IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.08.2018

C O R A M

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.33317 of 2017
and
WMP No.36759 of 2017

M/s.Govel Trust,
Rep. by its President,
Mr.G.Srinivasan,
No.1, Arvind Eye Hospital,
Anna Nagar,
Madurai 625 020. ...Petitioner

vs

1.The Deputy Commissioner of Income-Tax (Exemptions),
2nd Floor, May Flower Mid City Building,
1510, Trichy Road,
Coimbatore 641 018.

2.Commissioner of Income-Tax (Exemptions),
No.121, Mahatma Gandhi Road,
Chennai 600 034. ...Respondents

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records in AAATG2522P dated 24.03.2017 issued by the first respondent relating to the Assessment Year 2010-11 and quash the same and further direct the first respondent not to initiate any further proceedings or action pursuant to order in 215/AAATG2522P/DCIT/Exem/CBE/2017-18 dated 11.12.2017.

For petitioner : Mr.M.P.Senthilkumar
For Respondents: Mrs.Hema Muralikrishnan
Senior Standing Counsel (IT)

O R D E R

The petitioner is a public charitable trust and an assessee under the first respondent. The present Writ Petition is filed challenging the order of the first respondent dated

11.12.2017 preceded by a notice issued under section 148 of the Income Tax Act dated 24.03.2017. Through the impugned proceedings, the first respondent reopened the assessment under section 147 of the said Act in respect of the Assessment Year 2010-11 only on the reason that the depreciation to the extent of Rs.6,74,60,921/- claimed and allowed as an application of income was not in consonance with ruling of the Hon'ble Supreme Court in the case of Escorts Limited vs Union of India reported in 189 ITR 44 and followed by the Hon'ble High Court, Ernakulam in the case of M/s.Lissie Medical Institutions vs. CIT reported in 76 DTR (Kerala) 372. In other words, it is the contention of the Revenue that allowing such depreciation would amount to a double benefit.

2.This Court, while entertaining the writ petition on 20.12.2017, granted an order of interim stay of the impugned order with detailed discussions and reasoning for doing so. The said order reads as follows:

> "Heard the learned counsel for the petitioner.
>
> 2. The petitioner is a charitable trust registered under Section 12A of the Income Tax Act, 1961. In this writ petition, the petitioner challenges the notice issued by the first respondent under Section 148 of the said Act, in and by which, the first respondent stated that he has reason to believe that the petitioner's income, of which, they are assessable and chargeable to tax for the assessment year 2010-11, has escaped assessment within the meaning of Section 147 of the said Act.
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> 3. On receipt of the notice, the petitioner sent a reply dated 24.4.2017 stating that there is no escapement of income, that the income returned by them in the returns is correct and complete and that the return did not require any modification. Without prejudice to the said submission, the petitioner sought a copy of the reasons recorded by the first respondent to be furnished to them. Accordingly, by communication dated 03.7.2017, the first respondent communicated the reason stating that the depreciation as claimed and allowed in the assessment order dated 30.1.2013 is not in consonance with the decision of the Hon'ble Supreme Court in the case of Escorts Limited Vs. Union of India [reported in 189 ITR 44], which was followed by the High Court of Kerala in the case of M/s.Lissie Medical Institutions Vs. CIT [reported in 76 DTR (Kerala) 372] and the clarification given by the Central Board of Direct Taxes before the High Court in the said case.

Therefore, the respondent stated that he has reason to believe that excess depreciation allowance under the said Act has been computed and that as per Clause c (iv) to Explanation 2 to Section 147 of the said Act, income chargeable to tax has escaped assessment.

4. The petitioner submitted their objections dated 04.12.2017 pointing out, among other things, that the Hon'ble Division Bench of this Court in the case of DIT Vs. M/s.Medical Trust of the Seventh Day Adventists [TCA.No.844 of 2010 etc. cases dated 08.8.2017] considered similar assessments and ultimately distinguished the decision of the Hon'ble Supreme Court in the case of Escorts Limited, which was followed by the Kerala High Court in the case of M/s.Lissie Medical Institutions, as it turns on an entirely different position of law and would not impact the issue raised by the first respondent in the reopening proceedings. Furthermore, it was stated that the reopening is a clear case of change of opinion, that the claim regarding depreciation was thoroughly considered by the Assessing Officer when the petitioner's case was selected for scrutiny under Section 143(3) of the said Act and the assessment order was passed on 30.1.2013 and that reopening the assessment after a period of four years for the reasons assigned is not tenable.

5. However, the first respondent, by the impugned proceedings dated 11.12.2017, rejected the petitioner's objections. In paragraph 10 of the impugned order, the first respondent would take a stand that the decision of the Hon'ble Division Bench of this Court relied upon by the petitioner - assessee has not become final, as the Department has filed a special leave petition before the Hon'ble Supreme Court in the case of CIT Vs. Bangalore Baptist Hospital Society arising out of a judgment of the Karnataka High Court and the Hon'ble Supreme Court has admitted the special leave petition.

6. If that be the case, the question would be as to whether the first respondent was justified in reopening the assessment by relying upon those two decisions, when the jurisdictional High Court in the case of M/s.Medical Trust of the Seventh Day Adventists has taken a different view, which would bind the first respondent. That apart, this Court finds from the return of income filed by the petitioner that the claim regarding depreciation has

been disclosed and that the Assessing Officer, who completed the assessment under Section 143(3) of the said Act, observed that the Accounts Officer of the trust appeared for the hearing held on various dates and produced books of accounts, bills, statements and other details, based on which, the case was heard and the details produced were verified. In such circumstances, the basic facts, if furnished by the petitioner at the time of scrutiny were available in the file, can the first respondent, on the very same set of facts, issue the impugned proceedings for reopening the assessment. In the reasons for reopening, the first respondent does not assign such a reason that he proceeds only on the decision of the Hon'ble Supreme Court in the case of Escorts Limited, which was followed in the case of M/s.Lissie Medical Institutions.

7. Admittedly, the decision of the Hon'ble Supreme Court in the case of Escorts Limited was very much available even when the petitioner's case was taken up for scrutiny under Section 143(3) of the said Act, as the said decision was rendered in the year 1999. Thus, this Court is of the view that the petitioner has made out a prima facie case for grant of an interim order.

8. The impugned order of assessment is stayed till the writ petition is heard and finally disposed of. Mrs.Hema Muralikrishnan, learned Senior Standing Counsel accepts notice for the respondents and seeks time to get instructions and file counter. List on 12.2.2018."

Thereafter, the matter is listed today for further hearing.

3. Today, learned counsel appearing for the petitioner as well as the learned Senior Standing counsel appearing for the respondents submitted that the issue involved in this case is covered in favour of the petitioner in view of the subsequent decision made by the Hon'ble Supreme Court in Commissioner of Income Tax vs. Rajasthan and Gujarati Foundation reported in (2018) 300 CTR Reports (SC) 1.

4.Perusal of the said judgment would show that the Apex Court, has in fact, overruled M/s.Lissie Medical Institutions decision rendered by the High Court of Kerala at Ernakulam by categorically observing that depreciation is allowable to charitable trust even if the entire expenditure incurred for acquisition of capital assets has been treated as application of income for charitable purposes under Section 11(1)(a), while insertion of Section 11(6) by way of Finance (No.2) Act, 2014 is effective only from Assessment Year 2015-16. Admittedly, the present case involves the Assessment Year 2010-11.

5.Learned Senior Standing counsel for the respondents fairly conceded that the issue involved in this case in respect of Assessment Year 2010-11 is squarely covered by the above decision of the Apex Court in favour of the petitioner. Moreover, it is also seen that a Division Bench of this Court in TCA Nos.844 of 2010, etc., in the case of Director of Income Tax, Exemption III, Chennai 34 vs M/s.Medical Trust of the Seventh Day, has also found the very same issue in favour of the petitioner herein.

6.Thus, considering the above stated facts and circumstances, this writ petition is allowed and the impugned proceedings are set aside, since the impugned reopening was made only on the ground that depreciation claimed by the petitioner was not allowable, while the said question was answered against the Revenue in the above said ruling of the Supreme Court in respect of the Assessment Years prior to 2015-16. The connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS IX)

//True copy//

Sub Assistant Registrar

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To

1.The Deputy Commissioner of Income-Tax (Exemptions),
2nd Floor, May Flower Mid City Building,
1510, Trichy Road,
Coimbatore 641 018.

2.Commissioner of Income-Tax (Exemptions),
No.121, Mahatma Gandhi Road,
Chennai 600 034.

+1cc to Mr.Hema Muralikrishnan, Advocate SR.No.54811
+1cc to Mr.G.Baskar, Advocate SR.No.54833

W.P.No.33317 2017

GN(20/08/2018)