

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.10.2019
Delivered on : 18.10.2019

CORAM

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.2961 of 2019
and
W.M.P.Nos.15975 and 3231 of 2019

Smt.Neetaa Suneel Shah
D/o.Ramesh Bhai Doshi

..Petitioner

vs

The Income Tax Officer
Non-Corporate Ward - 5(2)
Income Tax Office - BSNL Tower
No.16, Greams Road,
Chennai-600 006.

..Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records in PAN : AAQPS8486E dated 31.12.2018 on the file of the respondent and quash the same.

For Petitioner : Mr.Sandeep Bagmar

For Respondents : Mr.Prabhu Mukunth Arunkumar
Standing counsel

O R D E R

The challenge made in this writ petition is against the assessment order dated 31.12.2018 made under Section 143(3) r/w Section 254 of the Income Tax, Act, 1961.

2. The case of the petitioner, in short, is as follows:

The petitioner is an individual Assessee. The relevant assessment year is 2010-2011. The assessment of the petitioner was reopened by issuing a notice under Section 148 of the Income Tax, Act, 1961, (for brevity "IT Act"). The reasons for reopening is that the Assessee had evaded tax through the client modification mode with regard to brokers in futures and options

business. The petitioner had objected to the reopening and however, the objections were rejected by the Assessing Officer, by order dated 29.08.2016. During the course of assessment proceedings, the petitioner had stated that she is consistently reporting her income/loss on sale of shares under the head Capital Gains. The assessment was completed by order dated 15.09.2016 under Section 143(3) r/w 147 of the IT Act. In the said assessment order, the Assessing Officer confirmed the assessment by making an addition of a sum of Rs.25,05,304/- as Short Term Capital Gains. Therefore, the Assessing Officer has accepted that the income has to be assessed under the head Capital Gains and consequently, made the addition as stated supra. The petitioner filed an appeal before the CIT(A) and the same was dismissed on 22.06.2017. The petitioner preferred further appeal before the Income Tax Appellate Tribunal, questioning the erroneous addition of Rs.25,05,304/- as Short Term Capital Gains. The entire issue in the appeal was only in relation to the sole addition of Rs.25,05,304/- as Short Term Capital Gains and no other dispute in respect of characterization of the heads of income of the petitioner. The Tribunal, by order dated 10.10.2017, remanded the sole issue in appeal to the file of the Assessing Officer, as it has found that there was violation of principles of natural justice. After remand, the Assessing Officer, without issuing any notice of personal hearing and in complete violation of the order of the Tribunal, completed the assessment by order dated 31.12.2018 and enhanced the total income of the Assessee. The entire income of the Assessee, which was accepted in the reopening of the assessment under the head Capital Gains, is now being assessed under the head Profits and Gains from the business and profession. Thus, the enhanced income of the petitioner by making new addition of Rs.60,48,161/- is without any notice of hearing. While the Assessing Officer has allowed the claim of Brought/Forward losses in the assessment order dated 15.09.2016, under Section 143(3) r/w 147 of the IT Act, has now, chosen to reject the claim of set off brought/forward without capital loss. The said act would amount to change of opinion. The addition of Rs.25,05,304/- which was made in the reopening of the assessment as Short Term Capital Gains is now, being added as income from Undisclosed Sources under Section 68 of the IT Act. Thus, the present impugned order enhancing the income of the petitioner pursuant to the order of the remand made by the Income Tax Appellate Tribunal, is wholly without jurisdiction, as the other issues dealt with by the Assessing Officer is not the subject matter appeal or issues raised in appeal. Since the impugned order was passed without jurisdiction and in violation of principles of natural justice, the present writ petition is maintainable, even though the appellate remedy is available against the order impugned.

3. The respondent filed a counter affidavit, wherein, it is stated as follows:

The writ petition is liable to be dismissed on the ground of availability of the statutory appellate remedy against the impugned order. It is not in dispute that the client code modifications had taken place in the case of the petitioner. This modification facility is used by some brokers to transfer gains/losses from one individual to another by modifying client codes in the guise of rectifying a genuine error. It is generally done by buying or selling stocks so as to say, consciously incur a loss and use that for tax offset. This is normally done in the fag end of the financial year so as to incur an artificial loss, which would enable an Assessee to reduce his tax liability. In the present case, the client code modified in the case of the petitioner are that of one Shri.Lalchand Misirimal (PAN:AACPL4767B) and Ms.Padmaja V.Ramana (AFTPR9690F), both are not fitting to the situations as explained in detail in the impugned order. It was to disallow such an artificial loss created in the books, the petitioner's case was reopened. The allegations that the assessment was made in violation of principles of natural justice and that the Tribunal has remanded the issue in appeal to the Assessing Officer for re-adjudication for the limited purpose of verifying the client code modifications are wrong and denied. The Tribunal has remanded the issue, as the petitioner had not provided all the details at the time of assessment and also directed the respondent to verify the client code modifications with the broker. The assessment was completed by taking into consideration the material already submitted by the petitioner in the reassessment proceedings. No new material was relied upon. Since the Tribunal has remitted the issue back to the Assessing Officer for re-adjudication after verification of the details of the client code modifications, it is not correct to state that it was remitted only for the limited purpose. The assessment order is absolutely within the jurisdiction of the respondent and there has been no violation of principles of natural justice.

4. The reply to the counter affidavit is filed by the respondent, wherein, the petitioner has reiterated the contentions already raised in the affidavit filed in support of the writ petition.

5. The learned counsel for the petitioner submitted as follows:

The only dispute raised by the petitioner as against the order of assessment dated 15.09.2016 made under Section 143(3)

r/w 147 of the IT Act, is in respect of the addition of Rs.25,05,304/- made under the head Short Term Capital Gains other than under Section 111A of the IT Act. The petitioner challenged the said addition before the first Appellate Authority. Though the said appeal was dismissed, the petitioner preferred further appeal before the Tribunal, which in turn remanded the sole issue raised in the appeal to the file of the Assessing Officer for re-adjudication. Therefore, the Assessing Officer is bound to confine only the issue raised before the Tribunal, which was remitted back to him viz., the addition of Rs.25,05,304/- as Short Term Capital Gains and not in respect of other heads viz., income from Short Term Capital Gains under Section 111A and Brought/Forward losses of previous assessment years, which were accepted by the Assessing Officer in the order of assessment dated 15.09.2016. However, after remand, the Assessing Officer has gone beyond the scope of the remand order and expanded the scope of the adjudication by making new additions, which were already accepted by him at the time of the original assessment. The Assessing Officer has now, treated the Short Term Capital Gains amounting to Rs.59,56,614/- as business income without notice. Equally, the Assessing Officer now, denied the Brought/Forward losses for a sum of Rs.56,96,224/-. Even in respect of the issue remanded, the Assessing Officer has changed the head from Short Term Capital Gains to Undisclosed Sources under Section 68 of the IT Act. This again, is without notice to the petitioner.

6. In respect of his contention that the Assessing Officer is not entitled to expand the scope of the assessment proceedings beyond the issue remanded, the learned counsel for the petitioner relied on the following decisions:

- (i) (1982) 145 ITR 255 (All), S.P.Kochhar Vs. Income Tax Officer, Dehradun,
- (ii) (2009) 309 ITR 434 (SC), Mcorp Global P. Ltd., Vs. CIT.
- (iii) (2008) 302 ITR 126 (Guj), Saheli Synthetics P. Ltd., Vs. CIT.
- (iv) An unreported judgement in T.C.(Appeal) No.885 of 2008 dated 04.04.2018, M/s.Sanmar Speciality Chemicals Limited Vs. The Income Tax Officer.
- (v) (1995) 213 ITR 502 (Mad), Raja DV Seetharamaya Vs. WTO.

7. Per contra, the learned counsel for the Revenue submitted as follows:

The Assessing Officer has not exceeded the scope of the remand. All the three issues are interlinked with each other and therefore, the petitioner is not justified in contending otherwise. The Tribunal has remitted the matter with specific directions for re-adjudication, after verifying the details of the client code modifications, also by granting liberty to the

Assessing Officer to have the verification of the share transactions with the stock brokers. Therefore, the issues, which are dealt with by the Assessing Officer, interlinked with each other, are in relation to the factual dispute, which have to be gone into and decided only by the next fact finding authority viz., the Appellate Authority. Therefore, the petitioner has to agitate the issue only by way of filing regular appeal and not by filing the present writ petition. There is no violation of principles of natural justice in this case, as alleged by the petitioner.

8. Heard both sides and perused the materials placed before this Court.

9. The petitioner, an individual Assessee, has chosen to challenge the order of the assessment made under Section 143(3) r/w 254 of the IT Act. Though a statutory appellate remedy is available against the impugned order, this writ petition is sought to be maintained on the ground that the Assessing Officer has exceeded his jurisdiction and enlarged the scope of the remand order passed by the Income Tax Appellate Tribunal. It is also the contention of the petitioner that by enlarging the scope of the remand, the Assessing Officer, in effect reopened the issues which were not put to challenge by the petitioner nor it was the case of the Revenue before the Appellate Forum. Therefore, it is contended that this Court can exercise its jurisdiction under Article 226 of the Constitution of India and decide as to whether the above contentions are true and if so, whether the impugned order is liable to be interfered with on those reasons.

10. There is no dispute to the fact that the present impugned order was passed as a compliance of the order passed by the Tribunal.

11. The following facts and circumstances would show as to how the present impugned order came to be passed:

(a) The relevant assessment year is 2010-2011. The assessment of the petitioner for the relevant assessment year was reopened by issuing the notice dated 22.04.2015 under Section 148 of the IT Act.

(b) The reasons for reopening the assessment was that the Assessing Officer had information that the Assessee had evaded the tax through client code modifications with regard to brokers in futures and options business to the tune of Rs.25,05,304/-. Though the petitioner filed the objections against reopening and the reasons given for the same, such objections were rejected and consequently, the assessment was completed by passing the order dated 15.09.2016 under Section 143(3) r/w 147 of the IT Act. The Assessing Officer in the said order has computed the

total income at Paragraph No.9 of the order as follows:

"The total income is computed as under:

Income from House Property as admitted	Rs. 1,56,762
Income from Short Term Capital Gains u/s 111A as admitted	Rs.59,56,614
Income from Short Term Capital Gains - other than u/s 111A as discussed in para 8 above	Rs.25,05,304
Income from other sources - as admitted	Rs. 4,107
Gross Total Income	Rs.86,22,787
Less : B/F Losses of A.Ys 2006-2007, 2007-2008, 2008-2009 & 2009-2010	Rs.56,96,224
	Rs.29,26,563
Less : Chapter VIA deduction	Rs. 54,204
Total Income	Rs.28,72,359 or Rs.28,72,360

12. Perusal of the above computation would show that the Assessing Officer has made only the addition to the tune of Rs.25,05,304/- as an income from Short Term Capital Gains other than the income from Short Term Capital Gains under Section 111A. Therefore, it is evident that in respect of the other heads viz., Income from House Property, income from Short Term Capital Gains under Section 111A, income from other sources, the Brought/forward losses for the assessment years 2006-2007 to 2009-2010 as admitted by the Assessee in her return were accepted by the Assessing Officer as such. In other words, after reopening, the Assessing Officer has passed the assessment order under Section 143(3) r/w 147 of the IT Act, only by making an addition of Rs.25,05,304/- as an income from Short Term Capital Gains other than under Section 111A of the said Act. Disputing such addition, the petitioner went on appeal before the First Appellate Authority, who in turn by order dated 22.06.2017 dismissed the appeal, thereby confirming the addition of Rs.25,05,304/- towards client code modifications as Short Term Capital Gains over and above the Short Term Capital Gains of Rs.59,56,614/- under Section 111A. The Assessee filed further appeal before the Income Tax Appellate Tribunal. The only dispute that was raised before the First Appellate Authority as well as the Income Tax Appellate Tribunal is with regard to the addition made to the tune of Rs.25,05,304/- as Short Term Capital Gains over and above the Short Term Capital

Gains under Section 111A, as admitted by the Assessee to the tune of Rs.59,56,614/-.

13. Therefore, it is evident that only issue traveled all along from the Assessing Officer to the Appellate Tribunal is with regard to the addition made to the tune of Rs.25,05,304/- as income from Short Term Capital Gains other than the income from Short Term Capital Gains under Section 111A. In other words, admitted income from Short Term Capital Gains under Section 111A taken as such and assessed by the Assessing Officer, is not the issue either raised by the petitioner or by the Revenue before the Appellate Authorities. Likewise, the Brought/Forward losses shown by the Assessee and accepted by the Assessing Officer to the tune of Rs.56,96,224/-, is also not the dispute raised before the Appellate Authorities. When such being the factual position, the Tribunal, after considering the issue with regard to the addition of Rs.25,05,304/- representing Short Term Capital Gains in respect of the share transactions on which client code modifications had been done, found that the said issue has not been properly assimilated nor the facts relevant for deciding the said issue were produced by the Assessee. Therefore, the Tribunal by partly allowed the appeal restored the said issue to the file of the Assessing Officer for re-adjudication after verifying the details of the client code modifications. At this juncture, it is relevant to note that the Tribunal consciously restored only that issue to the file of the Assessing Officer for re-adjudication viz., addition of Rs.25,05,304/- and not for re-adjudication in respect of all the issues that were considered by the Assessing Officer under various heads while passing the order of assessment.

14. After remand, the Assessing Officer in this case, gone into the issue with regard to the Short Term Capital Gains under Section 111A to the tune of Rs.59,56,614/- as well and given a finding that the Assessee has included profit/loss earned from trading in both the Equity and Derivatives segment under the head Short Term Capital Gains. Likewise, in respect of Set off of Capital Losses, the Assessing Officer has found that the income tax does not allow loss under the head Capital Gains to be set off against any income from other heads and that this can be only set off within the Capital Gains head. He also found that Long Term Capital Loss can be set off only against Long Term Capital Gains and Short Term Capital losses are allowed to be set off against both Long Term Gains and Short Term Gains. In other words, the Assessing Officer by observing so, has also taken the issue with regard to the brought/forward losses to the tune of Rs.56,96,224/- originally accepted by him at the time of original assessment, and reconsidered the same also and consequently, made the addition of Rs.60,48,161/-. In my

considered view, the above two issues taken up for consideration by the Assessing Officer were not the issues either raised before or considered by the Tribunal while remitting the matter as discussed supra and therefore, this Court is of the view that reconsideration of those two issues by taking advantage of the remand order, cannot be sustained legally. Hence, this Court finds that the Assessing Officer exceeded his jurisdiction over the issues which are not remitted to him, by reconsidering the same and thus, the present writ petition is maintainable against such order. It is further seen that the Assessing Officer has not given an opportunity of hearing to the petitioner before passing the impugned order and thus, violated the principles of natural justice. On that ground as well, the writ is maintainable.

15. At this juncture, it is useful to refer to the decisions relied on by the learned counsel for the petitioner as follows:

(a) In (1982) 145 ITR 255 (All), S.P.Kochhar Vs. Income Tax Officer, Dehradun, the Division Bench of the Allahabad High Court has observed that when the Tribunal set aside the assessment and remands the case for making a fresh assessment, the power of the Income Tax Officer is confined to the subject matter of appeal before the Tribunal and that he cannot take up the questions which were not the subject matter of appeal before the Tribunal, even though no specific direction has been given by the Tribunal. The relevant observation is extracted hereunder:

"When the Tribunal set aside the assessment and remands the case for making a fresh assessment, the power of the Income Tax Officer is confined to the subject matter of appeal before the Tribunal. He cannot take up the questions which were not the subject matter of appeal before the Tribunal, even though no specific direction has been given by the Tribunal".

(b) In (2008) 302 ITR 126 (Guj), Saheli Synthetics P. Ltd., Vs. CIT, the Division Bench of the Gujarat High Court has observed that even where an assessment is set aside simpliciter, without any enhancement proposal, it is always in the context of the appeal against an order of assessment and cannot be read to mean that the Appellate Authority granted powers to the Assessing Officer in relation to items of assessment which never formed part of the appeal before the Appellate Authority.

(c) In T.C.(Appeal) No.885 of 2008 dated 04.04.2018, the Division Bench of this Court has observed that the Tribunal has no power under the Income Tax Act to enhance the assessment in an appeal. Equally, it cannot be done on an order of remand being passed by the Tribunal to the Assessing Officer.

(d) In (1995) 213 ITR 502 (Mad), Raja DV Seetharamaya Vs. WTO, similar view was expressed by this Court that the jurisdiction of the Assessing Officer, after remand, would depend upon the terms of the remand order and he would not be entitled to go beyond them. The relevant observation made therein is extracted hereunder:

"If the facts of these petitions are considered in the context of the aforesaid principle of law, it would be clear that the Assessing Officer has gone beyond the remand order and has treated the whole matter as at large before him. This was not intended by the remand order passed by the Appellate Authority. He has thus reopened even the matter in relation to the years where the assessment orders had not been challenged in appeal and had become final. There is, therefore, a patent illegality in the impugned notices as also the assessment orders justifying issuance of a writ of certiorari in the matter".

16. In view of the above stated position of law, this Court is of the view that the Assessing Officer in this case has traveled beyond the scope of the remand order of the Tribunal and reconsidered the issues with regard to the income from Short Term Capital Gains under Section 111A and Brought/forward losses of previous assessment years and thus, exceeded his jurisdiction over and above the issue which was remanded. In other words, the Assessing Officer himself has enlarged the scope of the remand without confining himself to the issue which was remanded by the Tribunal. As rightly pointed out by the learned counsel for the petitioner under the guise of passing fresh order in pursuant to the order of remand, the Assessing Officer has in effect reopened the uncontested issues and passed fresh order on those issues as well, which were not the intent of the Tribunal, while remitting the matter back to the Assessing Officer. In fact, as rightly pointed out by the learned counsel for the petitioner, what the Assessing Officer could not have achieved by reopening the assessment under Section 148 of the IT Act, in view of lapse of time, sought to achieve the same under the guise of passing fresh order of assessment in pursuant to the remand by the Tribunal. Certainly, the above act of the Assessing Officer is impermissible under law and consequently, cannot be justified or sustained. No doubt, the learned counsel for the Revenue contended that all the issues are interlinked. I do not find any pleading to that effect in the counter filed herein or advancement of argument before the Tribunal. Hence, such contention is liable to be rejected.

17. Thus, this Court is of the view that the assessment made by the Assessing Officer in respect of those two issues viz., income from Short Term Capital Gains under Section 111A and Brought/Forward losses for the assessment years 2006-2007 to 2009-2010 cannot be sustained as valid in law, since such exercise was beyond the scope of the order of remand.

18. However, while considering the issue which was agitated by the Assessee before the Appellate forums viz., "Income from Short Term Capital Gains other than under Section 111A and consequential addition of Rs.25,05,304/-" is concerned, it is the specific case of the petitioner that the Assessing Officer has changed the head from "Short Term Capital Gains" to "Undisclosed Sources under Section 68", without putting the petitioner on notice and hearing them. It is not in dispute that before passing the impugned order, the petitioner was not put on notice and given an opportunity of hearing as well. Since it is seen that the disputed addition of Rs.25,05,304/- was reiterated by the Assessing Officer, however, taxing the same as income on a different head viz., from Undisclosed Sources under Section 68, instead of Short Term Capital Gains other than one under Section 111A, without issuing notice to the petitioner to that effect, this Court is of the view that the said issue can be considered by the Assessing Officer once again, however, by putting the petitioner on notice.

19. Accordingly, this Writ petition is allowed and the impugned assessment order is set aside. Consequently, the matter is remitted back to the Assessing Officer to redo the assessment only in respect of the issue relegated by the Tribunal while remitting the matter viz., income from Short Term Capital Gains other than under Section 111A and consequential addition of Rs.25,05,304/-, after giving a notice and an opportunity of hearing to the petitioner. Such exercise shall be done by the Assessing Officer within a period of six weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To

The Income Tax Officer
Non-Corporate Ward - 5(2)
Income Tax Office - BSNL Tower
No.16, Greams Road, Chennai-600 006.

+1 CC to Mr. Sandeep Bagmar, Advocate sr 87082.

+1 CC to M/s. Hema Muralikrishnan, Advocate sr 87060.

W.P.No.2961 of 2019

VGII (CO)
SP(13/11/2019)