IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 02.01.2018
Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition Nos.29413 to 29416 of 2017
and
W.M.P.Nos.31685 to 31688 of 2017

1. P. Chidambaram ...Petitioner in W.P.No.29413 of 2017
2. Karti P. Chidambaram ...Petitioner in W.P.No.29414 of 2017
3. Smt. Nalini Chidambaram ...Petitioner in W.P.No.29415 of 2017
4. Srinidhi Karti Chidambaram ...Petitioner in W.P.No.29416 of 2017

Vs.

1. The Assistant Commissioner of Income Tax,
Non-corporate Circle-3,
Room No.623-A, 6th Floor,
Wanaparthy Block,
121, MG Road, Nungambakkam,
Chennai - 600 034.
...sole Respondent in WP.29413/17 &
1st Respondent in WP.29414 to 29416/17

2. The Assistant Commissioner of Income Tax,
Central Circle - 2 (1),
Investigation Builiding, Room No.122,
1st Floor, New No.46,
MG Road, Nungambakkam,
Chennai - 600 034.
R-2 in W.P.Nos.29414 to 29416 of 2017

3. The Principal Commissioner of Income Tax-5,
Income Tax Department,
Wanaparthy Block,
5th Floor, No.121, Mahatma Gandhi Road,
Chennai - 600 034.
R-3 in W.P.Nos.29414 to 29416 of 2017

Prayer in W.P.No.29413 of 2017

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records, relating to the notice issued by the respondent, dated

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31.03.2017, having Ref No.F.No.REF/REOP/2016-17, under Section 148 of the Income Tax Act, 1961, to the petitioner, having PAN : AAAPC5522H for the assessment year 2010-11 and to quash the same.

Prayer in W.P.No.29414 of 2017

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records, relating to the notice issued by the first respondent, dated 31.03.2017, having Ref No.F.No.REF/REOP/2016-17, under Section 148 of the Income Tax Act, 1961, to the petitioner, having PAN No. AAAPC5488J for the assessment year 2010-11 and to quash the same.

Prayer in W.P.No.29415 of 2017

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records, relating to the notice issued by the first respondent, dated 31.03.2017, having Ref No.F.No.REF/REOP/2016-17, under Section 148 of the Income Tax Act, 1961, to the petitioner, having PAN No. AAAPC5521E for the assessment year 2010-11 and to quash the same.

Prayer in W.P.No.29416 of 2017

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records, relating to the notice issued by the first respondent, dated 31.03.2017, having Ref No.F.No.REF/REOP/2016-17, under Section 148 of the Income Tax Act, 1961, to the petitioner, having PAN No. AASPS5251M for the assessment year 2010-11 and to quash the same.

For Petitioners : Mr.Sathish Parasaran, Senior Counsel for M/s. C.Uma

For Respondents : Mr.G. Rajagopalan, Additional Solicitor General for Mrs. Hema Murali Krishnan Senior Standing Counsel

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COMMON O R D E R

Heard Mr. Sathish Parasaran, the learned Senior Counsel for Mrs.C.Uma, the learned counsel for the petitioners and Mr.G. Rajagopalan, the learned Additional Solicitor General for Mrs. Hema Murali Krishnan, the learned Senior Standing Counsel for the respondents.

2. These Writ Petitions have been filed by the petitioners, challenging the notices issued for reopening the assessment for the assessment year 2010-11.

3. The learned Senior Counsel appearing for the petitioners submitted that, an identical issue was considered by this Court, in respect of the earlier assessment year in W.P.Nos.1589, 1590, 1843 and 1855 of 2017, and the said Writ Petitions were allowed, by order, dated 13.11.2017, and the present Writ Petitions are squarely covered by a earlier decision.

4. When the matters came up for admission before this Court on 17.11.2017, Mr. G. Rajagopalan, the learned Additional Solicitor General appeared in the matter on behalf of the Revenue, and submitted that, they are yet to receive certified copy of the order, dated 13.11.2017 passed in W.P.Nos.1589, 1590, 1843 and 1855 of 2017, and they have to gothrough the order. Considering the fact that, in respect of the previous assessment year, the facts were identical and reopening proceedings were challenged, this Court granted interim order, and adjourned the matters to 21.11.2017. However, it appears that the cases were listed earlier and they have been adjourned to today.

5. The learned Senior Standing Counsel for the Revenue would contend that the Revenue is in the process of filing Appeal against the order passed on 13.11.2017.

6. In any event, since the issue pertaining to the present reopening proceedings is identical to that of the earlier batch of case, this Court is inclined to follow its earlier decision, which is prevailing as on date. At this juncture, it is useful to refer to the relevant portion of the said order, dated 13.11.2017, which is as follows:-

> " 10. Heard the learned counsels for the parties and carefully perused the materials placed on record.
>
> 11.Broadly three issues fall for consideration in this writ petition, namely,
>
> 1) Whether the impugned notice issued under Section 148 of the Act is on account of change of opinion of the Assessing Officer when the petitioner's case is that he has fully and truly disclosed all the details at the time of scrutiny assessment and whether any

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tangible material was available with the Assessing Officer to come to a conclusion that income chargeable to tax has escaped assessment during the relevant year?

2) Whether the respondent had complied with the mandate laid down by the Hon'ble Supreme Court in the case of GKN Drive Shafts (India) Limited vs. Income Tax Officer - 2002 Supp (4) SCR 359?

3) Whether the impugned reopening proceedings and the consequential assessment order amounts to discrimination by singling out the petitioner and taking up the case for reopening the assessment for the relevant year when there are several hundreds of similar coffee growers whose claim for exemption has not been questions or reopened?

12.In the decision in the case of Commissioner of Income Tax vs. Dinesh Chandra H.Shah and others reported in 1971 (82) ITR 367 ITR, the matter arose under the Income Tax Act, 1922 pertains to an action under Section 34(1)(b) of the 1922 Act (which is in paramateria with Section 147 of the Income Tax Act, 1961). The question which was referred to the High Court was whether on the facts and circumstances of the case, the Tribunal was justified in holding that the action under Section 34(1)(b) of the 1922 Act was legal and valid. The High Court opined that there may be information existing on record or brought to the notice which does not become informative at the first sight and requires further consideration and in such cases, realisation of the fact of the information subsequently may give to the Income Tax Officer the jurisdiction to start proceedings under Section 34(1)(b) of the 1922 Act but the mere fact that the Income Tax Officer changes his opinion subsequently or the fact that he fails to notice a palpable or glaring matter earlier should not be treated as additional information coming to his

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notice subsequent to the assessment order and accordingly the question was answered against the revenue. The Hon'ble Supreme Court while dismissing the appeal filed by the revenue held that a mere change of opinion regarding the chargeability of income on the part of the reassessing Officer, different from his own opinion or that of his predecessor in office, does not justify the action under Section 34(1)(b) of the 1922 Act.

13.In the case of Commissioner of Income Tax, Delhi vs. Kelvinator of India Limited, the Hon'ble Supreme Court pointed out that the conceptual difference between power to review and power to reassess has to be kept in mind. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, then in the garb of reopening the assessment, review would take place. It was further pointed out that the concept of change of opinion should be treated as an in-built test to check abuse of power by the Assessing Officer. Hence, after 01.04.1989 the Assessing Officer has the power to reopen, provided there is tangible material to come to the conclusion that there is an escapement of income from assessment. The reasons must have a live link with the formation of the belief.

14.In the case of Calcutta Discount Company Limited, the Hon'ble Supreme Court examined the words used in the provision "omission or failure to disclose fully and truly all material facts necessary for assessment for that year" and held as follows:

> "10.Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him

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to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences whether of facts or - law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law he would draw from the primary facts.

11.If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?

Thus, if primary facts have been disclosed before the Assessing Officer, he would require no further assistance by way of disclosure and he has to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. Thus, if from the primary facts more than one inferences can be drawn, it would not be possible to say the assessee should have drawn a particular inference nor can he be charged for any failure.

15.Having steered clear of the legal position, we need to apply the same to the facts of the present case. Two conditions are required to be satisfied before the respondent could issue notice under Section 148 of the Act, namely, (1) he must have

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reason to believe that income chargeable to tax has escaped assessment and (2) such income has escaped assessment by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for assessment for the year. The settled legal position is that both these conditions must co-exist in order to confer jurisdiction on the respondent. Further, the respondent should record his reasons before initiating proceedings under Section 148(2) of the Act; before issuing the notice after the expiry of four years from the end of the relevant assessment year. The assessee is expected to make a true and full disclosure of the primary facts. It is thereafter for the respondent to draw an inference from those primary facts. If on a further examination either by the same officer or by a successor, the inference arrived at appears to be erroneous, mere change of opinion would not be a justification to reopen the assessment.

16.In the instant case, the petitioner's assessment for the subject assessment year was taken up for scrutiny. All primary facts were available with the Assessing Officer. The Assessing Officer completed the scrutiny assessment vide order dated 30.12.2011. After the expiry of four years, the impugned notice dated 31.03.2016 was issued. The petitioner requested for the copy of the reasons for reopening vide representation dated 13.04.2016. The respondent by communication dated 19.04.2016 furnished the reasons for reopening. On a perusal of the reasons, I find that the respondent on verification of the assessment records and the order sheet entries inferred that the Assessing Officer on scrutiny had failed to examine and deliberate on the correctness of the income reported under the head agricultural income. Further, the respondent would state that even though the assessee had derived the predominant portion of the agricultural income from sale of coffee seeds, the aspect as to whether the income so derived is completely exempt or is it a case falling under Rule 7B was also omitted to be

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verified. Added to this, the Assessing Officer was inspired by a direction issued by the ITAT in the case of one TC Abraham. Thus, on a mere reading on the reasons for reopening clearly show that there is no allegation against the petitioner that there has been omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that year. The so called reason to believe that income chargeable to tax has escaped assessment is on the ground that the Assessing Officer at the time of scrutiny assessment did not examine as to whether the entire agricultural income was completely exempted or not. This can hardly be a reason to believe that income chargeable to tax has escaped assessment as it is a clear case of change of opinion by the respondent. As pointed out in the case of Calcutta Discount Company Limited, the obligation on the part of the assessee does not extend beyond fully and truly disclosing all primary facts. It is for the Assessing Officer to take an inference on facts and law based on such disclosure. If according to the respondent, his predecessor did not come to a proper inference on the facts disclosed, it is no ground to reopen the assessment, as if permitted and it would amount to a clear case of change of opinion. In the light of the above discussion, the first issue framed for consideration is answered in favour of the petitioner and against the revenue.

17.The second issue is whether the respondent has complied with the directives in the case of GKN Drive Shafts (India) Limited. The Hon'ble Supreme Court pointed out that if the assessee desires and seeks for reasons for reopening, the Assessing Officer is bound to furnish reasons within a reasonable time and on receipt of the reasons, the assessee is entitled to file objections for issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. The reasons were furnished to the petitioner vide communication dated 19.04.2016. The petitioner through their authorized representative submitted

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objections dated 24.05.2016. The petitioner also sought for an opportunity of personal hearing in case the officer is not satisfied with the explanation. The next step that the respondent should have undertaken is to pass a speaking order on the objections. Unfortunately, the respondent did not do so, but sent a communication to the petitioner dated 30.08.2016 terming it as a rebuttal for objections for reopening the assessment.

18.The revenue's case is that the communication dated 30.08.2016 is an order with reasons and it is a speaking order and the respondent has complied with the directives in the case of GKN Drive Shafts (India) Limited. While it may be true that the rebuttal dated 30.08.2016 has given certain reasons and the merits of which cannot be gone into at this stage, but the respondent has not rejected the objections outright but afforded further opportunity to the petitioner to make further submissions and fixed the outer time limit as 08.09.2016 to make further submissions. This rebuttal dated 30.08.2016 cannot be treated to be an order as required to be passed in terms of the directives in the case of GKN Drive Shafts (India) Limited as the respondent himself did not attach any finality to it. The petitioner sought for extension of time to make further submissions and accordingly the same was made on 29.09.2016. This submission appears to be an elaborate submissions bringing out the distinction between pulping and drying of coffee and curing of coffee. Further it was pointed out that the Assessing Officer erred in referring to the decision of ITAT in the case of TC Abraham as one of the reasons for reopening when the said order was modified by the Tribunal and the matter has been remitted for reconsideration by the concerned Assessing Officer. Though the respondent gave an opportunity to the assessee to make further submission which the petitioner had availed and submitted the same on 29.09.2016, without reference to the said submission, notice dated 28.12.2016 was issued under Section 143 (2) of the Act directing the petitioner to attend the office of the respondent on the

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very next day, i.e. on 29.12.2016 at 10.30 a.m. Unfortunately, the respondent committed a mistake in the assessment order compelling him to issue a corrigendum. On 29.12.2016, the petitioner through its authorized representative appeared before the respondent and submitted a written request to keep the notice under Section 143(3) of the Act in abeyance till a speaking order is passed on the petitioner's further representation dated 29.09.2016. However, on 30.12.2016 without any opportunity to the petitioner, the impugned assessment order has been passed. Thus the facts clearly demonstrate that the respondent has not followed the directives in the case of GKN Drive Shafts (India) Limited. The rebuttal dated 30.08.2016 cannot taken as an order required to be passed on the objections given by the petitioner for reopening the assessment and the manner in which the impugned assessment order has been passed is wholly illegal and the entire proceedings are flawed. The respondent while issuing the rebuttal dated 30.08.2016 did not attach any finality to the proceedings but gave an opportunity to the petitioner to make further submission. On account of this, the petitioner had no opportunity to challenge the rebuttal dated 30.08.2016. This is one more ground to state that the proceedings are in violation of principles of natural justice. Accordingly this issue is answered in favour of the petitioner and against the revenue.

19.The third issue is whether there has been discrimination. The petitioner in the affidavit filed in support of the writ petition in more than one place has indicated that the petitioner has been singled out where several hundreds of coffee growers who are only doing pulping and drying of coffee seeds and not engaged in curing coffee seeds and not in a single case for the assessment year 2009-2010, reopening has been done. Though such an averment has been specifically raised by the petitioner, the same has not been controverted in the counter affidavit, thereby deemed to have been accepted. In the reply affidavit filed by the petitioner to

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the counter affidavit filed by the respondent in paragraph No.20 therein, the petitioner has referred to an application filed under the Right to Information Act by one Mr.Radhakrishnan who had made an application on 25.01.2017 requesting information as to in how many cases notice under Section 148 of the Act has been issued for reopening the assessment beyond four years of the relevant assessment years for the reason that sale proceeds of coffee seeds after drying and pulping in effect amounts to sale of cured coffee seeds, in how may cases the Department construed that an assessee who has sold raw coffee after pulping and drying and has disclosed in the return that the coffee was subjected to pulping and drying disclosing the expenditure incurred thereon and claimed exemption under Section 10(1) of the Act has not disclosed fully and truly all material facts for his/her assessment warranting reassessment and also warrants penalty and in how many cases the Department has reopened the assessment relying on the decision of the ITAT in the case of TC Abraham. Reply for the first question as given by the Information Officer, dated 01.02.2017, is "Nil". For the second question, it was stated that no case has been reopened under Section 148 of the Act for the reason mentioned supra and there is no case in the concerned ward where application of Rule 7B (1) of the Rules has been levied by the Assessing Officer. The above facts would clearly establish that the reopening proceedings are clearly discriminatory. Accordingly this issue is answered in favour of the petitioner and against the revenue.

20. For all the above reasons, the impugned proceedings, namely, the notice for reopening and the consequential assessment orders are held to be illegal, unsustainable and a clear case of change of opinion. The facts of the other three writ petitions, viz. W.P.Nos.1589, 1590 and 1843 of 2017, being identical, the conclusion arrived at by this Court in W.P.No.1855 of 2017 will equally apply to the other cases as well.

21. In the result, the writ petitions are

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allowed and the impugned proceedings are quashed. No costs. Consequently, connected miscellaneous petitions are closed. "

7. Thus, following the earlier decision of this Court, rendered in the above referred case, the present Writ Petitions are allowed and the impugned orders are set aside. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-ix)

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Sub Assistant Registrar

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To
1. The Assistant Commissioner of Income Tax,
Non-corporate Circle-3,
Room No.623-A, 6th Floor,
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121, MG Road, Nungambakkam,
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3. The Principal Commissioner of Income Tax-5,
Income Tax Department,
Wanaparthy Block,
5th Floor, No.121, Mahatma Gandhi Road,
Chennai - 600 034.

+2cc to Mr.C.UMA, Advocate, S.R.No. 67 & 68
+3cc to Mr.A.P.SRINIVAS, Advocate, S.R.No. 239
+1cc to Mr.HEMA MURALIKRISHNAN, Advocate, S.R.No. 118

Writ Petition Nos.29413 to 29416 of 2017

GP(CO)
TR(07/02/2018)

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