel for the Respondent contended that since the Petitioner did not file the return for the assessment year 2008-09, it was presumed that the income chargeable to tax had escaped assessment and that the capital gain has to be brought to tax in the year in which the land was handed over to the developer and taking the market value of 40% undivided share of land given to the builder, it was presumed that the income chargeable to tax had escaped assessment for the year 2011-2012 within the meaning of Section 147 of the Act.

5. Further, he contended that when a notice under Section 148 of the Income Tax Act has been issued, the proper course of action for the assessee is to file his objections before the assessing authority and thereafter, the assessing authority will decide the same in accordance with law and hence, the present writ petitions are not maintainable. In support of the same, he relied on the following decisions:

(i) Saraswati Industrial Syndicate Ltd. v. Union of India reported in (2003) 133 TAXMAN 51 (Punj. & Har.)

(ii) Kapur Sons Steels (P) Ltd. v. Assistant Commissioner of Income Tax reported in (2004) 266 ITR 478 (Punj. & Har.).

(iii) Vidya Sagar v. Income Tax Officer reported in (2008) 305 ITR 124 (Punj. & Har.).

6. This Court heard and considered the submissions made by the learned Counsel on either side and also perused the materials placed on record.

7. It is seen that the Petitioner is a registered Private Limited Company and an assessee on the file of the Respondent. For the assessment year 2008-2009, a notice was issued on 26.08.2015 for scrutiny and the petitioner filed a reply on 3.9.2015. However, a further notice was issued on 14.9.2015 and the reason assigned by the Department for reopening the assessment is that no return was filed during the said assessment year and there was a capital gain on the joint venture agreement. But, it is the case of the petitioner that as there was no income at all during the said assessment year, no return need be filed. However, no notice under Section 148 was not received, but a copy of the same was obtained on 14.10.2015.

8. It is further case of the petitioner that in respect of the assessment year 2011-2012, a notice was issued on 16.08.2013 for scrutiny under Section 143(2) of the Act and a further notice was also issued on 1.10.2013 under Section 142 (2) and replies dated 11.10.2013 and 17.2.2014 were given by the Petitioner. Thereafter, a scrutiny assessment under Section 143(3) was passed on 13.3.2014. Subsequently, a notice for penalty was also issued on 13.3.2014, which was also replied on 9.4.2014 and it was accepted and further

proceedings were dropped. The appeal filed as against the assessment order for the assessment year 2011-2012 is pending before the Appellate Authority.

9. Pending the appeal filed by the petitioner, notice dated 25.8.2015 under Section 143(2) was issued for the assessment year 2011-12. A reply was also sent on 03.09.2015 and thereafter, a communication dated 14.9.2015 was issued, informing that the case of the petitioner was reopened under Section 147 of the Act and subsequently, a notice under Section 148 of the Act came to be issued on 30.3.2015, to the effect that the income chargeable to tax for the assessment year 2008-2009 and 2011-2012 had escaped assessment. However, it is the contention of the petitioner that though the said notice was not received by the petitioner, he had obtained the same on 26.10.2015 and now, the petitioner is before this Court seeking to quash the same.

10. The prime contention of the petitioner is that when the proceedings are completed under Section 143(3) of the Act, the Assessing Officer has no power to reopen the assessment under Section 147 of the Act, that too, in the absence of any new material. Further, it is contended that since there was no income during the assessment year 2008-09, the petitioner did not file any return and hence, it could not be found fault with.

11. Insofar as the joint venture agreement, the petitioner stated that 40% of the land area to to be transferred to the nominees of the builder was sold in the assessment year 2011-12 and they were offered for capital gain for the assessment year 2011-2012 and the balance area was sold in the subsequent assessment year 2012-2013 and the return was duly filed. Further, there was no proper sanction was obtained before issuing the impugned notices and the petitioner also challenged the impugned notices on that ground also.

12. On the contrary, it is contended by the respondent that failure on the part of the petitioner to file proper returns for the assessment year 2008-09, it was presumed that the income chargeable to tax had escaped assessment and that the capital gain has to be brought to tax in the year in which the land was handed over to the developer and taking the market value of 40% undivided share of land given to the builder, it was presumed that the income chargeable to tax had escaped assessment for the year 2011-2012 within the meaning of Section 147 of the Act.

13. Further, the respondent contended that when a notice under Section 148 of the Income Tax Act has been issued, it is for the assessee concerned to file his objections before the

Assessing Authority, who will decide the same in accordance with law, but the petitioner failed to file his objections and in the absence of the same, the present writ petitions are not maintainable.

14. In the decisions relied on by the learned Counsel for the respondent, it is held that upon receipt of a notice under Section 148 of the Act that an assessee's income was believed to be an escaped assessment within the meaning of Section 147 of the Act, the proper course for the assessee is to file his objections before the Assessing Authority and in the absence of such objections, the challenge made to the notice issued by the authority concerned has no legs to stand.

15. Considering the facts and circumstances of the case in the light of the decisions cited supra, this Court is of the view that the present writ petition filed challenging the notice issued under Section 148 of the Act is not maintainable and the petitioner has to file his objections before the Assessing Authority in the manner known to law.

16. Therefore, both the writ petitions are disposed of, directing the petitioner to file his objections to the impugned notices issued by the respondent, in accordance with the relevant provisions of the Income Tax Act, 1961, within a period of four weeks from the date of receipt of a copy of this order. On receipt of the objections to be filed by the petitioner, the respondent shall consider the same and pass appropriate orders on merits and in accordance with law, within a period of six weeks thereafter. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//सत्यमेव जयते

Sub Assistant Registrar

Srcm/rsb

To:

The Deputy Commissioner of Income Tax,  
Corporate Circle 1(2),  
Income Tax Department, Aayakar Bhavan,  
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M.G.Road, Nungambakkam, Chennai-34

+1cc to Mr.Mc Gan Law Firm, Advocate, S.R.No.58908

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SAI(CO)

CA/23/03/2016)

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