

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Order	Date of Pronouncing the Order
27.10.2017	31.10.2017

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition Nos.27549 and 27550 of 2017
and
W.M.P.No.29473 & 29474 of 2017

M/s. Alfa Investments,
rep.by its Partner, Shri. Ahamed Shakir.

...Petitioner in both W.Ps.

Vs.

The Income Tax Officer,
Non-Corporate Ward -1 (1),
Room No.305, III Floor,
Wanaparthi Block,
121, Mahatma Gandhi Road,
Chennai - 600 034.

...Respondent in both W.Ps.

Prayer in W.P.No.27549 of 2017

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records in AATFA1690D/NCW1(1) 2017-18, dated 11.10.2017 on the file of the respondent, relating to the A.Y.No.2010-11 and to quash the same.

Prayer in W.P.No.27550 of 2017

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records in AATFA1690D/NCW1(1) 2017-18, dated 27.09.2017 on the file of the respondent, relating to the A.Y.No.2011-12 and to quash the same.

For Petitioner : Mr.M.P.Senthil Kumar

For Respondent : Mrs. Hema Murali Krishnan
Senior Standing Counsel

COMMON O R D E R

Heard Mr. M. P. Senthil Kumar, the learned
counsel appearing for the petitioner and Mrs. Hema Murali

Krishnan, the learned Senior Standing Counsel, accepting notice on behalf of the respondent. Since the issue involved and the parties in both the Writ Petitions are one and the same, with the consent of the learned counsel appearing on either side, the Writ Petitions are taken up together for disposal.

2. The petitioner is an assessee on the file of the respondent, under the provisions of Income Tax Act, 1961 (hereinafter, referred to as 'the Act') and the petitioner has filed these Writ Petitions, challenging the proceedings of the respondent for re-opening of the assessment for the assessment years 2010-11 and 2011-12.

3. The facts, which are necessary for the disposal of the Writ Petitions are as follows:-

i) The petitioner was formed as a Partnership Firm and registered with the Registrar of Firms. They are engaged in the business of commercial and trading activities, including investing, acquiring and holding shares, stocks, assets and other securities.

ii) For the assessment year 2012-13, the petitioner filed returns of income on 27.07.2013, admitting NIL income. The case was selected for scrutiny, and the petitioner offered their explanation to the Assessing Officer. The assessment was completed under Section 143 (3) of the Act, 1961, by adding Rs.108,35,05,000/-, as 'unexplained credit' under Section 68 of the Act, and computed the total assessed income at Rs.108,35,05,000/- against the NIL returns filed by the petitioner. The petitioner challenged the assessment order, by filing Appeal before the Commissioner of Income Tax (Appeals) -2, Chennai, (hereinafter, referred to as CIT (A)). The Appeal filed by the petitioner was allowed, by an order, dated 13.10.2016. Challenging the same, the Revenue preferred Appeal to the Income Tax Appellate Tribunal (ITAT), which was dismissed, by order, dated 18.09.2017.

iii) During the pendency of the Appeal filed by the Revenue before ITAT, the respondent issued a notice under Section 148 of the Act, dated 19.01.2017, stating that, he has reasons to believe that the income chargeable to tax for the relevant assessment year has escaped assessment within the meaning of Section 147 of the Act. Therefore, the respondent proposed to assess/re-assess the income for the said assessment year, and requested the petitioner to file returns in the prescribed form. The petitioner, in response to the said notice, filed its returns on 25.01.2017, and sought reasons for re-opening the assessment proceedings. The respondent, by communication, dated 07.06.2017, furnished reasons, after which, the petitioner filed their objections through a Chartered

Accountant on 11.09.2017. The objections have been disposed of/rejected, by orders, dated 27.09.2017. These are impugned in these Writ Petitions.

4. The learned counsel appearing for the petitioner has submitted that, the Assessing Officer, in the reasons assigned in the impugned orders for re-opening the assessment has stated, as if, there is a direction issued by CIT (A), while allowing the petitioner's Appeal, by order, dated 13.10.2016, and grossly erred in re-opening the assessment, merely by treating the observation in the said order, dated 13.10.2016, as a direction issued under Section 150 (1) of the Act to re-open the assessment.

5. It is further submitted that, mere observation of the CIT (A) that the Assessing Officer can take cognizance of the matter, by way of initiating suitable proceedings, cannot be interpreted as a direction issued under Section 150 (1) of the Act, to initiate re-assessment proceedings under Section 147 of the Act. It is further submitted that, re-opening of the assessment by the respondent is a case of change of opinion, as the petitioner has filed all the relevant details, in respect of introduction of capital by Partners in the Firm during the assessment years 2010-11 and 2011-12, in the course of assessment proceedings in respect of the year 2012-13, and the Assessing Officer considered the entire material, and after due enquiry into the facts, treated the same as unexplained credit under Section 68 of the Act for the assessment year 2012-13, and therefore, power under Section 148 of the Act cannot be exercised.

6. The learned Senior Standing Counsel for the Revenue has pointed out that, the reasons given by the respondent for rejecting/disposing of the objections filed by the petitioner are clear, and there were certain facts, which never came before the Assessing Officer while he completed the assessment earlier, and therefore, it is submitted that, the impugned order is neither a change of opinion, nor a case, where, there was any reason to believe that income chargeable to tax has escaped assessment and therefore, the objections raised by the petitioner were rejected. Hence, the Assessing Officer should be allowed to complete the assessment, after which, it is open to the petitioner to exhaust the Appellate remedy available under the Act.

7. The CIT (A), while allowing the petitioner's Appeals, made an observation in para No. 7 of his order, dated 13.10.2016. The relevant portions of the observation are as follows:-

" From the facts on record, it is clear that the contention of the appellant that no fresh capital whatsoever was introduced during the FY 2011-12 relevant to the AY 2012-13, which is the AY in question, in the books of the appellant-Firm is correct. Thus, the claim of the appellant that the sum of Rs.108,35,05,000/- represents the opening balance of capital in the books of the appellant, is found to be correct. In other words, the amount of Rs.108,35,05,000/- which has been disallowed/added back as unexplained credit u/s 68 by the Assessing Officer represents the opening balance in the capital account as on 01.04.2011.

"Since the Capital was introduced in the earlier two FYs i.e., FY 2009-10 & FY 2010-11, the Assessing Officer can only take cognizance of the matter by way of initiating suitable proceeding for AYs. 2010-11 & 2011-12.

Hence, the Assessing Officer was not justified in disallowing/adding back the 'capital introduced' of Rs.108,35,05,000/-, by treating the same as unexplained credit u/s. 68. Since there was no introduction of fresh capital whatsoever during A.Y.2012-13, the addition made in the hands of the appellant-firm for A.Y.2012-13 is held to be unwarranted, and is therefore deleted."

8. The above finding of the CIT (A) has been affirmed by the ITAT, though subsequently.

9. The reasons for re-opening the assessment, which was furnished to the petitioner, by communication dated 07.06.2017 are as follows:

" On further appeal, the Ld. CIT (A) -2, vide her order in ITA No.119 CIT (A) 2/2015-16, dated 13.10.2016, had struck down the addition on the count that the additions u/s. 68 cannot be undertaken in the year when no capital is introduced. It should be undertaken only in the year of entry of the funds to the credit of the capital account. Therefore, a direction under Section 150 (1) was issued by the Ld.CIT (A) to re-open the assessment correspondent to the Financial Year, during which, the Capital was

introduced. In the case of the assessee Firm, for the A.Y.2010-11, no return of income is filed. The capital introduced during the year is a sum of Rs.64 crores. The Ld. CIT (A) had not provided relief to the assessee firm based on the finding on the genuineness of the source of credit, but only on the aspect of the year of introduction of the said credit. "

10. The petitioner submitted their objections dated 11.09.2017, in which, it is stated that, that CIT (A) nowhere, directed the Assessing Officer to consider the Partner's capital in the subject assessment years, and there was not even a passing observation to the said effect. Therefore, the assumption on the part of the respondent that the CIT (A) has directed him to re-open the assessment is factually incorrect, and the very basis, on which, the notice under Section 148 has been issued is incorrect. The respondent/Assessing Officer, while dealing with the objections filed by the petitioner has pointed out certain aspects, which, in the opinion of this Court are material. That is to say that the petitioner did not file returns of income for the assessment years 2010-2011 and 2011-2012, so there was no opportunity to verify the assessee's transactions claimed to have been made in those years; the assessee did not have any bank account and did not furnish any proof to establish the link between the capital introduced and its withdrawals for the purpose of investments. The above factual position would clearly show that there can be no change of opinion in the instant cases, as there was no opinion formed by the Assessing Officer on the said issue for the relevant assessment years.

11. The petitioner's/assessee's contention is that, there was no specific direction issued by CIT (A) to re-open the assessment, and it is a misreading of the order passed by CIT (A), dated 13.10.2016. I do not agree with the said submission in the light of the language and observations made by CIT (A) in his order, dated 13.10.2016 (quoted above). The reasons for deleting the addition made in the hands of the assessee-Firm for the year 2012-13, is because, the capital was required to be introduced in the course of earlier two financial years, i.e. FY 2009-10 and FY 2010-11. The CIT (A) did not stop with this observations, but made further observation by stating that, the Assessing Officer can only take cognizance of the matter, by way of initiating suitable proceedings for the assessment years 2010-11 and 2011-12. The petitioner seeks to interpret the word 'Can' by stating that, it cannot be construed as direction, but the petitioner should read the word 'Can' along with next word 'Only'.

12. The CIT(A) has pointed out that the Assessing Officer can only take cognizance of the matter, by way of initiating suitable proceedings for the assessment years 2010-11 and 2011-12. In such circumstances, it cannot be taken, as if, the observation contained in the order passed by CIT(A) is of no consequence. Such plea cannot be raised by the petitioner/assessee, as it would be fatal to their case, because, it is only on account of such observations, they got relief before CIT (A). The above observations were affirmed by ITAT. Even assuming for the sake of arguments that, there is no specific direction, in the order passed by CIT (A) yet, the Assessing Officer was entitled to exercise his powers under Section 148 of the Act, as there was no opportunity to verify the transactions claimed to have made in those years. Therefore, it is not a case of change of opinion. Consequently, the challenge to the impugned proceedings has to necessarily fail.

13. Accordingly, the Writ Petitions are dismissed, leaving it open to the Assessing Officer to complete the assessment in accordance law, and thereafter, the petitioner is at liberty to workout the remedy available under the Income Tax Act, 1961. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

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To

The Income Tax Officer,
Non-Corporate Ward -1 (1),
Room No.305, III Floor,
Wanaparthi Block,
121, Mahatma Gandhi Road,
Chennai - 600 034.

+1 Cc to Mrs. Hema Murali Krishnan, Advocate sr 77434.
+2 Ccs to Mr.G. Baskaranm Advocate sr 77034.

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SP(02/11/2017)