BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.03.2017

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Writ Appeal(MD)No.113 of 2017
and
C.M.P(MD)No.1132 of 2017

M/s.Penguin Apparels (P) Limited,
82, Aruppukottai Road,
Madurai 625 012,
Now at Plot No.2, Meenkashi Nagar,
GST Road, Pasumalai, Madurai 625 004. ... Appellant

Vs.

The Assistant Commissioner of Income-tax,
Company Circle I, Income-tax Offices,
V.P.Ratnaswami Nadar Road,
Madurai 625 002. ... Respondent

Writ Appeal is filed under Clause 15 of the Letters Patent against the order dated 21.04.2016 made in W.P.(MD)No.1389 of 2009.

Prayer in WP(MD). 1389/ 2009 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for the records in the matter of assessment of the petitioner in File No. AABCP7832P for the assessment year 2002-2003 wherein a notice dated 22/11/2007 under section 148 of the Income Tax Act, 1961 has been issued and reassessment has been made on 31/12/2008 without jurisdiction and quash the same.

For Appellant : Mr.R.Srinivasan

For Respondent : Mr.R.Krishnamoorthi

JUDGMENT

(Judgment of the Court was delivered by **T.S.SIVAGNANAM,J**)

This appeal is directed against the order in W.P.(MD) No.1389 of 2009, dated 21.04.2016 filed by the appellant herein.

The appellant sought for issuance of a Writ of Certiorari, to quash the proceedings issued by the respondent being a notice under Section 148 of the Income Tax Act, 1961, (the Act), dated 21.11.2007 on the ground that it is without jurisdiction.

2.Before the Writ Court, the petitioner, has not only challenged the impugned notice as being devoid of jurisdiction but also on merits that there were no reasons assigned by the Assessing Officer to reopen the assessment. The revenue, resisted the prayer sought for by the writ petitioner contending that if the assessee is aggrieved by the order, they have to prefer an appeal and without resorting to the alternative remedy available under the Act, the writ petition is not maintainable.

3.The Court after referring to the decisions cited at the bar held that the Assessing Officer is having ample power to reopen the assessment with regard to the income escaped and the Assessing Officer has given proper reasons for reopening the assessment and since the Assessing Officer has jurisdiction to initiate proceedings and his action being not barred by limitation under Section 149 of the Act declined to interfere with the notice and dismissed the writ petition. Aggrieved over the same, the present appeal has been preferred.

4.Learned counsel for the appellant would contend that the Writ Court ought to have considered that the Assessing Officer had no 'reason to believe' that income has escaped assessment and has not recorded any finding in the impugned order that there is a valid case for reopening.

5.It is further submitted that in terms of the decision of the Hon'ble Supreme Court in ***G.K.N Driveshaft (India) Ltd., Vs.Income-tax Officer [259 ITR 19 (SC)],*** the Assessing Officer is bound to consider the objections raised by the assessee and reasons should be assigned for reopening by passing a speaking order and it should be communicated to the assessee. However, in the instant case, an omnibus order has been passed by the Assessing Officer, that too, without assigning any reasons, as to how, reopening is valid and as to how, the issues pointed out by the appellant, in their objections dated 10.11.2008, is not sustainable. Thus, the rejection of the objections as well as the assessment order could not have been passed as a single order.

6.With regard to the merits, it is pointed out that in the communication dated 06.11.2008 addressed to the assessee, learned counsel for the appellant submitted that even in respect of retaining the profits for deductions under Section 80HHC of the Act and the quantum of deduction allowed under Section 80(1B) of the Act, reference was made to the decision of this Court in the case of ***SCM Creations Vs.ACIT [304 ITR 319 (Mad)]*** and that such a reduction is not proper.

7.Further, with regard to the observations made regarding Duty Entitlement Pass Book Scheme (DEPB), it was pointed out that in the absence of any material to arrive at a decision that deduction under Section 80HHC is not available to the appellant/assessee, merely because, the turn over had exceeded Rs.10 Crores is a mere conjecture and so reasons recorded cannot clothe the Assessing Officer to reopen the completed assessment.

8.It was further pointed out that there was no law or regulation or rule at the time of assessment for the assessment year 2002-2003 that any detail regarding conditions mentioned in the amended Section 80HHC for eligibility of deduction in respect of DEPB or regulation to be furnished. Further, the Assessing Officer has no detail to arrive at a conclusion that the appellant is not entitled to deduction under Section 80HHC since details regarding the comparative rates of drawback and DEPB which is higher or lower are not available with the Assessing Officer. It is further pointed out that none of these issues which were raised by the assessee were considered by the respondent in the impugned assessment order.

9.Learned counsel for the appellant placed reliance on the decision of the Division Bench of the Gujarat High Court in ***General Motors India (P) Ltd., Vs.Deputy Commissioner of Income Tax (2013) 82 DTR 0304*** and submitted that the objections could not have been rejected and an assessment order could not have been passed simultaneously. Further, by relying upon the decision of the Hon'ble Supreme Court in ***Jeans Knit Private Limited, Bangalore Vs.The Deputy Commissioner of Income Tax, Bangalore***, in Civil Appeal No.11189 of 2016, dated 08.12.2016, it is submitted that the law laid down by the Hon'ble Supreme Court in ***Calcutta Discount Limited Company Vs.Income Tax Officer, Companies District I, Calcutta and another [(1961) 41 ITR 191 (SC)*** still holds the field and these decisions were rendered after taking into consideration, the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax and others Vs.Chhabil Dass Agarwal [(2013) ITR 357 (SC)].***

10.Learned counsel appearing for the revenue would contend that the Assessing Officer has elaborately assigned reasons in the impugned assessment order wherein the Assessing Officer has discussed the validity for reopening in the relevant paragraphs. Further, it is submitted that with regard to deduction under Section 80HHC and the provisions of Section 80IA(9) of the Act, the Assessing Officer has given reasons and if at all, the assessee was aggrieved, he ought to have filed an appeal as against the impugned assessment order. To support the said contention, reliance has been placed on the decision of the Supreme Court in the case of ***Chhabil Dass Agarwal*** *(supra).*

11.It is further submitted that the Hon'ble Supreme Court in the case of ***Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt., Ltd.,*** in Civil Appeal No.2830 of 2007, dated 23.05.2007 has discussed about the scope and effect of Section 147 of the Income Tax Act, 1961 and that if the Assessing officer, has reason to believe that income has escaped assessment it confers jurisdiction upon him to reopen the assessment. Therefore, it is submitted that the appellant should be relegated to avail the alternative remedy under the provisions of the Act.

12.We have carefully considered the submissions on either side and gone through the materials placed on record.

13.The first issue to be considered is as to whether the Assessing Officer could have passed an omnibus order, that is the assessment order simultaneously deciding on the objections made by the appellant for reopening the assessment.

14.The Hon'ble Supreme Court in ***G.K.N Driveshaft (India) Ltd.,*** *(supra)* has laid down the procedure to be adopted by the Assessing Officer/Assessee whenever the provisions of Section 147 and Section 148 of the Act are invoked. The directions issued by the Hon'ble Supreme Court is that as and when a notice under Section 147 or 148 is issued by the Assessing Officer, the assessee is entitled to demand the reasons for reopening and on reasons being furnished the assessee could raise objections, and the Assessing Officer is bound to consider the objections and pass an order.

15.In the instant case, such a demand was made by the appellant vide his representation dated 10.04.2008 and in response to the same, the reason for reopening was furnished on 06.11.2008. As held in ***G.K.N Driveshaft (India) Ltd.,*** *(supra)*, as soon as, reasons have been received, it is open to the assessee to make objections and if objections are given, it is incumbent upon the Assessing Officer to consider the said objections and pass a speaking order and communicate the same to the assessee. In the instant case, on receipt of the reasons for reopening the assessment, the assessee has given its objections on 10.11.2008 by opposing the reopening stating that it is not supported by any material to have 'reason to believe' that the income has escaped assessment apart from raising objections on the factual aspect and referring to the decision in the case of ***SCM Creations*** *(supra)*.

16.The revenue seeks to sustain the impugned assessment order by stating that there is no error on the part of the Assessing Officer to consider the objections for reopening while passing the impugned assessment order. We do not agree with the said submission as the same is not the procedure which was evolved by the Hon'ble Supreme Court in ***G.K.N Driveshaft (India) Ltd.,*** *(supra)*. The High Court of Gujarat in General Motors (*supra)* has considered somewhat a similar order in which the Assessing Officer has decided the issue as to whether the reopening was valid or not along with the assessment order. The Court held that the Assessing Officer may pass the reassessment order but it was not open to him to decide the objections to the notice under Section 148 of the Act by a composite assessment order. Therefore, the procedure adopted by the Assessing Officer does not have sanction of law.

17.The learned counsel for the revenue would contend that in the impugned assessment order, the Assessing Officer has gone into the validity of reopening.

18.We have carefully gone through the pages 1 and 2 of the impugned assessment order in which there is a separate paragraph which is substituted as “Validity of Reopening”, in which after extracting the objection given by the assessee, the Assessing Officer states that the contention of the assessee company was carefully analyzed in relevance to the facts and circumstances of the case. Thereafter, the Assessing Officer refers to a decision of the Delhi High Court in the case of ***Bawa Abhai Vs.Deputy Commissioner of Income Tax, 253 ITR 83*** and the decision of the Gujarat High Court in the case of ***Praful C Vs.ACIT 236 ITR 832*** and the decision of the Hon'ble Supreme Court in the case of ***ACIT Vs.Rajesh Jhaveri Stock Brokers Pvt., Limited 291 ITR 500 (SC)*** and held that the contention of the assessee that the reopening is invalid and the same is rejected.

19.We are of the clear view that the manner in which the objections made by the appellant were dealt with by the respondent is wholly untenable. There was no discussion, no reason was assigned, except referring three decisions. The Assessing Officer did not endeavour to discuss as to how those decisions would apply to the facts of the present case. In any event, the composite order of the assessment as well as the rejection of the objections does not have sanction of law and that would be sufficient to set aside the impugned proceedings.

20.The second issue with regard to the availment of alternative remedy is concerned, as against the assessment order, the appellant has alternative remedy under the Act, but in ***G.K.N Driveshaft (India) Ltd.,*** *(supra)*, the Hon'ble Supreme Court has carved out a procedure to be adopted by the Assessing Officer in cases where reopening is made under Section 147 of the Act. This procedure contemplates passing a speaking order and the validity of that such order is justiciable by way of writ petition. In fact, this issue was also considered by the Gujarat High Court in ***General Motors India (P) Ltd., Vs.Deputy Commissioner of Income Tax (2013) 82 DTR 0304.*** Therefore, the appellant need not be directed to avail appellate remedy under the Act. The decision in the case of ***Chhabil Dass Agarwal*** *(supra)* was not a case of reopening and considering the facts of the present case and taking note of the conduct of the assessee, the Court observed that the assessees therein are to avail the alternative remedy. The said decision is clearly distinguishable on facts.

21.That apart, the Hon'ble Supreme Court, in the recent decision, in ***Jeans Knit Private Limited, Bangalore*** *(supra)* took note of the decision in ***Chhabil Dass Agarwal*** *(supra)* and held that the law laid down by the Supreme Court in ***Calcutta Discount Limited Company Vs.Income Tax Officer, Companies District I, Calcutta and another [(1961) 41 ITR 191 (SC)*** still holds the field.

22.With regard to the merits of the contentions raised, there is no discussion as to how the decision relied upon by the Assessing Officer in the case of ***SCM Creations*** *(supra)* is not applicable to the case of the assessee nor with regard to the interpretation given by the Assessing Officer with regard to the deductions under Section 80HHC of the Income Tax Act, 1961. Thus, we find that reopening of the assessment for the year 2002-2003 is not supported by any material and there are no valid 'reasons to believe' that the income had escaped assessment.

23.For all the foregoing reasons, we are inclined to interfere with the order passed in the writ petition and allow the writ appeal. Accordingly, the writ appeal stands allowed and the order passed in the writ petition is set aside, consequently, the writ petition is allowed and the impugned assessment order is quashed. No costs. Consequently, W.M.P(MD)No.1132 of 2017 is closed.

Sd/-
Assistant Registrar(writs)

/True Copy/

Sub-Assistant Registrar

TO

+1 CC TO MR.R.KRISHNAMOORTHY,ADVOCATE,SR NO.18290
+1 CC TO MR.R.SRINIVASAN,ADVOCATE,SR NO.18087

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MAS/MR/SAR4:18.04.2017:6P-3C

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