

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 16.03.2017

Delivered on 07.04.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.1019 of 2017

and

W.M.P.Nos.1001 and 6076 of 2017

M/s. Home Finders Housing Limited
Represented by its Chairman and Managing
Director, K.S. Ramalingam,
Block N.10, Homefinders Estate,
75/2, Thiruvallurvar Salai,
Ramapuram, Chennai - 600 089

.. Petitioner

Vs.

The Income Tax Officer,
Corporate Ward 2(3)
Rome No.504, Wanaparthi Block,
5th Floor,
121, M.G.Road, Nungambakkam.
Chennai - 600 034.

.. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the respondent contained in its Assessment Order dated 30.12.2016 in PAN: AAACH1651B, passed under Section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13 and to quash the same as arbitrary, unjust and illegal.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondent : Mr.T.Pramod Kumar Chopda,
Senior Standing Counsel for
Income Tax.

O R D E R

The petitioner is aggrieved against the order of assessment dated 30.12.2016 passed under Section 143(3) of Income Tax Act, 1961, for the assessment year 2012-13.

2. The case of the petitioner in short is as follows:

The petitioner is a real estate Company involved in the development of properties. They filed their return for the assessment year 2012-13 on 30.09.2012, admitting a nil total income. The petitioner's case was selected for scrutiny and notice dated 03.12.2014 was issued under Section 143(2) of the Income Tax Act, 1961. On 29.12.2014, the petitioner, through their authorised representative, submitted certain documents pertaining to the issue. After detailed scrutiny of the documents and hearing the petitioner's representative on various dates, the respondent passed an order of assessment on 23.03.2015, by accepting the petitioner's return. While so, the respondent issued a notice dated 16.10.2015 under Section 148 of the said Act seeking to reopen the assessment under Section 147 of the said Act, simply by stating that the respondent has reasons to believe that the petitioner's income escaped assessment. By letter dated 20.11.2015, the petitioner requested for furnishing the informations pertaining to the reasons for reopening the assessment and the copies of documents relied upon by the respondent. The petitioner also requested to treat the return filed on 30.09.2012 as response to the notice under Section 148 of the said Act. After four months, the respondent through letter dated 05.02.2016 furnished the purported reasons recorded for reopening of the assessment. In response to the aforementioned letter, the petitioner gave a reply on 26.03.2016 objecting to the reopening of the assessment. It is specifically stated by the petitioner that a joint venture development agreement dated 12.03.2012 was very much available with the respondent at the time of original scrutiny itself and that the assessment had been completed under Section 143(3) of the said Act after scrutinising the said document as well. There was no tangible material or basis available to the respondent so as to reopen the assessment under Section 147 of the said Act. In spite of the specific objection raised by the petitioner to the reopening of the assessment, the respondent failed to pass a speaking order disposing those objections. On the other hand, the respondent passed the impugned order of assessment on 30.12.2016 assessing the petitioner's income at Rs.1,63,58,148/-. Hence, this writ petition.

3. The respondent filed a counter affidavit wherein it is stated as follows:

During the financial year 2011-12 relevant to the assessment year 2012-13, project expenses were claimed to the extent of Rs.56,14,265/- without submitting the details of the same. The previous officer had accepted only the difference in the opening and closing stock to the extent of Rs.7,43,883/- and not the above project expenses. The assessment was reopened under Section 147 by issuing notice under Section 148 after obtaining

necessary approval as contemplated under Section 151 of the said Act. The objections raised by the petitioner for reopening the assessment was considered while passing the impugned order of assessment.

4. A rejoinder affidavit was filed by the petitioner wherein it is contended as follows:

The objections of the petitioner to the reopening of the assessment was submitted on 26.03.2016 and however, the assessment order was passed only on 30.12.2016 just one day prior to the last date for passing such assessment, as required under Section 153(2) of the said Act. Therefore, this Court at any event cannot extend the time period by giving an opportunity to the respondent to further reassess the income of the petitioner. The period of limitation statutorily prescribed cannot be extended by an order of the Court.

5. Learned counsel for the petitioner submitted as follows:

(a) Once the respondent has chosen to reopen the assessment under Section 147 by issuing a notice under section 148, he is duty bound to pass a speaking order on the objections raised by the petitioner which is admittedly received by the respondent, well before passing the impugned order of assessment. Without passing a speaking order on the objections raised against reopening of the assessment, the respondent cannot pass the final order of assessment. In support of the above contention, the decision of the Apex Court reported in 2003(1) SCC 72 (GKN Driveshafts (India) Ltd. vs. Income Tax Officer and Ors) is relied on.

(b) The Joint Venture Agreement dated 12.03.2012 was very much available with the respondent even at the time of the original scrutiny of the returns and therefore, the respondent is not having jurisdiction to reopen the assessment in the absence of any tangible material which has come to his knowledge later. In this aspect, the decision of the Apex Court reported in 2010(2) SCC 723 (Commissioner of Income tax, Delhi vs. Kelvinator of India Limited) is relied on.

(c) When, admittedly, the respondent has not passed any speaking order on the objections raised by the petitioner and when the impugned order of assessment itself was passed just one day prior to the expiry of the prescribed period, this Court cannot even remit the matter, by extending the period of limitation, to the respondent to redo the assessment beyond the period prescribed under Section 153(2) of the said Act. In support of the above contentions, the decision of the Apex Court reported in 2001(10) SCC 280 (Sone Builders vs. Union of India and others) and the Division Bench decision of the Bombay High Court reported in (2016)382 ITR 333 (Bayer Material Science (P.) Ltd. vs. Deputy Commissioner of Income Tax-10(3)) are relied on.

6. Per contra, learned Standing Counsel appearing for the respondent submitted that though a speaking order is not passed by the respondent on the objections raised by the petitioner against the reopening of the assessment, all those objections were considered while passing the impugned order of assessment. Even though the learned Standing Counsel submitted so, he is however fair enough to state further that in view of the Division Bench decisions made by the Bombay High Court reported in (2006)287 ITR 1(Bombay) (Allana Cold Storage Ltd. vs. Income-tax Officer) , (2012)27 Taxmann.com 163(Bombay) (Rabo India Finance Ltd. vs. Deputy Commissioner of Income-tax) and (2010) 233 CTR 175(Bombay) (IOT Infrastructure & Energy services Ltd. vs. Assistant Commissioner of Income-tax), the matter may be remitted back to the Assessing Officer to first pass a speaking order on the objections raised by the petitioner and thereafter, to pass a final order of assessment afresh.

7. Heard both sides.

8. The petitioner is aggrieved against the order of assessment passed in pursuant to the reopening of the same under Section 147 of the said Act. There is no dispute to the fact that in respect of the assessment year 2012-13, an assessment order was passed on 23.03.2015 under Section 143(3) of the said Act. Thereafter, the Assessing Officer issued a notice under Section 148 on 16.10.2015 stating that he had reasons to believe that the income chargeable to tax had escaped assessment, within the meaning of Section 147 of the said Act. On receipt of such notice, the petitioner, through their reply dated 20.11.2015, sought the details of reasons for reopening the assessment. In response to such request, the respondent sent a communication on 05.02.2016 indicating the reason for reopening the assessment as extracted hereunder:

"It has been observed that the assessee has claimed erroneous reduction in the value of inventory being flats under construction as per joint venture development, which will be completed only on receipt of share of flats apart from cash by the assessee-company as agreed in the Joint Venture document which has not taken place during the year. Hence the claim of reduction to the tune of Rs.1,63,58,148/- is found not to be in order and thus the income to the extent is considered as having escaped assessment."

9. The petitioner, on receipt of such communication, sent a detailed objection on 26.03.2016 running to several pages. It is specifically stated therein that the assessment itself was completed under section 143(3) read with Section 147 and that

the entire books of accounts, bank statements, re-conciliation of Form 26AS with profit and loss accounts was done during the course of assessment proceedings. It is also stated in their objection that the entire details and agreements and documents were scrutinised in detail before passing the assessment order under section 143(3) and that the petitioner had furnished the details on various matters relevant to the assessment year. Therefore, it is contended by the petitioner in the said reply/objection that reopening of the assessment is without jurisdiction, since it does not satisfy the test for reopening the assessment, as held by the Apex Court in the Kelvinator of India's case.

10. Though such objections of the petitioner were received by the respondent, admittedly he has not passed any order, muchless a speaking order, rejecting those objections. On the other hand, he straight away passed the impugned order of assessment on 30.12.2016. It is well settled that the Assessing Officer has to first pass a speaking order on the objections raised by the petitioner against the reopening of the assessment before ever proceeding to pass final order of assessment. In this aspect, the decision of the Apex Court reported in 2003(1) SCC 72 (GKN Driveshafts (India) Ltd. vs. Income Tax Officer and Ors) is relevant to be quoted wherein at paragraph No.5, it has been observed as follows:

5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice 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 notice 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.

(emphasis supplied)

11. Learned counsel for the respondent though wants to sustain the impugned order of assessment, is, however, fair enough to admit the position that the respondent has not passed any order on the objections raised by the petitioner. Therefore, he submitted that the matter may be remitted back to the

Assessing Officer for passing a speaking order and thereafter, to pass the assessment order. In support of such contention, he relied on the decision of the Bombay High Court reported in (2006)287 ITR 1(Bombay) (Allana Cold Storage Ltd. vs. Income-tax Officer). In the above decision, the Division Bench of the Bombay High Court, after following the GKN Driveshafts (India) Ltd. case, set aside the order of assessment and remitted the matter back to the Assessing Officer for passing a speaking order on the objections. At paragraph Nos.7, 8, and 9, it has been observed as follows:

7. We have noted the submissions of both counsel. The law as laid down by the apex court is binding on this court as well as on the authorities functioning under the statute. This being the position, we fail to understand as to why the first respondent did not decide the objections separately which he is duty bound to decide. The whole idea in laying down the law in the abovereferred judgment of the apex court is to give an opportunity to the assessee to know as to what is the decision on his objections, which decision has also to be arrive at after giving an opportunity to the assessee. In the present case, the assessee has been denied this opportunity. Not only that but in the first three writ petitions what we find is that a common order has been passed on the objections as well as for the reassessment. In the fourth matter, the assessment order does not disclose any decision on the objections at all and undoubtedly no such decision has been given separately on the objections.

8. Having noted this scenario, in our view the proper course will be to interfere with the assessment orders passed in all four matters by the concerned officer. We are aware that when an alternative remedy is resorted to, the writ jurisdiction is not to be exercised, but that is a rule of self-limitation. The orders challenged in the present matter are clearly against the law laid down by the apex court and, therefore, the exercise of writ jurisdiction is called for. That being so, we allow these petitions and quash and set aside the orders of assessment passed in all these four petitions. Inasmuch as the assessment orders are set aside, the appeals filed by the petitioners no longer require to be

prosecuted. The same will stand disposed of.

9. Now that the impugned orders are set aside, the first respondent, after hearing the petitioners, will pass separate speaking orders on the objections which the petitioners have filed. We further add that in the event the objections are rejected, the assessment order will not be passed for a period of four weeks thereafter.

12. The same view was taken by another two Division Bench of the Bombay High Court in the cases reported in (2010) 233 CTR 175(Bombay) (IOT Infrastructure & Energy services Ltd. vs. Assistant Commissioner of Income-tax) and (2012)27 Taxmann.com 163(Bombay) (Rabo India Finance Ltd. vs. Deputy Commissioner of Income-tax). Thus, it is evident from the above decisions of the Bombay High Court that after setting aside the order of assessment, the matter was remitted back to the Assessing Officer to pass a speaking order on the objections raised by the respective petitioners therein.

13. In this case, the first contention raised by the petitioner is that the respondent has not passed a speaking order on the objections filed against the reopening of assessment. Insofar as the said contention is concerned, the respondent's side has not raised any serious objections and on the other hand, they admit to such position. However, they want the matter to be remitted back for passing such a speaking order. However, the petitioner is opposing to such course of action by contending that it would amount to extension of the period of limitation prescribed for passing the order of assessment. Therefore, this Court has to now consider as to whether remitting the matter back to the respondent for passing a speaking order on the objections raised against the reopening of the assessment and thereafter, to pass a fresh order of assessment, would amount to extension of period of limitation.

14. In my considered view, the question of extension of period of limitation, as contended by the petitioner, does not arise at all in this case. Admittedly, the order of assessment impugned in this writ petition was already passed within the prescribed period of limitation. If the Assessing Officer has passed the order of assessment within the prescribed period of limitation and thereafter, if such order is put to challenge before the Court of law and consequently, is set aside on some reason, which in the opinion of the Court is a curable defect, it is always open for the Court to remit the matter back to the Assessing Officer for passing a fresh order of assessment after curing those defects. In such cases, it does not mean that the Court has extended the period of limitation. Needless to say that once the Court has set aside the order and remitted the matter back to the Assessing Authority, the parties are reverted

back to their original position as existed before passing the order of assessment and therefore, a fresh order to be passed in pursuant to such remand, is deemed to have been passed within the prescribed period of limitation, even though the time prescribed so under statute got expired by that time.

15. An order passed within the period of limitation can always be questioned before the Court of law by raising very many grounds touching upon the merits of the matter. Upon considering those grounds, if the Court comes to a conclusion to set aside the impugned order and remit the matter back to the authority for passing a fresh order, depending upon the facts and circumstances of each case, it can do so. In view of such remand, as the parties are reverted back to their original position as existed prior to the impugned order, it cannot be said that the court is extending the period of limitation. If such construction or interpretation is accepted, no fresh order of assessment can ever be made in respect of cases remitted by the Court where the limitation for passing the orders prescribed under the statute has already expired. Needless to say that prescription of statutory period of limitation is for the concerned authority to perform a particular act within such time limit. If he has acted within such prescribed time and passed an order, the statutory obligation vested on such authority, insofar as the period of limitation is concerned, is deemed to have been discharged. His order, so passed within time, may be right or wrong. Still it is an order passed within time. The person aggrieved against such an order is entitled to challenge the same before the appropriate forum, in a manner known to law. If any such challenge is made, such Forum has to look into the other aspects of the matter and the objections raised by the person so aggrieved, in order to come to a conclusion on the question whether to sustain the order or to set aside the same. If for some reasons such Forum chooses to set aside, it is open to such Forum to remit the matter back to the Original Authority for redoing the exercise once again. At that point of time, certainly, the question of considering the limitation does not arise, as such forum is not granting time to pass the original order itself beyond the period of limitation and on the other hand, it is an order empowering the original authority to redo their exercise. Certainly, there is a vast difference between the stage and circumstances of the exercise of power "to do" and "redo". When the power "to do" is certainly to be exercised within the statutory period of limitation, the power to "redo" such exercise does not fall under the purview of limitation once again. Hence, I reject the contention of the petitioner on this aspect.

16. In all the three cases relied on by the learned Standing Counsel for the respondent, the respective Division Bench of the Bombay High Court has only remitted the matter back to the

Assessing Officer to pass a speaking order.

17. No doubt, the learned counsel relied on another Division Bench decision of the Bombay High Court reported in (2016)382 ITR 333 (Bayer Material Science (P.) Ltd. vs. Deputy Commissioner of Income Tax-10(3)). A perusal of the said decision would show that the Assessing Officer has passed a draft assessment order on 30.03.2015 without disposing of the petitioner's objections therein. Since the Division Bench has found that the final assessment order as provided under 4th proviso to sub-section 2 of Section 153 of the Income Tax Act, 1961, has not been passed in that case within the time prescribed, it has set aside the draft assessment order itself. Paragraph No.10 of the said decision reads as follows:

10. In the present facts, we find that the draft Assessment order was passed on 30th March, 2015, without having disposed of the petitioner's objections to the reasons recorded in support of the impugned notice. The reasons were supplied to the petitioner only on 19th March, 2015 and the Petitioner had filed the objections to the same on 25th March, 2015. This passing of the draft Assessment order without having disposed of the objections is in defiance of the Supreme Court's decision in GKN Driveshafts (India) Ltd. (Supra). Thus, the draft assessment order dated 30th March, 2015 is not sustainable being without jurisdiction. This for the reason that it has been passed without disposing of the objections filed by the Petitioner to the reasons recorded in support of their impugned notice. accordingly, we set aside the draft assessment order dated 30th March, 2015. we are not dealing the validity of the reasons in support of the impugned notice in the present facts as the time limit to pass the Assessment order as provided under 4th Proviso to sub-section (2) of Section 153 of the act has already expired when the petition was filed. Rule is made absolute in the aforesaid terms, with no order as to costs.

18. The facts and circumstances of the present case are totally different. As I have pointed out earlier, it is not the draft assessment order and on the other hand, admittedly, the final assessment order itself was passed well within the period of limitation. Therefore, the above said decision, which is factually distinguishable, cannot be applied to the facts and circumstances of the present case.

19. The next decision relied on by the learned counsel for the petitioner reported in 2001(10) SCC 280 (Sone Builders vs. Union of India and others) is also not relevant to the facts and circumstances of the case. A perusal of the said decision would show that the Apex Court did not think fit to remand the matter to the appropriate authority as there was breach of the principles of natural justice and by that time, the statutory limit within which the appropriate authority has to act also got lapsed. In this case, there is no violation of principles of natural justice. On the other hand, the petitioner was put on notice and his objections were received. The only fault on the side of the respondent is that he has not passed a speaking order on those objections. Moreover, the respondent has admittedly passed the order of assessment within the period of limitation. Going by these facts, I do not think that the above decision of the Apex Court helps the petitioner in any manner.

20. Considering all these aspects, I am of the view that the matter has to go back to the respondent for passing a speaking order on the objections and thereafter, to pass the final order of assessment. Accordingly, the writ petition is allowed and the impugned order of assessment is set aside and the matter is remitted back to the respondent to pass a speaking order on the objections raised by the petitioner, after giving an opportunity of hearing to them. Such exercise shall be done by the respondent within a period of four weeks from the date of receipt of a copy of this order. Thereafter, it is open to the respondent to pass the final order on merits and in accordance with law within a period of four weeks. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Asst.Registrar (CS II)

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Sub Asst. Registrar

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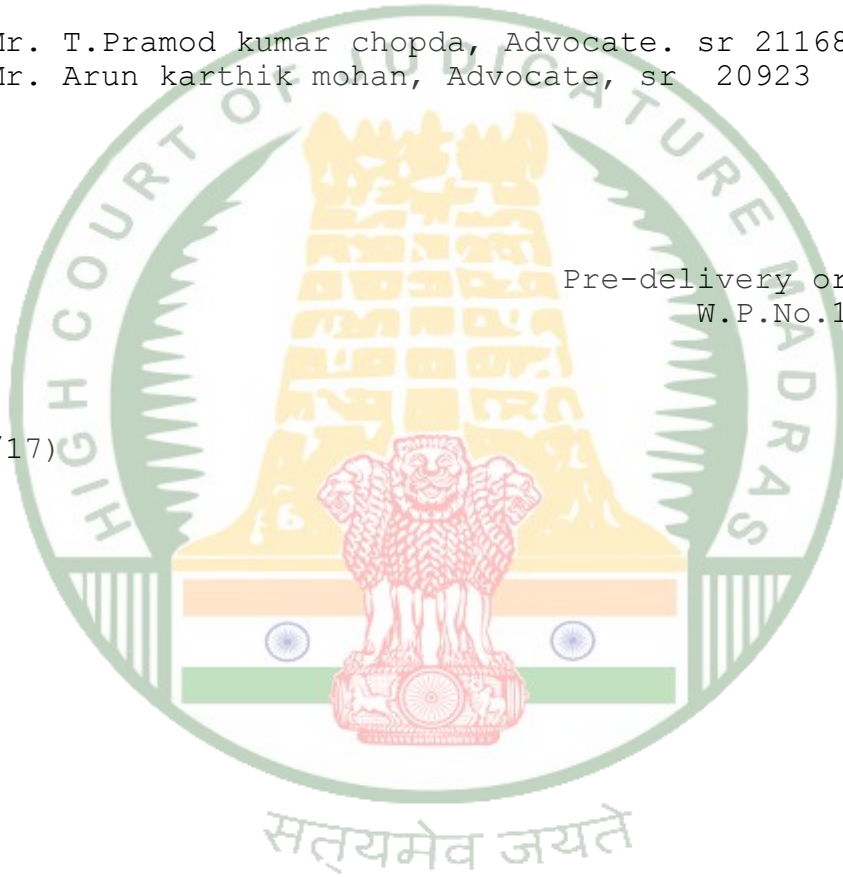
To

The Income Tax Officer,
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Chennai - 600 034.

+1 cc to Mr. T.Pramod kumar chopda, Advocate. sr 21168
+1 cc to Mr. Arun karthik mohan, Advocate, sr 20923

Pre-delivery order made in
W.P.No.1019 of 2017

rj (co)
rmp (10/04/17)



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