IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.7598 & 7599 of 2015 and M.P.Nos.1 & 1 of 2015

M/s.Tamil Nadu State Marketing
Corp. Ltd., rep. by its
Managing Director, Shri.T.Soundiah,
4th Floor, CMDA Tower-II,
Gandhi Irwin Bridge Road,
Egmore, Chennai-600 008. ... Petitioner in both W.Ps.

Vs.

1.The Chief Commissioner of Income Tax,
Chennai-3,
124, MG Road, Chennai-34.

2.The Commissioner of Income Tax,
Chennai-3,
124, MG Road, Chennai-34.

3.The Joint Commissioner of Income Tax,
Corporate Circle 3,
124, MG Road, Chennai-34.

4.The Assistant Commissioner of Income Tax,
Corporate Circle 3 (1),
124, MG Road, Chennai-34. ... Respondents in both W.Ps.

Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, to call for the records of the 4th respondent and quash the impugned orders dated 19.02.2015 and 20.02.2015 passed under Section 143(3) r.w.s 147 of the Income-tax Act, 1961 in PAN : AAACT2964P for the assessment year 2007-08 & 2009-10 respectively and direct the 4th respondent to grant opportunity of hearing on the objections filed by the petitioner on 10.02.2015.

For Petitioner : Mr.Vijayaraghavan
for Mr.Subbaraya Aiyar

For Respondents: Mr.J.Narayanaswamy,
Senior Standing Counsel

C O M M O N O R D E R

Heard Mr.Vijayaraghavan, learned counsel for the petitioner and Mr.J.Narayanaswamy, learned Senior Standing Counsel for the respondents.

2.The petitioner in these writ petitions is a State owned Corporation called Tamil Nadu State Marketing Corporation Ltd., which has been given the exclusive privilege right to engage in the business of trading/retail vending in liquor within the State of Tamil Nadu. In these writ petitions, the petitioner questions the orders of reopening of assessment passed by the fourth respondent (Corporate Circle 3 (1)) for the assessment years 2007-08 and 2009-10.

3.Mr.J.Narayanaswamy, learned Senior Standing Counsel for the Revenue objected to the maintainability of these writ petitions on the ground that, if the petitioner was aggrieved, they have to file regular appeals against the assessment orders dated 19.02.2015 & 20.02.2015 and they cannot bypass the appellate remedy available under the statute. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in Deputy Commissioner of Income Tax v. Divya Investment Private Limited, [2007] 15 SCC 99. As such preliminary issue has been raised, I propose to consider the same at the first instance.

4.Admittedly, regular assessment for the subject assessment years were completed and orders have been passed against the petitioner, which were challenged by the petitioner by way of appeals before the ITAT in ITA Nos.1367 to 1370/Mds/2012, and those appeals were allowed by the Tribunal, as against which the Revenue is on appeal before the Hon'ble Division Bench.

5.The core issue in those appeals is whether the privilege fee paid by the petitioner/Corporation to the State Government to enjoy the exclusive privilege to sell liquor in the State of Tamil Nadu is an allowable deduction in terms of Section 37 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). This issue has been answered in favour of the assessee for the relevant assessment year. After the orders were passed by the Tribunal dated 18.09.2012 and 30.10.2012 for the very same assessment years in favour of the assessee, the respondent issued notices under Section 148 of the Act stating that he has reason to believe that income, which are assessable/chargeable to tax for the relevant assessment year has escaped assessment within the meaning of Section 147 of the Act. The petitioner by letter dated 02.09.2013, requested for reasons for furnishing the reopening, which were furnished on 14.02.2014, for which the petitioner has submitted objections on 10.02.2015.

6.In terms of the decision of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. vs. ITO reported in [2003] 259 ITR 19, the respondent/assessing officer was expected to pass a speaking order and if aggrieved, the assessee is entitled to challenge the same. This procedure has been given a go-by. This defect committed by the assessing officer goes to the root of the matter thereby affecting the very validity of the impugned assessment order. Thus, when the Tribunal has held in favour of the petitioner in respect of the similar issue for the very same assessment year, would the present reassessment amount to a change of opinion is the question to be considered.

7.The case before the Hon'ble Supreme Court in Divya Investment Private Limited (supra) relied on by the learned counsel for the Revenue was couched on entirely different set of facts, where the High Court held that the Tribunals view would be binding on all subordinate authorities, so long as the view of the Tribunal is not reversed either by the Tribunal or by the superior Court and therefore, the Income Tax Department will continue to follow the view. Pointing out that under the Income Tax Act, the unit of assessment is a 'year' and when the case before the Supreme Court was not a block assessment, the assessee therein was directed to prefer appeals under Section 260-A of the Act. However, in the instant case, the impugned reopening proceedings and the consequential assessment orders pertain to the very same assessment years, which were subject matter of appeals before the Tribunal, in which the assessee has succeeded. Thus, for the above reason, I hold that these writ petitions are maintainable.

8.The next aspect to be seen is as to whether the impugned reopening proceedings and the consequential assessment orders are outcome of change of opinion. The manner in which the same has to be considered has been laid down in several decisions and the sum and substance of the conclusion is that the respondent should have reason to believe that income, which is assessable to tax, has escaped assessment and it cannot be a reason to suspect. That apart, it has been held that the duty of the assessee is only to disclose primary facts before the assessing officer and it is for the assessing officer to arrive at a conclusion on the facts disclosed.

9.Bearing the above legal principles in mind, if the reasons for reopening are seen, it is stated that the entire special privilege fee debited to the profit and loss account is not allowable, since it is an application of income and cannot be allowed as deduction under Section 37(1) or under any other provisions of the Act. In fact, for all the assessment years, the assessing officer himself granted partial relief to the assessee by allowing amount paid as special privilege fee as deduction under Section 37(1) of the Act, that is, by extending it for the period during the year in which the Government order is dated/passed.

10.By way of illustration, G.O.Ms.No.65 dated 27.10.2005 was passed fixing the amount as "43.37" instead of "46.35". Though this Government Order was issued in October, 2005, it was given retrospective effect from 01.04.2004. The Tamil Nadu Government has power to issue such retrospective notification in terms of Rule 2a of the Tamil Nadu Indian Made Foreign Spirit (Supply by Wholesale) Rules, 1983. Therefore, the issue before the assessing officer was whether the payment of special privilege fee can be allowed as deduction. The assessing officer held against the assessee and on appeal before the Tribunal, they succeeded. What the assessing officer now seeks to do is to reword his reasons for reopening by stating that the said amount of special privilege fee cannot be debited to the profit and loss account, as it is an application of income. In fact, this issue was considered and it has been decided in favour of the petitioner before the Tribunal and the said order of the Tribunal as on date holds the field.

11.More or less, identical issue came up for consideration before the Hon'ble Division Bench of the Karnataka High Court in the case of Karnataka State Beverages Corporation Ltd. vs. Commissioner of Income Tax reported in [2016] 283 TAXMAN 0299 (Karnataka), wherein the Court held that privilege fee payable by the petitioner therein viz., Karnataka State Beverages Corporation Ltd., which is some what similar to the petitioner/Corporation, to the State Government would be taxable with effect from 01.04.2004 and not prior thereto. It was further held that unreasonable privilege fee payable is also not a ground to hold that it is a device by which the petitioner and the State Government are avoiding payment of tax. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Har Shankar v. Deputy Excise and Taxation Commissioner AIR 1975 SC 1121. Ultimately, the Court set aside the assessment order in so far as it treats the privilege fee paid as being taxable income.

12.The decision in the case of Karnataka State Beverages Corporation Ltd. (supra) was noted and followed by the Tribunal in both it's orders dated 18.09.2012 and 30.10.2012. One more reason, which finds place in the reasons for reopening communicated to the petitioner vide proceedings dated 14.01.2015, is by stating that the issue of allowability of special privilege fee was examined in the assessment year 2010-11 and held against the assessee. This assessment order has now been set aside by the Tribunal in an appeal filed by the petitioner in ITA No.2866/Madras/2016, which was heard along with other appeals for other assessment years and by order dated 21.08.2017, the Tribunal allowed the assessee's appeal. I find that the Tribunal has taken note of the decisions in Karnataka State Beverages Corporation Ltd. (supra) and that of Har Shankar (supra). Learned Senior Standing Counsel submits that appeal has been preferred as against the said order passed by the ITAT.

13.In any event, as on date, there is no order of stay operating against the said decision of the Tribunal and it will bind the assessing officer and judicial discipline demands that the assessing officer follows the decision of the Tribunal, unless it is set aside or reversed. Thus, I am fully convinced that the impugned reopening and the consequential assessment orders are a clear case of change of opinion.

14.As pointed out earlier, the respondent did not follow the guidelines laid down by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) by which the respondent should have passed a speaking order and communicated to the petitioner before passing the impugned assessment orders. This defect though said to be stated as a curable defect, I am not inclined to accept the said submission of the revenue, as it affects the rights of the assessee and goes to the very root of the matter. In fact, the assessee has, while submitting the objections to the reopening vide representation dated 10.02.2015, specifically referred to the decision in GKN Driveshafts (India) Ltd. (supra), yet the assessing officer ignored the same and proceeded to pass the impugned assessment orders.

15.Thus, for the above reasons, the reopening proceedings are held to be a clear case of change of opinion. Consequently, the impugned assessment orders are not sustainable in law. Accordingly, these writ petitions are allowed as prayed for. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

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4.The Assistant Commissioner of Income Tax,
Corporate Circle 3 (1),
124, MG Road, Chennai-34.

+2cc to Mr.Subbaraya Aiyar, Advocate sr.no.3868

+2cc to Mr.J.Narayanaswamy, Advocate sr.no.4494,4693(22/03/18)

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