IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.01.2018

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.8569 of 2006 & WPMP No.9518 of 2006

M/s.India Electronics, rep. by its
Partner, V.Gurunathan,
No.167-168, Nehruji Road,
Villupuram-605 602. ... Petitioner

Vs.

1.The Joint Commissioner of Income Tax,
Range II, Cuddalore.

2.The Income Tax Officer, Ward I(1),
No.1, Chairman Subbarayar Street,
West Shanmugapuram, Villupuram. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, calling for the records of the second respondent in his proceedings in PAN:AAAF12397A : GIR.No.307-I, dated 12.08.2004 under Section 148 of the Income Tax Act, and the impugned order dated 01.03.2006 in PAN: AAAF12397A : GIR.No.307-I, for reassessment of the petitioner's income tax return for the assessment year 1999-2000 and to quash the same.

For Petitioner : Mr.A.Muthukumar

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel
: assisted by Mr.A.N.R.Jayaprathap
Junior Standing Counsel

O R D E R

Heard Mr.A.Muthukumar, learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel assisted by Mr.A.N.R.Jayaprathap, learned Junior Standing Counsel for the respondents.

2.The petitioner, a partnership firm represented by its partner V.Gurunathan, is aggrieved by an order passed by the second respondent rejecting the petitioner's objections for reopening of the assessment for the assessment year 1999-2000 by invoking the power under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The basis for reopening of the assessment is a statement, which is said to have been recorded from one of the partners of the firm by name, Shri S.Balasubramanian, during the course of survey conducted in the business premises of the petitioner on 06.03.2002. The respondent would state that in the said statement, the partner stated that there is an understatement of the cost of construction of a commercial building, which was put up by the petitioner during the assessment year 1999-2000 and such statement was recorded in the course of survey under Section 133A of the Act and this statement was also confirmed by the petitioner's partner and therefore, the second respondent has reason to believe that income chargeable to tax for the assessment year 1999-2000 within the meaning of Section 147 of the Act has escaped assessment.

3.Admittedly, reopening has been done after a period of four years and the second respondent should have tangible material available with him other than the material, which was considered by the assessing officer while completing the assessment based on the return dated 30.12.1999. In fact, after giving credit to the advance tax paid, the petitioner was granted refund of a sum of Rs.3,353/- during the regular assessment. It is seen that the petitioner was confronted with the statement given by their partner viz., S.Balasubramanian, for the first time when the impugned reopening proceedings were initiated and it came to his knowledge only after the petitioner sought for reasons for reopening, which were furnished to the petitioner on 24.11.2004. On seeing the said reasons, the petitioner has submitted objections and also filed an affidavit of partner under what circumstances the statement was recorded and how the partners were under tremendous pressure, as the survey proceedings were going on throughout the night. Thus, in effect, the petitioner disputed the correctness of the statement. If that is so, can the second respondent rely on the said statement and reopen the proceedings.

4.The counter affidavit proceeds to justify the impugned action by placing reliance on the decision of the Hon'ble Allahabad High Court in the case of Dr.S.C.Gupta vs. Commissioner of Income Tax reported in [2001] 248 ITR 782. This judgment was considered by the Hon'ble Division Bench of this

Court in the case of Commissioner of Income-Tax v. S.Khader Khan Son reported in [2008] 300 ITR 157 (Mad). Among other things, the Court held that the statement recorded during the course of survey action under Section 133A of the Act shall not have any evidentiary value and solely based on the said statement given by one of the partners of the firm, the question of reopening cannot be done. Further, after taking note of the decision in the case of Dr.S.C.Gupta (supra), the Court held that the power to examine a person on oath is specifically conferred on the authorities only under Section 132(4) of the Act in the course of any search or seizure and Section 133A does not empower any income-tax officer to examine any person on oath.

5.Reliance was also placed on the decision of the Kerala High Court in the case of Paul Mathews and sons v. CIT reported in [2003] 263 ITR 101, wherein it was held that whatever statement recorded under Section 133A of the Act is not given any evidentiary value. In the instant case, the petitioner has denied such statement in their objections, which is in the nature of retraction. If the statement of the partner, which was relied on by the second respondent is eschewed, then there is no material available with the second respondent to reopen the assessment.

6.One more contention advanced by the learned counsel for the petitioner is that no prior sanction was obtained, as required under proviso to Section 151 of the Act. The notice under Section 148 of the Act dated 12.08.2004, states that notice has been issued after obtaining necessary sanction from the Joint Commissioner Income Tax, Range-II, Cuddalore. While furnishing the reasons for reopening, the officer states that proceedings will be initiated after obtaining necessary approval from the Joint Commissioner of Income Tax, as per Section 151 of the Act. This has been clarified by the respondent in the counter affidavit stating that the approval was obtained on 10.08.2004, much prior to the issuance of the notice under Section 148 of the Act. Further, the averment in the reasons for reopening has been explained in the counter affidavit to be an inadvertent error. The submission of the revenue in this regard is acceptable.

7.However, I am satisfied that there is absolutely no basis for reopening of the assessment. That apart, though the second respondent seeks to bring out a case of underestimation in the cost of construction by referring to the statement of the partner, the second respondent himself called for a valuation report from the Public Works Department and I find that the cost of the construction as disclosed in the return for the assessment year 1999-2000 and the valuation, which was done by the Public Works Department officials in the year 2003 has only marginal difference and the variation appears to be around

Rs.1,00,000/-. Thus, on his own showing, the second respondent was not able to bring out a case of underestimation of the cost of construction. Thus, for the above reasons, I find that the impugned reopening proceedings are wholly without jurisdiction and illegal.

Accordingly, this writ petition is allowed and the impugned reopening proceedings are quashed. No costs.

Sd/
Assistant Registrar

/True copy/

Sub Assistant Registrar

To

1.The Joint Commissioner of Income Tax,
Range II, Cuddalore.

2.The Income Tax Officer, Ward I(1),
No.1, Chairman Subbarayar Street,
West Shanmugapuram, Villupuram.

+1cc to Mr.A.P.Srinivas Advocate SR.No.2019/18

+1cc to M/sA.Muthukumar Advocate SR.No.1811/18

W.P.No.8569 of 2006

SDR 05.02.2018