



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 23.07.2018
CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

WEB COPY

W.P. (MD) No.5974 of 2013
and
M.P. (MD) No.1 of 2013

S.Padmalakshmi,
C/o.Visvas Promoters (P) Ltd.,
78, TPK Road, Andalpuram,
Madurai 625 003.

... Petitioner

/Vs./

The Deputy Commissioner of Income Tax,
Circle I(1),
Madurai 625 002.

... Respondent

PRAYER: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records in the matter of re-assessment of the petitioner in File No.AFVPP1130 L and quash the order dated 12.03.2013 of the Deputy Commissioner of Income-tax Circle I(1), Madurai, passed under Section 147 read with 143(3) of the Income Tax Act, 1961.

For Petitioner : Mr.R.Srinivasan

For Respondent : Mrs.S.Srimathy
Standing Counsel

ORDER

The writ petitioner is an income tax assessee. She was a director in a Private Limited Company, which is carrying on business on real estate development. Pursuant to a resolution passed by the company on 20.11.2007, the properties are purchased in the name of the petitioner for the purpose of company business. In the said transaction, the petitioner was only a name lender and the properties purchased were not for any individual profit or money advanced to the purchase of property is not by any loan or dividend. Therefore, the money advanced by the company for the purchase of property shall not be treated as dividend. The respondent under Section 143 (3) of the Income Tax Act, 1961 [hereinafter referred to as "the Act"] completed the original assessment for the assessment year 2008-2009. Thereafter, on 08.12.2011, the respondent issued a notice under Section 148 of the Act for the alleged escapement of income and for re-assessment of the income for the assessment year 2008-09. The petitioner, by a letter dated 05.01.2012, sought for



reasons as contemplated under Section 148(2) of the Act. But without assigning the reasons for re-assessment, the respondent completed it and passed orders on 12.03.2013. Challenging the said order, the petitioner is before this Court.

2. According to the respondent, the petitioner is a Director of a Private Limited Company having substantial shares to the extent of 44.58%. She received loans, advances from the company to the extent of Rs.3.34 Crores and by utilizing the loan advance, purchased certain properties. This was not disclosed in the tax returns filed by the petitioner. The amount received by the loan advance will fall under the definition of deemed dividend within the meaning of Section 2 (22) (e) of the Act and the same was not reported. Therefore, a notice under Section 148 of the Act was issued for escaped assessment. Therefore, the respondent has jurisdiction to reopen the assessment and pass order after issuing notice under Section 148 of the Act. Therefore, the order is very much valid within the jurisdiction and does not require any interference.

3. Heard both sides.

4. Section 2 (22) (e) of the Act reads as follows:

" (e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is member or a partner and in which he has a substantial interest (hereafter in this clause referred to partnership as defined in the Limited Liability Partnership Act, 2008.)"

5. From a reading of the above Section, any payment by the company by way of advance or loan to a shareholder for the individual benefit or to any firm in which he / she has substantial interest is treated as accumulated profit and thereby taxable.

6. In this context, it is contention of the petitioner that it was not received as a loan or advance for any individual benefit. The entire transactions were made by the company and she was only a name lender.

7. Be that as it may. The respondent issued a notice under Section 148 of the Act.



Section 148 (2) of the Act reads as follows:

" The Assessing Officer shall, before issuing any notice under this Section, record his reasons for doing so."

8. The notice dated 08.12.2011 issued to the petitioner by the respondent reads as under:

"Whereas I have reason to believe that your income chargeable to tax for the assessment year 2008-09, has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

I, therefore, propose to reassess the income/re-compute loss/ depreciation allowance under Section for the said assessment year and I hereby require you to deliver to me before the expiry of 30 days from the date of service of this notice, a return in the prescribed form of your income for the said assessment year."

9. From a reading of the notice, it does not record any reason. The petitioner by her letter dated 05.01.2012 sought for the reasons for the purpose of submitting her reply to the notice. But without furnishing any reasons, the main assessment order was passed. In the assessment order, for the first time, the respondent assigned the reasons that the company in which, the petitioner was a shareholder, paid advance loan to the petitioner and company has got accumulated profit. This would warrant the respondent treat the loan as deemed dividend under Section 2 (2) (e) of the Act. That is the reason to believe that the taxable income had escaped assessment. Section 148 (2) of the Act, mandates that the assessing officer shall record his reasons, before issuing notice. Therefore, recording the reasons before issuing a notice is a mandatory requirement. Failure to adhere to the mandatory requirement will vitiate the impugned order.

10. In the case of Commissioner of Income Tax vs. Videsh Sanchar Nigam Ltd. dated 20.07.2011 reported in (2012) 340 ITR 66 (Bom), the Bombay High Court has held that the re-assessment order was bad for non compliance of Section 148 (2) of the Act. Further, in the case of GKN Driveshafts (India) Ltd. V. Income-Tax Officer and others reported in [2003] 259 ITR 19 (SC), the Hon'ble Supreme Court has held that the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the 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.

11. As per the observations made by the Hon'ble Supreme Court, <https://hcservices.ecourts.gov.in/hcservices/> it is very clear that the assessing officer is bound to disclose the reasons to the notice within a reasonable time. In the instant case,



although the assessee sought for reasons by her letter dated 05.01.2012, it was not supplied to her. Therefore, the order passed stands vitiated for non furnishing of reasons, which is mandatory under Section 148 (2) of the Act.

12. The Bombay High Court, in yet another case of Commissioner of Income-Tax v. Trend Electronics reported in [2015] 379 ITR 456 (Bom) has categorically held in the absence of reasons being furnished when sought for would make an order of re-assessment bad in law. The recording of reasons and furnishing of the reasons has to be strictly complied with as it is jurisdictional issue. In the instant case also, the reasons were not informed by the assessing officer instead of asking for the same.

13. The learned counsel appearing for the petitioner would also submit that the impugned notice cannot be developed by adducing reason while passing orders. The respondent cannot improve the order by filing an additional affidavit.

14. He would rely on a judgment of this Court in the case of Apollo Hospitals Enterprises Ltd., vs. Assistant Commissioner of Income Tax reported in [2006] 287 ITR 25 (Mad) held as under:

."9.Learned Senior Counsel submitted that the so called "reasons to believe" stated in the impugned proceedings are sought to be supplemented by new reasons stated in the counter affidavit which according to learned senior counsel is not permissible in view of the law laid down by the honourable Supreme Court of India. The honourable Supreme Court of India in the case of Mohinder Singh Gill v. Chief Election Commissioner reported in AIR 1978 SC 851 ; [1978] 2 SCJ 441 has laid down in paragraph 8 as follows (page 858);

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J., in Commissioner of Police v. Gordhandas Bhanji, AIR 1952 SC 16, 18.

Public orders, publicly made, in exercise of a statutory authority cannot be



WEB COPY

construed in the light of the Explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself'.

Orders are not like old wine becoming better as they grow older."

10. Therefore the contention of the learned senior counsel has to be considered in the light of the "reasons to believe" as contained in the impugned proceedings. Learned senior counsel relied upon the following passage found at page 177 of the decision rendered in the case of Jindal Photo Films Ltd. v. Deputy CIT reported in [1998] 234 ITR 170 (Delhi), which reads as follows:

"where the Income-tax Officer (very often successor-officer) attempts to reopen the assessment because the opinion formed earlier by himself (or more often, by a predecessor-Income-tax Officer), was in his opinion incorrect, judicial decisions have consistently held

Page No: 0035

that this could not be done. (see Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC) and A.L.A.Firm v. CIT [1991] 189 ITR 285 (SC)).

17. The abovesaid two judgments of the honourable Supreme Court of India clearly lay down that the respondent cannot reopen the assessment order passed by a mere change of opinion or by drawing a different inference from the same facts as were earlier available. Admittedly, in this case there is no change of law and no fresh material has come on record enabling the respondent to invoke the powers under Section 147 of the Act. The instant case is a case of mere change of opinion which does not provide jurisdiction to the respondent to initiate proceedings under Section 147 of the Act."

15. In view of the above judgments, I am of the considered view that non-furnishing of reasons under Section 148 (2) of the Act will make the impugned order bad in law. Therefore, the impugned order is



unsustainable and accordingly, the impugned order is set aside. The Writ Petition is allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

WEB COPY

/True Copy/

Sd/-
Assistant Registrar(AS)

Sub Assistant Registrar(CS-II)

To:

The Deputy Commissioner of Income Tax,
Circle I(1),
Madurai 625 002.

+1CC to Mr.R.Srinivasan, Advocate, SR.No.74504
+1CC to M/s.S.Srimathy, Advocate, SR.No.74530

W.P. (MD) No.5974 of 2013
23.07.2018

SM/TK
ES/SKN/RSK/SAR 2/09.10.2018/6P/4C