IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.07.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.35606 & 35607 of 2002

M/s.Gay Travels (P) Ltd.,
61, Nungambakkam High Road,
Chennai - 34. ... Petitioner in both W.Ps'.

Vs.

Deputy Commissioner of Income Tax,
Company Circle II ((2), Chennai - 34. ... Respondent in both W.Ps'.

Common Prayer: Petitions filed under Article 226 of the Constitution of India to issue a WRIT OF CERTIORARI, to call for the records of the case on the files of the respondent herein in P.A.No.AAA CG 1081A dated 16.08.2002 issued under Section 148 of the Income Tax Act, 1961 relating to the Assessment years 1997-98 and 1998-99 respectively and quash the same.

For Petitioner (In both W.Ps')	:	Ms.Lakshmi Sriram for M/s.R.V.Chitra & Associates
For Respondent (In both W.Ps')	:	Mr.Naveen Durai Babu Standing Counsel

*****

COMMON ORDER

Heard Ms.Lakshmi Sriram, learned counsel for the petitioner and Mr.Naveen Durai Babu, learned Standing Counsel for respondent.

2. The petitioner has filed these writ petitions praying for issuance of a writ of Certiorari to quash the notices issued by the respondent dated 16.08.2002, under Section 148 of the Income Tax Act, 1961, relating to the assessment years 1997-98 and 1998-99 respectively.

3. The petitioner is an assessee on the file of the respondent under the provisions of the Income Tax Act, 1961 (in short 'the Act'). The petitioner had entered into an agreement

for sale dated 04.07.1996 with M/s.Shorelines Pvt. Ltd., agreeing to sell their agricultural lands located in Muttukadu Village, for a total sale consideration of Rs.3,50,00,000/- (Rupees three crores and fifty laks only) and received a sum of Rs.1,60,00,000/- (Rupees one crore and sixty laksh only) in the accounting year 1996-97 relevant to the assessment year 1997-98 and a sum of Rs.1,90,00,000/- in the accounting year 1997-98 relevant to the assessment year 1998-99.

4. The returns filed by the petitioner were accepted by the respondent that there is no capital gains attracted on the sale transaction and the assessment for the year 1997-98 was completed. For the assessment year 1998-99, since the sale consideration was to be assessed in the previous years i.e., 1997-98, as the petitioner had entered into the agreement for 1996-97, the assessment for 1997-98 was reopened to consider the question of assessing the capital gains arising on the sale of agricultural lands. Therefore, the said consideration was not considered for taxability in the assessment year 1998-99.

5. Notice was issued under Section 148 of the Act dated 25.01.2001 for reassessment of the assessment made for the year 1997-98. The petitioner sought for reasons for reopening and the same were furnished by the respondent, which was priming on the ground that the lands sold were not agricultural lands. This was on the basis that the sale consideration received by the petitioner was grossly different from the amount invested by them for the purchase of the property, the location of the property and the development of the property into plots done by the purchasers. The petitioner was served with a notice under Section 142 (2) of the Act on 22.06.2001, fixing the date of enquiry as 08.03.2001. In terms of Section 153(2) of the Act, the time limit for completing the assessment for the reassessment proceedings is given as one year from the end of the financial year in which notice under Section 148 was served.

6. The petitioner's case is that the notice dated 25.01.2001 was served on 01.02.2001 and the last date for passing reassessment was 31.03.2002. While so, on 16.08.2002 for the very same assessment year 1997-98, the respondent issued notice under Section 148 of the Act proposing to reassess the income for the said year and requiring the petitioner to file a return of income within 30 days. The petitioner submitted replies on 03.09.2002 and 09.09.2002 for furnishing the basis for reopening and submitted that in the light of the first notice issued and the proceedings have been failed to be pursued as contemplated under Section 153(2) of the Act, in the absence of any further materials at the hands of the respondent, the second notice issued is without jurisdiction. Since no further action was initiated on those representations, the petitioner approached this Court by way of these writ petitions.

7. The petitioner's contention is that it is an admitted fact that the petitioner had filed its returns in compliance with the notice of reassessment issued at the first instance, summons were also issued and also acted upon. In terms of Section 153(2) of the Act such reassessment can be done within the period of limitation prescribed therein. Admittedly, within the said period, no action was initiated and consequently, any fresh proceedings taken ignoring the earlier notice is without jurisdiction.

8. Learned Standing counsel for respondent by referring to the counter affidavit filed by the respondent submitted that the earlier notice dated 25.01.2001 was dropped on 31.03.2002 for technical reasons, as recorded in the file wherein, it has been specifically mentioned that another notice under Section 148 of the Act would be issued after obtaining necessary approval. Therefore, the respondent would state that the second notice issued, after obtaining approval from the Additional Commissioner of Income Tax, Company Range-II, Chennai is proper, as it has been issued well within the period of limitation prescribed under Section 148 of the Act.

9. Further the learned counsel for the respondent also referred to the merits of the matter and sought to substantiate as to why the respondent was justified in issuing the impugned notices and the petitioner should file a return of income and participate in the assessment proceedings and if aggrieved, they could prefer an appeal as against the assessment.

10. After hearing the learned counsels for the parties and carefully perusing the materials placed on record as well as the Original file, it is seen that pursuant to the notice dated 25.01.2001 served on the assessee on 01.02.2001, the petitioner sought for reasons for reopening, which were furnished and the petitioner through their authorized representative appeared for hearing on 19.03.2001 and produced the books of accounts and case was heard and subsequently adjourned for furnishing further details. On the adjourned date viz., 21.03.2001, once again the case was heard and the assessee filed the details and the file note shows, no other endorsement except say "case heard". While so, there is a typed note signed by an Officer dated 31.03.2002, stating that on technical grounds necessary approval will be obtained to issue Section 148 notice afresh and treated as technically dismissed.

11. The learned standing counsel for the respondent sought to sustain the impugned notice by referring to a judgment of the Division Bench of Punjab and Haryana High Court in the case of R.Kakkar Glass and Crockery House Vs. Commissioner of Income-Tax [2002 252 ITR 273 PH]. The Division Bench examined the issue

as to whether a notice under Section 148 could be issued in respect of the same income for a second time. After noting the various distinguishing features, it was pointed out that when a notice is quashed on some technical ground, it would be in order to issue a fresh notice under Section 148 provided all other legal requirements of law have been complied with. One more important factor which was pointed out in the judgment, which would be relevant for the purpose of this case, is as follows:

> "However, if a notice under Section 148 is quashed after examination of the material relied on by the Assessing Officer and after recording a finding that on the basis of such material the additional income cannot be said to have escapped assessment, then it shall not be permissible for Assessing Officer to issue a fresh notice on the basis of the same material in respect of the same item of income. However, in case some fresh material comes into the possession of Assessing Officer subsequently suggesting escapement of income under the same head or some other head, we see no fetters on his power to issue a fresh notice under Section 148. Needless to emphasise that all such subsequent notices have to conform to the parameters prescribed under the law including the provision regarding limitation."

12. Thus the Division Bench held that, if a notice is quashed after examining the material relied on by the Assessing Officer and after recording a finding that on the basis of such material the additional income cannot be said to have escaped assessment, then it will be impermissible for the Assessing Officer to issue a fresh notice. However, in case some fresh material comes into the possession of the Assessing Officer suggesting escapement of income under the same head or some other head, no fetters could be imposed on his power to issue a fresh notice.

13. On a careful perusal of the original file including the note file, it is evidently clear that there is no factual difference for reopening the assessment as proposed in the first notice and as presently proposed in the impugned notices. The only difference being the language, as the officers are different. The same documents which formed the basis for reasons for reopening and issuance of notice dated 25.01.2001 is identical to that of the reasons, which are set out for the issuance of the impugned notice. Further the petitioner was kept completely in the dark about the closing of the proceedings on technical grounds, stated to be endorsed on 31.03.2002 and the Officers, who endorsed the same was very well aware that it will be a time barred assessment if anything is not done within the said date as already reassessment proceedings were commenced

and the petitioner is being heard in the matter.

14. Therefore, I find that there is no fresh material in possession of the Assessing Officer suggesting escapement of the income at the time of issuance of notice dated 25.01.2001. Thus it is a clear case where the respondent is attempting to reopen a settled issue with no fresh materials and therefore, the impugned notice is wholly without jurisdiction as it is a mere change of opinion.

15. For the above reasons, these writ petitions are allowed and the impugned orders are set aside. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

vsm

To

Deputy Commissioner of Income Tax,
Company Circle II ((2), Chennai - 34.

+1 cc to Ms.Hema Muralikirshnan Advocate sr 54679
+1 cc to Ms.Lakshmi Sriram Advocate sr 54608

W.P.Nos.35606 and 35607 of 2002

rj(co)
aa29/08/2017