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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 4623/2001

SOUTH ASIAN ENTERPRISES LTD. & ANR. Petitioners

Through: Mr. Shashwat Bajpai with Mr. Jagjeet Singh Sahani, Advocates.

versus

COMMISSIONER OF INCOME TAX & ANR. Respondents

Through: Mr. Rahul Chaudhary, Senior Standing counsel with Ms. Lakshmi Gurung, Junior standing counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE CHANDER SHEKHAR

ORDER

25.05.2017

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Dr. S. Muralidhar, J.

1. South Asian Enterprises Limited ('SAEL') and VLS Finance Limited ('VLS'), Petitioners 1 and 2, respectively, have filed the present petition on 30th July, 2001 under Article 226 of the Constitution of India praying (i) that the impugned notices dated 31st May 2001 issued under Section 148 of the Income Tax Act, 1961 ('Act') being Annexure A, A-1 and A-2 and B, B-1 and B-2 be quashed and (ii) costs of the petition be awarded.

2. On 16th July 2002, while admitting the petition and expediting its hearing, this Court stayed the proceedings under Section 147 of the Act. That interim order has continued ever since.

Background facts

3. The background facts are that VLS was incorporated in the year 1986 and SAEL in 1990. VLS has been carrying the business of financing, leasing, investments etc. as non-banking finance company. SAEL has been carrying the business of running amusement parts and leasing etc. It is stated that both Petitioners are income tax assesseees filing returns on a regular basis on the basis of audited accounts. It is stated that VLS has been carrying on the business of leasing since its inception and has been claiming depreciation on the leased assets under Section 32 of the Act.

4. Search and seizure operations were carried out under Section 132 (1) of the Act on 22nd June, 1998 in the premises of both companies and their respective directors. Thereafter notices under Section 158BC(a) of the Act were issued to both VLS and SAEL on 26th July, 1999 proposing block assessment for the period 1st April 1988 till 22nd June 1998. Pursuant to the above notices both Petitioners filed their block returns on 10th September 1999. On 29th June 2000, notices under Section 142 (2A) of the Act proposing special audit of both Petitioners were issued. This was challenged by them by filing W.P. (C) No. 4685 of 2000 in this Court. In the said petition challenge was also laid to the block assessment proceedings. By an interim order dated 24th August 2000, the Court stayed the operation of the notice dated 29th June 2000 under Section 142 (2A) of the Act directing a special audit. That interim order continued till 15th December 2006.

5. It is stated that on a perusal of the order under Section 142 (2A) of the Act, it appeared that the Department had received an appraisal report from the Investigation Wing according to which depreciation was wrongly

allowed on cinematographic films. It transpired that the search was conducted and the block assessment proceedings were initiated primarily for disallowance of depreciation on cinematographic films. It is claimed by the Petitioners that this had been legally allowed by respective Assessing Officers (AOs) in regular assessments including for these three AYs completed much before the search on 22nd June 1998.

Notices under Section 147

6. While the block assessment proceedings were pending, the AO issued the impugned notices to both the Petitioners on 31st May, 2001 under Section 148 of the Act seeking to reopen the assessments for the Assessment Years ('AYs') 1994-95, 1995-96 and 1996-97. Although the reasons for the reopening were not immediately furnished to the Petitioners, it is submitted no action under Section 147 could lie on the basis of the same material for which even block assessment proceedings could not be legally taken. It is pointed out that for the aforesaid AYs, in the case of both Petitioners, the original assessments were completed under Section 143 (3) of the Act and depreciation was allowed in respect of the cinematographic films. Therefore, there was no question of escapement of any income. Even as regards the income from the lease rent, this was regularly assessed from the AY 1995-96 to 1999-2000. According to the Petitioners, the re-opening of the assessments was "a simple case of change in the opinion on the same facts and material." Under protest both Petitioners filed their respective returns on 27th June 2001 pursuant to the notices issued under Section 148 of the Act.

7. The present petition was thereafter filed on 31st July 2001. After the

reasons for the reopening were furnished, a supplementary affidavit dated 20th August 2001 was filed by the Petitioner. These reasons have been analysed in the said additional affidavit as dealing with (i) those items of income which have already been disclosed and dealt with in the original assessment orders and therefore there is no escapement of income (ii) where the facts are incorrect both as regards the AYs in question and as regards the escapement of income and (iii) concern the rate of depreciation to be allowed which has already been dealt with in the original assessments. These are without prejudice to the broad general argument regarding the impermissibility of parallel proceedings under Section 147 of the Act when the block assessment proceedings under Section 158 BC (a) are pending.

8. The Petitioners contend that under Section 158BA of the Act, notwithstanding anything contained in any provisions of the Act, where after the 30th June 1995, a search was initiated under Section 132 of the Act in the case of any person, then, the AO should proceed to assess the undisclosed income in accordance with the provisions of Chapter XIV-B of the Act. It is contended that there was no justification for initiating any parallel proceedings under Section 147 read with Section 148 of the act as regards to the same question, whether it was a claim of depreciation or any other matter covered by the block assessment proceedings under Section 158 BC of the Act. It is contended that there was no development of any kind since the completion of the regular assessments for those AYs except the search on 22nd June, 1998. Therefore, there was absolutely no occasion to invoke Section 148 of the Act and that too for three of the AYs which were included in the block assessment proceedings.

Orders in WP (C) 4685/2000

9. By an order dated 8th December 2006, the Court passed the following order in W.P. (C) 4685 of 2000:

"Learned counsel for the parties have addressed arguments on the applicability of the decision of the Supreme Court in *Rajesh Kumar v. CIT (2006) 287 ITR 91 (SC)*. On the question whether a notice has to be issued to the Petitioner before passing an order under Section 142 (2A) of the Income Tax Act, 1961, learned counsel for the parties are agreed that the matter is squarely covered by the decision of the Supreme Court referred to above and that a notice would have to be issued to the Petitioner in accordance with the law laid down by the Supreme Court. Since this issue is no longer *res integra*, we need not dilate any further on this. As far as the other issues that have been canvassed before us are concerned, we reserve orders."

10. Consequent upon the said order, fresh notice was issued to the Petitioners under Section 142 (2A) of the Act and another order directing a special audit was passed.

11. As regards the other issue concerning the validity of the block assessment proceedings, the High Court delivered a judgment on 15th December 2006 in W.P. (C) 4685 of 2000 holding that the block assessment proceedings initiated by the Department had not become time-barred and that the Department would have benefit of the period during which proceedings were pending in the High Court, in view of the interim orders passed that remained operative during the pendency of the writ petition. In other words, it was held that the period between 24th August, 2000, i.e., date on which interim order was passed staying special audit direction under Section 142 (2A) dated 29th June, 2000, and 15th December, 2016, i.e., when

the High Court has passed the order setting aside the direction for special audit, would be excluded in counting limitation for concluding block assessment.

12. Aggrieved by the said judgment of this Court as regards the block assessment proceedings, the Petitioners filed a Special Leave Petition in the Supreme Court in which leave was granted and the appeal was registered as Civil Appeal No. 4667 of 2007.

13. The developments subsequent thereto have been referred to in this Court's order dated 9th March, 2016 in the present petition. It reads as under:

“1. It is pointed by Mr. Ajay Vohra, learned Senior counsel for the Petitioners, that the reasons for reopening of the assessments for the three Assessment Years (AYs) 1994-95, 1995-96 and 1996-97 under Section 147/148 of the Income Tax Act 1961 ('Act') refer to the material purportedly recovered by the Income Tax Department during the search proceedings which took place on 22nd June, 1998 under Section 158 BC of the Act. One of the grounds urged to assail the said reopening of assessment is that since action under Section 158BC (a) of the Act is already taken in pursuance to search and seizure operations, no parallel proceedings can be started under Section 147 of the Act in relation to the same issue.

2. Mr. Vohra further states that the validity of the said search proceedings and the consequential notices issued to the Petitioners was the subject matter of WP (C) No.4685/2000, which was dismissed by this Court by the order dated 15th December, 2006. Against the said order, SLP (Civil) No.1620/2007 was filed by the Petitioners, in which notice was issued by the Supreme Court on 5th February, 2007 and it was directed that the audit under Section 142 (2A) of the Act may go on, but no final assessment order shall be passed. It is stated that Civil Appeal No.2667/2007 (arising out of the aforementioned SLP) is likely to be heard finally in the near future.

3. In the present petition, while issuing 'Rule DB' on 16th July 2002, further proceedings under Section 147 of the Act against the Petitioners was stayed.

4. Since the outcome of the above appeal in the Supreme Court will have a bearing on the aforementioned ground urged in the present petition, it is considered appropriate to await the decision of the Supreme Court.

5. List in the category of 'After Notice Miscellaneous Matters' on 28th April, 2016."

14. On 28th April, 2016, the Court was informed that the Supreme Court had delivered the judgment in Civil Appeal No. 2667/2007 on that date which was in favour of the Revenue and against the Assessee. In effect, the Supreme Court allowed the block assessment proceedings to continue (which it had earlier stayed during the pendency of the Civil Appeal).

Settlement Commission

15. An important development that took place thereafter was that both SAEL and VLS had approached the Income Tax Settlement Commission ('ITSC') with applications on 1st June, 2016. By its order dated 3rd August, 2016 under Section 245D(1) of the Act, the ITSC, after perusing the order of the Principal Commissioner of Income Tax ('Pr CIT') came to the conclusion that the Petitioners had satisfactorily explained the manner of deriving the undisclosed income offered in the settlement application. There was no clinching and direct evidence placed on record till then to enable the ITSC to come to the conclusion that the Applicants had not made true and full disclosure of its income in the settlement application. It was also pointed out that the issues raised by the Pr. CIT in his report required further

verification/inquiry which could be taken in the later proceedings. Accordingly, the settlement application could not be held to be 'invalid'. Both applicants were allowed to be proceeded with further within the meaning of Section 245D (2C) of the Act. It appears that the Department has accepted the above order passed by the ITSC on 3rd August 2016.

Submissions of counsel

16. Mr. Shashwat Bajpai, learned counsel for the Petitioners, submitted that since there was full and true disclosure of all materials by both Petitioners during the original assessments for AYs 1994-95, 1995-96 and 1996-97, their re-opening by the impugned notices under Section 147 of the Act, based on mere change of opinion, was unsustainable in law. He further submitted that question of parallel proceedings under Section 147 of the Act involving the same question of alleged claim of depreciation on cinematographic film or any other matter covered by the block assessment proceedings under Section 158 BC of the Act did not arise. In support of the above propositions, he referred to the decisions in ***Ramballah Gupta v. ACIT (2007) 288 ITR 347 (MP)***, ***Cargo Clearing Agency (Gujarat) v. JCIT (2008) 307 ITR 1 (Guj)***, ***Smt. Mira Ananta Naik v. DCIT (2009) 221 CTR 149 (Bom)*** and ***ACIT v. Sunil Kumar Jain (2014) 367 ITR 370 (Chattisgarh)***.

17. It is submitted by Mr. Rahul Chaudhary, learned Senior standing counsel for the Revenue, that all questions concerning the block assessment proceedings can be examined by the ITSC. This would involve the questions that arose as a result of the search that took place on 22nd June 1998. As

regards the notices issued to the Petitioners under Section 147 read with Section 148 of the Act, Mr. Chaudhary submitted that while the decisions cited by learned counsel for the Petitioners do hold that the provisions of Sections 147 and 148 of the Act cannot be invoked where resort has been had by the Department to block assessment under Sections 158BA and 158BC of the Act, it could not be said as a general rule that there would never be a situation where notwithstanding the pendency of the block assessment proceedings under Section 158BC of the Act, no notice under Section 147 of the Act could be issued to an Assessee.

Analysis and Reasons

18. The Court does not propose to examine the academic issue raised by Mr. Chaudhary on whether notwithstanding the pendency of the block assessment proceedings under Section 158BC of the Act, notice under Section 147 of the Act could still be issued to an Assessee. The Court would like to confine its examination to the question whether, in the facts and circumstances of the present case, such a course was permissible for the Department to resort to.

19. The facts of the case as already noted show that the impugned notices under Section 147 of the Act were issued to the Petitioners consequent upon the search and seizure operations and subsequent to the issuance to them of the notices under Section 158BC of the Act. In other words, the impugned notices under Section 147 of the Act were issued by the Department even while it was seized of the block assessment proceedings. Notices under Section 158BC (a) of the Act had already been received by the Petitioners

on 26th July 1999. They had filed their returns pursuant thereto for the block period 1st April 1988 to 22nd June 1998 on 10th September 1999. The subject matter of the block assessment proceedings, as noted in the order dated 3rd August 2016 of the ITSC, was on the alleged bogus transactions in respect of the cinematographic films and the claim of depreciation. Further, the issue was additional income attributable to the business in cinematographic films.

20. As a result of the applications filed by both Petitioners before the ITSC on 1st June 2016, the question of disallowance of the depreciation on account of the cinematographic films and the income attributable to lease rentals is also the subject matter of the said settlement applications before the ITSC.

21. It is not in dispute that the reasons for reopening of the assessment under Section 147 of the Act are more or less on the same grounds viz., the claim of depreciation on cinematographic films and income from lease rentals etc. In ***Ramballah Gupta v. ACIT*** (*supra*), it was held by the Madhya Pradesh High Court, that once a search was undertaken and a notice under Section 153A issued, then the question of issuing notice thereafter under Section 148 of the Act on the strength of the same material collected during the search did not arise.

22. In ***Cargo Clearing Agency (Gujarat) v. JCIT*** (*supra*), the Gujarat High Court examined the issue in detail and concluded that “one cannot envisage escapement of undisclosed income once a search has taken place and material recovered, on processing of which undisclosed income is brought to tax.” The Gujarat High Court referred to the decision of the Supreme Court

in *CIT v. Suresh N. Gupta (2008) 297 ITR 322 (SC)* and concluded as under:

“In the light of this specific distinction in the statutory scheme brought about by specific definitions of the two terms, “assessment year” and “block period”, the submission on behalf of the Revenue that the term “assessment year, wheresoever it appears in the group of Sections 147 to 153 of the Act, be substituted by the term “block period” cannot be accepted, because on a plain reading of the said provisions, viz., Section 147 to Section 153 of the Act, the entire scheme becomes unworkable. The principles of interpretation also do not permit such an exercise.

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As already noticed hereinbefore, the entire scheme under Chapter XIV of the Act, more particularly from Sections 147 to 153 of the Act pertaining to reassessment, and the special procedure for assessing the undisclosed income of the block period under Chapter XIV-B of the Act are not only separate and distinct from each other, but if an effort is made to incorporate the scheme under Chapter XIV of the Act for the purpose of assessment of the block period there is a conflict between the provisions which becomes apparent on a plain reading. In the circumstances, as per the established rules of interpretation, unless and until, a plain reading of the two streams of assessment procedure does not result in the procedures being independently workable, only when the question of resolving the conflict would arise. But to the contrary, in the present case, in the light of the provisions of Section 158BH of the Act, once there is a conflict between the two streams of procedure, as laid down by the Apex Court, the provisions of Chapter XIV-B of the Act shall prevail and have primacy.

Thus, viewed from any angle, the stand of the Revenue does not merit acceptance. Once assessment has been framed under Section 158BA of the Act in relation to undisclosed income for the block period as a result of search there is no question of the Assessing Officer issuing notice under Section 148 of the Act for reopening such assessment as the said concept is abhorrent to the special income of assessment of undisclosed income for block period. At the cost of repetition it is

required to be stated and emphasised that the first proviso under Section 158BC (a) of the Act specifically provides that no notice under Section 148 of the Act is required to be issued for the purpose of proceeding under Chapter XIV-B of the Act.”

23. In ***Smt. Mira Ananta Naik v. DCIT*** (supra), the Bombay High Court has also held that once the Department has resorted to Section 158BA to 158BC undertaken for the block assessment it could not be said that the income had escaped assessment merely because the block assessment was not upheld by the Tribunal. The attempt by the Department to reopen the assessment under Section 147 of the Act was held to be impermissible.

24. In ***CIT v. C. Sivandan (2011) 52 DTR 428 (Ker)***, the Kerala High Court followed the above decision in ***Smt. Mira Ananta Naik*** (supra). In ***ACIT v. Sunil Kumar Jain*** (supra) the Chattisgarh High Court followed the decision of Gujarat High Court in ***Cargo Clearing Agency (Gujarat)*** (supra).

25. In the facts and circumstances of the present case, the Court is satisfied that reopening of the assessment for AYs 1994-95 to 1996-97 by the impugned notices dated 31st May 2001 under Section 148 of the Act during the pendency of the block assessment proceeding was impermissible in law. Having initiated the proceeding under Section 158BC for the block assessment, there was no justification to issue the aforementioned notice under Section 147 of the Act as that would undoubtedly result in parallel proceedings. They are based on the same materials which form subject matter of the block assessment. The impugned notices dated 31st May 2001 are hereby quashed.

26. However, it is clarified that the Court has not expressed any view on any aspect of the block assessment proceeding or the materials gathered for that purpose and which form the subject matter of the proceedings before the ITSC. By virtue of all the applications filed by the Petitioners having been allowed to be proceeded with by the order 3rd August 2016 of the ITSC, it will be open to the ITSC to examine these aspects in the proceedings pending before it. However, it is also clarified that neither ITSC nor any of the parties to the pending proceedings refer to any part of the notices under Section 147 of the Act or the reasons for such reopening as such notices have been quashed by the present judgment of this Court.

27. The petition is disposed of in the above terms but, in the facts of the case, with no orders as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 25, 2017/Rm