

RESERVED ON : 19.03.2018

DELIVERED ON : 28.03.2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2018

CORAM

THE HON'BLE Mr. JUSTICE M.DURAI SWAMY

W.P.No.25210 of 2017 and

W.M.P.No.26653 of 2017

M/s.Beta Wind Farms Private Limited
Sigappi Ache Building, 4th Floor,
No.18/3, Rukmani Lakhsmipathy Salai,
Egmore, Chennai - 600 008,
rep by its DGM.

... Petitioner

Vs.

The Deputy Commissioner of Income Tax,
Corporate Circle (2),
Aayakar Bhavan,
No.121, Nungambakkam High Road,
Chennai - 600 034.

... Respondent

Petition filed under Article 226 of The Constitution of India praying to issue a writ of certiorarified mandamus to call for the records of the respondent in his proceedings leading to issuance of Order in reply to objection for reopening of assessment u/s 147 dated 22.08.2017, quash the same and direct the respondent to drop the re-assessment proceedings.

For Petitioner : Mr.S.Sathiyarayanan

For Respondent : Mrs.Hema Muralikrishnan,
Senior Standing Counsel

O R D E R

The petitioner has filed the above Writ Petition to issue a writ of certiorarified mandamus to call for the records of the respondent in his proceedings leading to issuance of Order in reply to objection for reopening of assessment under Section 147 dated 22.08.2017 and to quash the same and to direct the respondent to drop the re-assessment proceedings.

2.The brief case of the petitioner is as follows:

(i)According to the petitioner, they are engaged in the generation of electricity through non-conventional source of Wind energy. The petitioner's income tax return for the assessment year 2012-13 was taken up for scrutiny assessment and after detailed scrutiny, including details relating to the addition to fixed assets by way of Windmills, the Assessing Officer had passed an assessment order. Subsequently, on account of Revenue Audit objection, a notice was sent for reopening of assessment and on enquiry, it was found that the depreciation claimed was not proper as the Windmills were not commissioned in the relevant previous year. The petitioner filed their objections for the said query and the details of Windmills and Commissioning Certificate issued by Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) was submitted as required by the Assessing Officer at the time of scrutiny assessment.

(ii)According to the petitioner, the reopening of assessment is only based on change of opinion and not on any material documents. Further, the petitioner had furnished all the details truly, without any concealment at the time of scrutiny assessment. Therefore, the reopening of assessment is unlawful and against the established legal principles. On 22.08.2017, the respondent had passed an order in reply to the objection for reopening of the assessment, without considering the established legal principles and ignoring the principles of natural justice. Aggrieved over the order dated 22.08.2017, the petitioner has filed the above Writ Petition.

3.The brief case of the respondent is as follows:

(i)According to the respondent, the petitioner's scrutiny assessment under Section 143(3) was passed on 13.03.2015 and at the time of passing of the assessment order, two issues, viz., allowance under Section 35AD claimed and disallowance under Section 14A alone were discussed and based on these discussions, the assessment was completed. There was no mention either in the order or in the order sheet about the claim of depreciation on the petitioner's Windmills. Only on verification of the Bills, it was found that the Windmills were commissioned only after 12.04.2012, therefore, the petitioner's averments that the order was passed after considering all the facts relating to the Windmills are contrary to facts.

(ii)The reasons for reopening the assessment for the assessment year 2012-13 were provided to the petitioner Company. The depreciation was wrongly made and on that ground, the assessment was reopened. The petitioner produced the particulars regarding the details of purchase of Windmills and

not the Commissioning Certificate from TANGEDCO. Had the petitioner produced, there would have been no reason for reopening.

(iii) It is verified from the details of Windmills purchased and the Commissioning Certificate issued by TANGEDCO that all the certificates present a clear picture that the Units have been generated from 30.03.2012 to 13.04.2012. The TANGEDCO had issued the certificates from 30.03.2012 to 13.04.2012, since the Bill in question is dated 12.04.2012 (i.e.) from GAMESA Wind Turbines Private Limited, which entity has erected and commissioned the Windmills. The Certificate issued by TANGEDCO does not disclose the Units received from the assessee from 30.03.2012 to 13.04.2012. Therefore, it becomes necessary to ascertain whether the commissioning was done on 30.03.2012, in view of the fact that the Bill for commissioning and erection is dated 12.04.2012 issued by GAMESA Wind Turbines Private Limited, Chennai.

(iv) The Bill dated 12.04.2012 would reflect the fact that the charges claimed on completion of erection and commissioning of 8 Wind Turbine Generators. Therefore, it is clear that the erection and commissioning was not done before 31.03.2012 and assuming that the Wind Turbine Generators are commissioned on or prior to 31.03.2012, the Bill dated 12.04.2012 remains a contradictory fact. The order dated 22.08.2017 has been passed only after considering the present facts, circumstances and also the veracity of the erection and commissioning of the 8 Wind Turbine Generators, which fact is clear from the Bill dated 12.04.2012, which otherwise should have been dated 31.03.2012.

(v) No opinion regarding date of commissioning of Windmills and the petitioner's eligibility for depreciation was formed during the original scrutiny assessment. Till date, the petitioner has not filed the details of Units generated date-wise to prove that the Windmills were commissioned on 30.03.2012. The invoice of completion of erection and installation of Windmill raised on the petitioner by its supplier is dated 12.04.2012 and is beyond comprehension as to how the petitioner would have commissioned the Windmills on 30.03.2012. Therefore, there is a prima facie case made out for reopening of the assessment under Section 148 and it is for the petitioner to prove the factual details before the Assessing Officer.

(vi) The order dated 13.03.2015 had been passed by considering the issues covered by Section 35AD and Section 14A and no opinion was formed regarding the petitioner's eligibility to claim depreciation of Windmills for the assessment year 2012-13. The issue is not the satisfaction of the Assessing Officer about the eligibility of the petitioner

to claim depreciation, but when there had been wrong allowance of depreciation and the same is identified, the same has to be remedied by taking recourse to Sections 147 and 148. When there had been wrong allowances of depreciation and the Assessing Officer is satisfied about that, the same authority is at liberty to reopen the assessment.

(vii) The impugned order dated 22.08.2017 is not with mala fide intention and it is only to verify whether correct allowance of depreciation is done, which was not done at the time of scrutiny assessment. The principles of natural justice does not arise in this case as it is only with a purpose to set right the wrong allowance of depreciation, which is allowable as per the provisions of Income Tax Act. The impugned order is not per se, but only to consider the provisions of the Income Tax Act. The respondent has called upon the petitioner to prove its contention that the Windmill was commissioned before 31.03.2012 and it is not understandable as to why the petitioner is feeling shy of the same. In these circumstances, the respondent prayed for dismissal of the Writ Petition.

4. Heard Mr.S.Sathiyarayan, learned counsel appearing for the petitioner and Mrs.Hema Muralikrishnan, learned senior standing counsel appearing for the respondent.

5. Mr.S.Sathiyarayan, learned counsel appearing for the petitioner submitted that the respondent had passed the impugned order for reopening the assessment for the assessment year 2012-13 after the passing of the scrutiny assessment order on 13.03.2015, which was passed by the Assessing Officer after examining the records in details. Further, the learned counsel submitted that the respondent had come to a wrong conclusion that the assessee has failed to disclose fully and truly all material facts required for the assessment. The learned counsel also submitted that when the Assessing Officer was satisfied about the eligibility of the petitioner to claim depreciation based on the documents furnished and also on the facts, cannot now reopen as it only amounts to case of change of opinion and therefore, reassessment proceedings cannot be sustained.

5.1. In support of his contentions, the learned counsel for the petitioner relied upon a judgment reported in (2017) 99 CCH 0019 DelHC [Director of Income Tax (International Taxation) & Ors. Vs. Rolls Royce Industrial Power India Ltd., & Ors.] wherein a Division Bench of the Delhi High Court held as follows:

"...

19. The fact of the matter is that during the course of the original assessments under Section 143 (3), the AO did serve upon the Assessee a details

questionnaire. The AO examined the nature of the transactions involving the Assessee and the payments received therefor. The reopening was not based on any fresh material. By revisiting the same materials the successor AO now concluded that the payments received by the Assessee pursuant to the O&M Agreements should be treated as FTS. In the circumstances, the view taken by a successor AO on the same material was indeed nothing but a mere change of opinion. It is a well-settled legal proposition, as explained in Calcutta Discount Co. Ltd Vs. ITO [1961] 41 ITR 191 (SC) that once an Assessee has discharged the burden of not only producing the account books and other documents, but also the specific material relevant to the assessment, "it is for the Income-Tax Officer to draw the proper inferences of fact and law therefrom and the Assessee cannot further be called upon to do so for him." In Indian Oil Corporation Vs. ITO [1986] 159 ITR 956, the Court pertinently observed "it is for the authority to draw inference. It is not necessary for the Assessee to draw inference." These observations apply on all fours to the case on hand. Here the Assessee had discharged its burden of disclosing fully and truly all the material facts before the AO during the original assessments. There was no basis for the successor AO to conclude that "no opinion with regard to taxation" of the payments received for the services rendered had been formed by the AO. It is plain that the pre-condition for invoking Section 147 did not exist. The assumption of jurisdiction under Section 148 of the Act was not valid."

6. Countering the submissions made by the learned counsel for the petitioner, Mrs. Hema Muralikrishnan, learned senior standing counsel for the respondent submitted that the respondent has called upon the petitioner to prove its contention that the Windmills were commissioned before 31.03.2012 for the reason that the petitioner's supplier's invoice for the completion of installation and erection of Windmill is dated 12.04.2012, therefore, the respondent has rightly reopened the assessment of the petitioner. Further, the learned standing counsel submitted that the impugned order is only an order disposing of the petitioner's objections to the reasons for reopening of the assessment and that the petitioner has contended as though the impugned order called upon them to prove their case. The learned counsel further submitted that the impugned order is not per se and there was no mala fide intention to pass the impugned order.

6.1. In support of her contentions, the learned senior standing counsel relied upon a judgment reported in [2002] 125 Taxman 965 (SC) [GKN Driveshafts (India) Ltd., Vs. Income Tax Officer] wherein the Apex Court held as follows:

"...

There was no justifiable reason to interfere with the order under challenge. However, it was clarified that when a notice under Section 148 is issued, the proper cause of action for the noticee is to file return and if he so desires, to seek reasons for issuing notice. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons had been disclosed in the proceedings, the Assessing Officer had to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment."

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the petitioner Assessee Company filed its e-Return of Income on 27.09.2012 for the assessment year 2012-13, admitting a NIL income and claiming current year loss of Rs.35,05,24,397/-. After completing the formalities, scrutiny assessment under Section 143(3) was passed on 13.03.2015 making disallowance under Section 35AD of Rs.13,96,553/- and disallowance under Section 14A of Rs.38,10,686/-, thereby, determining the current year loss at Rs.34,53,17,158/-. By order dated 22.08.2017, the respondent rejected the petitioner's objections for the reasons for reopening the assessment for the year 2012-13. The respondent had sought to reopen the assessment by issuing the notice dated 12.04.2012 containing reasons for reopening is that the assets viz., Wind Energy Generators were commissioned and put up to use only during the financial year 2012-13. While submitting their objections, the petitioner pointed out that all the particulars were furnished to the Assessing Officer during the scrutiny assessment under Section 143(3) of the Income Tax Act. The Assessing Officer has also made a reference in the order dated 13.03.2015 as to the presence of the authorized representative of the petitioner and the filing of their objections as called for. As per the Certificate issued by the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), the Wind Electric Generators were commissioned on 29.03.2012. While completing the assessment and passing the order dated 13.03.2015, the Assessing Officer has considered the Certificate issued by the TANGEDCO to the effect that the Wind Electric Generators were

commissioned on 29.03.2012. The Certificate also states that the one Electric Generator has been tied up with TNEB 11 kv Grid.

8. On a perusal of the reasons for reopening, furnished by the respondent, along with the letter dated 12.04.2017, it could be seen that the respondent had no other material to disbelieve the Certificate issued by TANGEDCO. In the absence of any material to disbelieve the Certificate issued by TANGEDCO stating that the Generators were commissioned on 29.03.2012, the present attempt to reopen the assessment is a clear change of opinion. The respondent could not have reopened the assessment when the Certificate and materials were considered by the Assessing Officer while completing the assessment and passing the order dated 13.03.2015.

9. The judgment relied upon by the learned counsel for the petitioner applies to the present case.

10. Since the facts of the present case are different from the judgment relied upon by the learned standing counsel for the respondent, the same is not applicable.

11. The respondent himself, in his counter, has stated that had the petitioner produced the Commissioning Certificate issued by the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), there would have been no reason for reopening the assessment. Now that the petitioner had produced the Certificate from the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) and in spite of receiving the same, reopening of the assessment cannot be sustained. The present attempt to reopen the assessment is a clear change of opinion and therefore, the impugned order dated 22.08.2017 is liable to be set aside. Accordingly, the same is set aside. The Writ Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/
Assistant Registrar

/True copy/

Sub Assistant Registrar

To

The Deputy Commissioner of Income Tax,
Corporate Circle (2),
Aayakar Bhavan,
No.121, Nungambakkam High Road,
Chennai - 600 034.

+1cc to Mr.S.Sathyanrayanan Advocate SR.No.23597

+1cc to Mrs.Hema Muralikrishnan Advocate SR.No.23816

Order made in
W.P.No.25210 of 2017 and
W.M.P.No.26653 of 2017

SDR 09.04.2018