IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :05.02.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.41295 of 2002

O.N.Gugan Babu ...Petitioner

Vs.

1.Deputy Commissioner of Income Tax,
Central Circle, Salem - 7.

2.The Additional Commissioner of Income Tax,
Central Range, Coimbatore. ...Respondents

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records in P.A.N/G.I.R.No.CCPG. 002 dated 31.10.2002, on the file of the first respondent and quashing the same.

For Petitioner : Mr.M.P.Senthil Kumar

For Respondents : Mr.A.P.Srinivas and
Mr.A.N.R.Jayaprathap

O R D E R

Heard Mr.M.S.Senthil Kumar, learned counsel for the petitioner and Mr.A.P.Srinivas, learned standing counsel for the Revenue.

2. The petitioner has filed this writ petition challenging the assessment order passed by the 2nd respondent dated 31.10.2002 for the block period 01.04.1990 to 06.07.2000. The assessment was made under Section 158 BD read with Section 158 BC(c) and Section 143(3) of the Income Tax 1961. The challenge to the impugned proceedings are broadly on the following grounds :

(1) The notice issued to the petitioner dated 11.10.2000 was issued under Section 158 BC of the Act. The period of limitation for completion of block assessment under Section 158 BC is in terms of Section 158 BE (1) (b) which states that it should be within two years from the end of the month in which the last of the authorization for search under Section 132 or for requisition under Section 132 (A), as the case may be was

executed in case where a search is indicated was books of accounts or other documents or any assets or requisition on or after 01.01.1997. It is submitted that the impugned assessment order is an order under Section 158BC as the notice issued to the petitioner dated 11.10.2000 stated that the petitioner is required to file a true and correct return of the total income including the undisputed income in terms of 158BC and if it is so, the limitation comes to an end on 31.07.2002 and the 1st respondent having passed the impugned assessment order on 31.10.2002 is barred by limitation.

(2) It is further submitted that the notice itself being defective that is not having been issued under Section 158 BD, the respondents would not be entitled to amend the notice or cure the defect, in the light of the language employed in Section 292(B) of the Act in support of such contention, the learned counsel played reliance on the decision in the case of V.Ramaiah Vs.Commissioner of Income Tax reported in (2013) 85 CCH 0155 ChenHC

(3) As the notice dated 11.10.2000 mentioned Section 158BC, the petitioner had absolutely no knowledge that the assessment order is under Section158BD and came to know of it only when the impugned assessment order was passed and therefore, the petitioner is entitled to canvass the question of limitation for passing the impugned assessment order.

(4) It is submitted that the Division Bench in the case of Commissioner of Income Tax-I vs. M/s.Chennai Petroleum Corporation Ltd. reported in (2013) 353 ITR 0646 (Madras) considered the issue and held that a person other than the person with respect to whom the search was conducted, the provision under Section 158BD would apply and the provision of Section 158BC has no application to the case.

(5) The above contentions have been raised by the petitioner without prejudice to the other factual contention i.e., is by accepting that there was a valid warrant of search issued in favour of the petitioner.

(5.1) In alternate to the above submission, the learned counsel for the petitioner challenged the very jurisdiction of the 1st respondent on the ground that there was no authorization for conducting a search on the petitioner. Though this appears to be a factually contrary stand taken by the Assessee especially, in the light of the three contention stated above, this is one more submission made by the learned counsel for the petitioner.

(6) It is further submitted that the Central Board of Direct Taxes accepted the decision of Hon'ble Supreme Court in

the case of Commissioner of Income Tax-iii vs. M/s.Calcutta Knitwears reported in 2014-TIOL-30-SC-IT and issued a circular bearing No.24/2015, dated 31.12.2015, with regard to recording of satisfaction note under Section 158BD / 158BC of the Act and held that satisfaction note can be prepared at any of the following stages:

> "(a) at the time of or along with the initiation of proceedings against the searched person under Section 158 BC of the Act or
>
> (b) in the course of the assessment proceedings under Section 158BC of the Act; or
>
> (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person."

7. It is submitted that in the instant case, no satisfaction note was prepared and it has been seriously disputed by the petitioner.

8. The Revenue, on the other hand has raised the following contentions:

(8.1) The legal issue involved in this writ petition is squarely covered by the decision of the Division Bench in the case of Kailash Sarda V. CIT reported in [2014] 363 ITR 36 (Madras).

(8.2) The learned counsel would contend that the applicability of the circular has not been raised before this Court at any earlier point of time and in the absence of question being raised in the form of proper pleadings, the respondents cannot be expected the answer the allegation by way of counter affidavit.

(8.3) Referring to paragraph no.13 of the counter affidavit, it is submitted that once Section 158BD is invoked, the only notice to be issued would be under Section 158BC (a) and not under any other section.

(8.4) The assessee was fully aware of all the facts and voluntary statement was recorded from the assessee which is part of the records and the impugned assessment is proper and if the petitioner is aggrieved, they should file an appeal before the **Commissioner of Income Tax (Appeals).***

9. After having carefully considered the above submissions of the learned counsel on either side and I am unable to pursuade myself to entertain the writ petition on the grounds canvassed by the petitioner not on the merits but on the ground of existence of an effective alternative remedy before the **Commissioner of Income Tax (Appeals).*** This Court

while recording such findings, is conscious of the fact that the writ petition has been pending since the year 2002. Under normal circumstances, the Courts have held that it would be harsh on the litigant to compel him to pursue an alternate remedy after substantial length of time, when the matter was pending before the High Court. I seek to draw an exception to the said decisions on the peculiar facts and circumstances of the case. As mentioned above, two of the main contentions raised by the petitioner prima facie appear to be contrary to each other. In my view, only if the petitioner accepts that a proper warrant of search was issued in its name and thereafter, search was conducted, it is doubtful whether the question of limitation could be canvassed. If the petitioner's case is that no authorization was given and no valid search was conducted, this would go contrary to the other submissions. However, I do not wish to express any opinion on this as the Court is convinced that the assessee should be relegated to avail the appeal remedy before ITAT.

10. The issue pertaining to whether the satisfaction note was drawn as mentioned in circular No.24 of 2015, requires to be verified by going through the factual matrix. In any event, the circular was issued in the year 2015 and the decision of the Hon'ble Supreme Court in M/s.Calcutta Knitwears (cited supra) was rendered only on 12.03.2015 and much prior, the present writ petition had been filed. Admittedly, the petitioner did not raise any additional ground in this regard. However, I do not wish to foreclose the rights of the petitioner, since the petitioner is permitted to canvass all points before the Tribunal. In the decision relied on by the Revenue in the case of Kailash Sarda V. CIT reported in [2014] 363 ITR 36 (Madras) it was pointed out that the fact that the assessment is made based on the materials seized in the course of the search operation of two other persons, does not mean that the assessment is not under section 158BD of the Income Tax Act. As pointed out earlier, since the procedure given under Section 158BC is the only procedure given under Chapter XIV-B for making block assessment, the reference to section 143(3) notice read with proceedings under Section 158BC does not make the assessment as the one not falling under Section 158BD.

11. In the light of the above decision, I find that complicated factual issues are to be first thrashed out before one goes into the aspect as to which of the legal principles as put forth would apply. This has necessarily to be done before the **Commissioner of Income Tax (Appeals)*** not by way of the writ petition. Therefore, I hold that the writ petition is not maintainable and the factual and disputed question of fact have to be analysed and thrashed out before the ITAT.

12. Record of proceedings shows that there has been an order of interim stay granted by this Court in this writ petition, when the writ petition was entertained on 26.11.2002 and till date, interim order is in force and infact, it has been made absolute on 31.12.2002, much prior to the filing of the counter affidavit by the 1st respondent, dated 22.08.2003. Therefore, while relegating the assessee to avail the appellate remedy before the **Commissioner of Income Tax (Appeals)*** this Court is inclined to direct that the impugned assessment proceedings shall continue to remain stayed till the disposal of the appeal by the Tribunal.

13. In the result, the writ petition is held to be not maintainable and accordingly dismissed and the petitioner is granted liberty to file an appeal before the **Commissioner of Income Tax (Appeals)*** as against the impugned assessment order. Considering the fact that the assessment has been pending since 2002 and the writ petition was filed well within a period of thirty days from the receipt of the impugned assessment order, the writ petitioner is granted thirty days time from the date of receipt of a copy of this order to file an appeal before the **Commissioner of Income Tax (Appeals)*** and if the appeal is filed within the said time, the appeal shall not be rejected on the ground of limitation, and it shall be entertained and decided on merits.

14. The petitioner as well as the Revenue are entitled to canvass all points including the contentions advanced before this Court and produce factual material in support of their claim, which shall be considered by the **Commissioner of Income Tax (Appeals)***, uninfluenced by any observation made in this order. No costs. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)
dt. 02/03/2018

Corrected as per order dt.16.3.2018
made in WP.No.41295/02

Sd/-
Assistant Registrar(CS-VIII)
dt.23/03/2018

//True copy//

Sub Assistant Registrar

sk/rka

To

1.Deputy Commissioner of Income Tax,
Central Circle, Salem - 7.

2.The Additional Commissioner of Income Tax,
Central Range, Coimbatore.

To be substituted to the order already despatched on 15.3.2018

Copy TO

The Section Officer,
ER Section, High Court,
Madras.

+1cc to Mr.A.P.Srinivas, Advocate SR.No.8840
+2cc to Mr.Mallika srinivasan, Advocate SR.No.8484, **19967***

W.P.No.41295 of 2002

SS(CO)
GN(07/03/2018)
EU 26.3.2018