

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.03.2019

Pronounced on : 27.03.2019

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH

W.P.No.26664 of 2003

and

W.M.P.Nos.32587 & 46516 of 2003

M/s.GE T&D India Limited,
19/1, GST Road,
Pallavaram, Chennai-600 043
rep. by its Director
(Treasury & Taxation)

Mr.L.V.Srinivasan.

(Petitioner substituted as per order dated 13.09.2017
by TSSJ in WMP.No.25307/17 in
WP.No.2664/2003).

... Petitioner

Vs

1.The Deputy Commissioner of Income Tax,
Company Circle I (1),
121 Mahatma Gandhi Road,
Aayakar Bhavan, New Block VI Floor,
Chennai-600 034.

2.The Commissioner of Income Tax,
Tamil Nadu-II,
121 Mahatma Gandhi Road,
Chennai-600 034.

... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, calling for the records of the first respondent in GIR No.AXI-061/90-91 dated 18.09.2003 and to quash the same and forbearing the first respondent from taking any further proceedings and further direct the first respondent to make fresh assessment for the Assessment Year 1990-91.

For Petitioner : Mr.M.P.Senthil Kumar

For Respondents : Mr.Naveen Duraibabu
for M/s.Hema Muralikrishnan

ORDER

Heard Mr.M.P.Senthil Kumar, learned counsel for the petitioner/Assessee and Mr.Naveen Duraibabu, learned counsel appearing on behalf of the respondents Department.

2. For the purpose of appreciating the contentions raised before this Court, it would be necessary to set forth the relevant facts of the case.

3. The petitioner is a public limited company registered under the Companies Act and an assessee under the Income Tax Act (hereinafter referred to as 'the Act').

4. For the Assessment Year 1990-91, the petitioner filed its return of income on 31.03.1990, declaring an income of Rs.6,65,91,820/- and an intimation under Section 143(1)(a) was issued, determining the total income at Rs.7,24,42,000/-. Thereafter notice under Section 143(2)(1) for scrutinising the return was sent to the petitioner for making assessment under Section 143(3) of the Act. After further process, the assessment order under Section 143(3) was made on 24.03.1993 determining the petitioner's total income at Rs.8,05,67,450/-

5. On 31.01.1995, the second respondent issued a notice under Section 263 of the Act to the petitioner, proposing to revise the assessment made on the petitioner under Section 143 (3) of the Act, on the ground that the order of the Assessing Authority was erroneous and prejudicial to the interest of revenue. The petitioner had raised his objections to the proposed revisions which came to be overruled by the Commissioner by an order dated 28.02.1995. The petitioner herein had not chosen to file an appeal against the order passed under Section 263 and thus, the order became final. After about 8 ½ years, the Assessing Authority issued a notice on 18.09.2003 to give effect to the order passed under Section 263 dated 28.02.1995 proposing to revise the assessment order under Section 143(3) dated 24.03.1993. This notice dated 18.09.2003 is under challenge in the present writ petition.

6. The learned counsel for the Assessee put forth his submissions in two folds:

i) The first limb of his submission is that since the order of the Commissioner under Section 263 of the Act tantamounts to setting aside/cancelling the assessment, no order of assessment, re-assessment or re-computation can be made under Section 147, beyond a period of two years, as contemplated under Section 153 (2A) of the Act.

ii) His alternate submission is that the proceedings for

assessment has to be made within a reasonable time and the assessment cannot be kept under suspense indefinitely. The delay of 8 years and 7 months from the date of order under Section 263 of the Act, would be fatal to the department and thereby, the petitioner is entitled to succeed.

7. The learned Standing counsel for the Department countered the submissions put forth by the counsel for the Assessee and stated that the provisions of Section 153(2A) of the Act is not applicable to the instant case but on the other hand, the revision of the assessment order is sought to be made under Section 153(3) of the Act to give effect to the directions of the Commissioner in his order passed under Section 263. Since there is no limitation prescribed under Section 153(3), it cannot be said that the impugned notice is barred by limitation. The learned Standing counsel had further relied upon the averments in their counter affidavit and submitted that the delay in taking further course of action consequent to the direction of the Commissioner in his order under Section 263 was due to repeated change in the name of the assessee and consequent change of assessment circles. According to him, the assessment order dated 24.03.1993 under Section 143(3) was subjected to appeals before the Commissioner of Income Tax (Appeals) and was finally allowed by the Income Tax Appellate Tribunal (ITAT) accepting the claim of the petitioner. Pursuant to the order of the ITAT, the petitioner filed its claim of refund and during the course of processing the same, the old files pertaining to the petitioner was traced and the order passed under Section 263 came to light. In view of these various factors, the delay had occurred and since there is no bar of limitation under Section 153(3) of the Act, the Writ Petition is liable to be rejected.

8. I have given my anxious consideration to the contentions put forth by both the learned counsels.

9. Insofar as the first contention of the petitioner is concerned, the crucial aspect would be to determine, as to whether the revision sought to be made under the impugned notice by the Assessing Authority, would fall under Section 153(2A) or 153(3) of the Act?

10. For the sake of convenience, the provision of Section 153 (2A) & (3) as it stood in the year 1995, is extracted hereunder:-

"153. Time limit for completion of assessments and reassessments:-

(2A) Notwithstanding anything contained in sub- sections (1) and (2), in relation to the

assessment year commencing on the 1st day of April, 1971 , and any subsequent assessment year, an order of fresh assessment under section, 146 or in pursuance of an order, under section 250, section 254, section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of two years from the end of the financial year in which the order under section 146 cancelling the assessment is passed by the Assessing] Officer or the order under section 250 or section 254 is received by the Chief Commissioner or Commissioner] or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner.

(3) The provisions of sub- sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub- section (2A),] be completed at any time-

i)where a fresh assessment is made under section 146;

ii)where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section- 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act];

iii)where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147."

Thus, the meaning, as understood from the plain reading of the Sub Section 153 (2A), for the purpose of the case in hand, would be to the effect that when the assessment or reassessment is set aside or cancelled, pursuant to an order under Section 263, the consequent fresh assessment can only be made, before the expiry of two years from the end of the financial year when the order under Section 263 came to be passed and not after that. Likewise, when such assessment or reassessment or recomputation is made for the purpose of giving effect to any finding or direction in the order under Section 263, the same can be completed, at any time. Such a rework could be either to give effect to a finding or to comply with a direction or both.

11. With these provisions in mind, the order of the Commissioner dated 28.02.1995 passed under Section 263 was looked into.

12. On a scrutiny of the order under Section 263, the Commissioner of Income Tax was of the view that the assessment order under Section 143(3) for the assessment year 1990-91 is erroneous and prejudicial to the interest of revenue on the following aspects:-

- "i) Excess deduction u/s.35AB of Rs.7,43,245/-
- ii) Wrong allowance in respect of unascertained liability of Rs.40,634/- in respect of tax alleged to be payable to Cantonment Board on leased property;
- iii) Wrong allowance of the following three items under miscellaneous expenditure:
 - a) Donation Rs. 35,300
 - b) Registration fee and expenses Rs. 78,139
 - c) Liquidated damages Rs.33,19,335
- iv) Excess deduction allowed u/s.80HHC Rs. 23,521
- v) Excess depreciation claim of Rs.5,08,423 allowed wrongly on moulds which are entitled to 33 1/3% only."

13. The Commissioner of Income Tax, dealt with the above five issues in the following manner:

i) Insofar as the excess deduction in Clause (i) is concerned, the Commissioner had held that the excess deduction of Rs.7,43,245/- was held to be erroneous and prejudicial to the interest of revenue and had therefore, directed the Assessing Officer to withdraw this excess deduction.

ii) In Clause (ii), the allowance of unascertained liability of Rs.40,634/- was also held to be erroneous and prejudicial to the interest of revenue and therefore, directed the Assessing Officer to disallow the sum of Rs.40,634/-.

iii) Likewise in Clause (iii)(a), the donation of Rs.35,300/- allowed by the Assessing Officer was held to be erroneous and prejudicial to the interest of revenue and thereby, directed the Assessing Officer to disallow this amount.

iv) In Clause (iii)(b), the expenditure towards registration fee and expenses was found to be in the nature of capital, which should not have been allowed as a deduction from business income and therefore, it was held that this expenditure was erroneous and prejudicial to the interest of revenue and therefore, the assessing officer was directed to disallow this sum.

v) In clause (iii)(c), it was found that the expenditure towards liquidated damages of Rs.33,19,335/- was allowed by the Assessing Officer, without obtaining any details or making an enquiry and not obtaining break-ups and as such, the order of

the Assessing Officer under this head was held to be erroneous. Hence, the Commissioner had directed the Assessing Officer to make further enquiry with regard to the claim made by the assessee under this head.

vi) In Clause (iv), the excess deduction of Rs.23,521/- allowed under Section 80HHC, was directed to be recomputed.

vii) In Clause (v), the excess depreciation at the rate of 50% allowed by the Assessing Officer was found to be erroneous and prejudicial to the interest of revenue and therefore, since the assessee was entitled to depreciation at the rate of 33 1/3% only, he had directed him to recompute the depreciation on this head at the rate of 33 1/3%.

14. Thus, the order passed under Section 263 of the Act reveals that the Commissioner was of the view that the Assessing Officer had committed erroneous acts, which are prejudicial to the interest of revenue in 5 Clauses above and in 2 Clauses, he had rendered his findings as to how the assessment was erroneous and thereby had directed the Assessing Officer to make further enquiry and recompute the deduction respectively.

15. Thus, pursuant to the orders of the Commissioner under Section 263, the task that awaits the Assessing Officer to be carried out, in the aforesaid 7 clauses, are as follows:

Clause (i):

The Assessing Officer is required to comply with the direction to withdraw the excess deduction under Section 35AB of Rs.7,43,245/-, in view of the findings in para 4 of the order under Section 263.

Clause (ii):

The Assessing Officer is required to comply with the direction to disallow a sum of Rs.40,634/- in view of the findings rendered in para 5 of the order under Section 263.

Clause (iii):

The Assessing Officer is required to comply with the direction to disallow the sum of Rs.35,300/- in view of the findings rendered in para 6 of the order under Section 263.

Clause (iv):

The Assessing Officer is required to comply with the direction to disallow the sum of Rs.78,139/- in view of the findings rendered in para 7 of the order under Section 263.

Clause (v):

Since the Commissioner had rendered a finding in his order under Section 263 that the expenditure towards liquidated damages Rs.33,19,335/- was allowed without obtaining any details

or making an enquiry or not obtaining break-ups of this huge sum, the Assessing Officer was required to recompute the liquidated damages based on the findings rendered in para 8 of the order under Section 263.

Clause (vi):

The Assessing Officer is required to recompute the deduction under Section 80HHC in the light of the findings rendered by the Commissioner in para 9 of his order under Section 263.

Clause (vii):

The Assessing officer was required to comply with the direction to recompute the depreciation of the items mentioned in para 10 of the Commissioner's order under Section 263, at the rate of 33 1/3%.

16. Thus, it is seen that in furtherance of the order under Section 263, the Assessing Officer is now required to reassess or recompute the assessment made, in order to give effect to the findings rendered by the Commissioner and to comply with the directions therein.

17. When Sub Section (2A) is read along with Sub Section (3), it is apparent that the order passed by the Commissioner under Section 263 is not one setting aside or cancelling the assessment or the assessment order. On the other hand, the Commissioner had rendered certain definite findings, establishing that the original assessment order requires reassessment or recomputation, in view of the various findings given therein and in pursuant to such findings and directions, the Assessing Officer was required to reassess or recompute the assessment.

18. The provisions of Section 153(3) would be subject to the provisions of Sub Section 153 (2A) and as such, it would apply only to instances where Sub Section (2A) were not applicable. But it cannot be said that in all cases where the matter is remanded back to the Assessing Officer, it would fall under Sub Section (2A). Where the ITAT or the Commissioner, as the case may be, sends back the matter to the Assessing Officer after rendering its findings or with directions, without effectively setting aside the assessment, Sub Section (2A) will not apply in such cases. In other words, where findings are rendered or directions given to the Assessing Officer for the purpose of reassessment or recomputation, Section 153(3) alone would be applicable. Otherwise, on the bare fact that the issue is being sent back to the Assessing Officer for reassessment, if construed to fall under Sub Section (2A), would render Sub

Section (3), redundant.

19. The learned counsel for the petitioner placed reliance on two decisions reported in 1)2017 (298) CTR 0334 (Delhi) in the case of Nokia India Private Limited Vs. DCIT and 2) 217 ITR 330 in the case of Commissioner of Income Tax Vs. Srimathi Kamaladevi on these propositions.

20. In Nokia's case (supra), among the seven issues raised therein, the assessment in respect of five were "set aside" and the issues "remanded for fresh determination". In these circumstances, the Court held that in view of the fact that a fresh assessment order was required to be made on remand after setting aside some of the issues in the earlier assessment, the time limit for completing such an exercise would be governed under Section 153 (2A) of the Act. Likewise, in Srimati Kamaladevi case (supra), the Commissioner had set aside the assessments under Section 263 and directed the assessment proceedings to be initiated afresh. It is no doubt true that in circumstances like the above cited, wherein, the Assessing Officer is directed to make a fresh determination after some of the assessments or the assessment order is set aside, such an exercise would squarely fall under Section 153(2A) of the Act.

21. In the instant case in hand, the Commissioner had given certain directions with determined findings and thereby, directed the Assessing Officer to carry out such directions. In consequence to these findings and directions of the Commissioner, the Assessing Officer will be required to exercise his powers under Section 153 (3) and not under Section 153 (2A). As such, it cannot be said that the impugned proceedings now initiated by the Assessing Officer is barred by limitation under Section 153(2A) of the Act. The first ground raised by the learned counsel for the petitioner is answered accordingly.

22. The alternate ground raised by the petitioner is that the assessment proceedings requires to be made within a reasonable time and as such, the delay of 8 years and 7 months is inordinate and unreasonable and therefore, the petitioner is entitled to succeed. One of the settled proposition of law, as decided in various decisions of the Hon'ble Apex Court as well as many High Courts is that where no limitation is prescribed for completion of reassessment, such process must be completed within a reasonable time and this proposition would depend on the facts and circumstances of each and every case.

23. In support of the aforesaid ratio, the learned counsel for the petitioner relied upon various decisions of the Hon'ble Apex Court as well as other High Courts.

24. In Mohamad Kavi Mohamad Amin V. Fatmabai Ibrahim reported in 1997 (6) SCC 71, the Hon'ble Apex Court had observed that where no time limit is prescribed for exercise of a power under a statute, it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. The aforesaid decision was followed by this Court in M.Srinivasa Rao V. Assistant Commissioner of Income Tax reported in 2007 (295) ITR 0136 (MAD) and this Court has held that though no time limitation is prescribed under Section 153(3) of the Act, the same cannot be presumed that the respondent is empowered to continue even after lapse of several years. By holding so, this Court had held that the delay of six years for initiating proceedings under Section 153(3) was inordinate and unexplained. In Iswara Bhat V. Commissioner of Agricultural Income Tax reported in 1993 (200) ITR 0238 (Ker), the Division Bench of the Kerala High Court held that statutory powers must be exercised bona-fidely, reasonably, without negligence and the purpose in which they were conferred. By placing reliance on various decisions, the Kerala High Court held that if Suo moto revisional proceedings can be invoked only within a reasonable time, by the same logic, proceedings can be rendered only within a reasonable time. In view of the inordinate delay in that case, it was held that the statutory authority acted arbitrarily and unreasonably. In Commissioner of Income Tax Vs. Goyal M.G. Gases (P) Ltd., reported in 2009 (316) ITR 0303 (Delhi), it was held that non specification of the period of limitation does not mean that the Assessing Officer can wait interminably or for an infinite period before passing a consequential order. A period of 3 years and 8 months was held to be unreasonable in that case. Since various other decisions relied upon by the learned counsel for the petitioner are also on the same lines, I am not dealing those cases, since this Court is of the view that in the absence of any limitation prescribed under Section 153(3), the Assessing Officer cannot wait indefinitely and his bound to complete the proceedings within a reasonable time. Nevertheless, it has also been held in various decisions that such a reasonable period would depend on the facts and circumstances of each and every case.

25. With this proposition in mind, the reasons assigned by the respondents for the delay of 8 years and 7 months was analysed from the averments made in the counter affidavit. According to the respondents, after the Commissioner had passed

orders under Section 263, the Assessee had consistently changed its name on various occasions which resulted in the delay. A further vague reason has also been stated in the counter that after the original assessment order was passed, appeals came to be filed before the Commissioner of Income Tax and ITAT. Thereafter, when the Assessee sought for refund, the old files of the Assessee were retrieved.

26. Such an explanation cannot be at any stretch of imagination deemed to be sufficient cause for the delay. Insofar as the consistent change of the Assessee's name is concerned, it is nobody's case that the PAN number of the Assessee was also undergoing a change. When the relevant files and documents pertaining to the PAN number of the Assessee was before the Assessing Officer, I am unable to comprehend as to how the change in names could result in delay of more than 8 years. Hence, the reason of change in name of the Assessee, cannot be accepted as a sufficient cause for the delay and consequently, could only be termed as 'inordinate' or 'unreasonable'. The second reasoning that the Assessee's files were traced only when they made a claim for refund goes to show that the respondents were admittedly sleeping over the matter. The very fact that they had commenced tracing of the old files of the Assessee, when they had filed their claim of refund would amount to an admission on the part of the Department that they were not proceeding any further in the matter. Accordingly, this reason will also not amount to a satisfactory explanation for the delay. When the delay by itself is 8 years and 7 months without any reasonable explanation whatsoever, it can be termed as 'inordinate'.

27. By applying the well laid down ratios of several decisions cited above and by applying the facts to the present case in hand, I am of the view that the proceedings initiated under Section 143(3) dated 18.09.2003 after an inordinate delay, is illegal and opposed to the several well laid down decisions cited supra. Though there is no limitation prescribed under section 153(3) for reassessment or recomputation, in view of the unreasonable delay in initiating the proceedings, the impugned notice dated 18.09.2003 is liable to be set aside.

28. For all the foregoing reasons, this Court, holds that the impugned notice which seeks to give effect to an order under Section 263 for revision under Section 143(3) falls under Section 153(3) of the Act. However, the delay of 8 years and 7 months in initiating such proceedings is inordinate and therefore fatal to the Department. Accordingly, the impugned notice passed by the first respondent in GIR No.AXI-061/90-91

dated 18.09.2003 is set aside. Consequently, the first respondent shall refrain from initiating any further proceedings for fresh assessment for the Assessment Year 1990-91. The Writ Petition is ordered accordingly. Connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

DP

To

1.The Deputy Commissioner of Income Tax,
Company Circle I (1),
121 Mahatma Gandhi Road,
Aayakar Bhavan, New Block VI Floor,
Chennai-600 034.

2.The Commissioner of Income Tax,
Tamil Nadu-II,
121 Mahatma Gandhi Road,
Chennai-600 034.

+1 cc to Mr.Philip George, Advocate Sr.No.29495

Order made in

W.P.No.26664 of 2003
and

W.M.P.Nos.32587 & 46516 of 2003

CSL/07.05.2019