IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2019

Reserved on 05.11.2019
Delivered on 21.11.2019

C O R A M

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.539 of 2018
and
W.M.P.Nos.32917 and 649 of 2018

Doosan Bobcat India Private Limited
(Formerly known as Doosan Infracore India Private Limited)
Rep. by its Chief Financial Officer, Mr.Kibong Nam,
3rd Floor, No.67, TNPL Building,
Mount Road, Guindy,
Chennai 600 032. ...Petitioner

vs

1.The Deputy Commissioner of Income Tax,
Corporate Circle-1(1),
121, Mahatma Gandhi Road,
Chennai 600 034.

2.The Assistant Commissioner of Income Tax (OSD)
Corporate Range 1,
121, Mahatma Gandhi Road,
Chennai 600 034.

3.The Principal Commissioner of Income Tax-1,
121, Mahatma Gandhi Road,
Chennai 600 034. ...Respondents

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorari to call for the records on the file of the second respondent and quash the impugned order passed by the second respondent in PAN:AACCD6529L dated 12.12.2017 along with notice in PAN: AACCD6529L dated 31.03.2017 in Letter No.ITBA/AST/S/148/2016-17/1003811296(1) issued under Section 148 of the Income Tax Act for the assessment year 2010-11.

For petitioner : Mr.N.V.Balaji
For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

This writ petition is filed challenging the assessment order dated 12.12.2017 passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 along with notice dated 31.03.2017 issued under Section 148 of the Income Tax Act.

2.The case of the petitioner is as follows:

It is a Private Limited Company and an assessee before the respondent Department. The petitioner filed a return of income for the Assessment Year 2010-11 under Section 139(1) of the Income on 08.10.2010 declaring loss of Rs.17,30,25,913. The original return was filed within the due date. On the date of filing of the return, the petitioner did not get its account audited and had sought approval from the Registrar of Companies for extending the time limit to hold its Annual General Meeting. The petitioner was required to file an electronic return of income and such electronic return would get uploaded only when all the mandatory fields are filled, one such being the details of audit under section 44AB of the said Act. Since the petitioner was liable for audit under Section 44AB of the said Act, the online return could not be uploaded without filling details of the audit return. Therefore, the petitioner mentioned the date of audit report as 29.09.2010, an adhoc date to enable the online filing of the return. The accounts of the petitioner were eventually audited under the Companies Act, 1956 and subsequently under Section 44AB of the said Act on 12.01.2011. Based on the tax audit report dated 12.01.2011, the petitioner filed a revised return on 05.02.2011 declaring loss of Rs.10,93,69,356/-. The first respondent passed an order under Section 143(3) of the said Act dated 13.03.2014, accepting the loss declared in the revised return. During the course of assessment proceedings, the petitioner provided all the material information required for the purpose of assessment, including the tax audit report and Auditor's report under the Companies Act. The first respondent later issued the impugned notice under Section 148 of the said Act dated 31.03.2017. In response to the said notice, the petitioner filed these return of income on 21.04.2017. They also sought for furnishing reasons for reopening through its letter dated 26.04.2017. The reasons were furnished through proceedings dated 15.06.2017. The petitioner filed their objections against the reopening on 02.08.2017. The Assessing Officer rejected the objections by proceedings dated 29.09.2017. Consequently, the Assessing Officer issued notice under Section 143(2) of the said Act dated 27.10.2017 for scrutiny for reassessment under Section 147 of the Act. Thereafter, the impugned reassessment order under Section 143(3) read with 147 of the Act was passed on 12.12.2017. Subsequent to the notice issued under Section 143(2), no further opportunity was provided or notice of hearing was issued to the

petitioner. Hence, the impugned order of assessment violates the principles of natural justice. The reopening is made after the expiry of four years from the end of the assessment year 2010-11. The notice under Section 148 is served after the end of the four years from the end of the assessment year 2010-11. Since the petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment in the course of original assessment, the limitation of four years as provided in the first Proviso to Section 147 is attracted. The reasons provided by the first respondent for reopening have not been drawn on the basis of any fresh material on record. The assessing Officer merely claimed the return of income to be invalid due to typographical error made by the petitioner. The second respondent rejected the objections of the petitioner against reopening stating that the error with respect to the date of audit report is not typographical error but amounted to assessee not furnishing truly and fully all the materials. The reopening is one which is based on same materials that were present at the time of original assessment. Therefore, the same amounts to change of opinion. Proceedings under Section 147 of the Act on the basis of opinion of the Revenue Audit party without individual application of mind by the Assessing Officer, is illegal and bad in law.

3. A counter affidavit is filed by the respondents, wherein it is stated as follows:

This writ petition is not maintainable, since the statutory appellate remedy is available to the petitioner against the impugned order. The impugned order was passed after giving due and sufficient opportunity to the petitioner. Principles of natural justice and the statutory provisions were duly complied with. The question whether the addition made by the respondent is justifiable or not, is an issue to be agitated on merits after letting in evidence and does not hit jurisdiction of the respondents to maintain the writ petition as against the assessment order. The original return of income was filed by the petitioner herein on 08.10.2010 declaring a loss of Rs.17,30,25,913/-. In the affidavit itself, it is stated that the date of Audit Report under Section 44AB was mentioned as 29.09.2010 and that such date was not the correct date but an adhoc date mentioned by the petitioner at its whims and fancies. It is necessary to note that Section 44AB audit report has to be mandatorily completed and prepared before the due date for filing of return under Section 139(1), which for the present year is 15.10.2010. However, the petitioner herein has not got the 44AB audit report prepared by then. Further, even in the revised return of income dated 05.02.2011 , the petitioner has mentioned the date of audit report as 29.09.2010, which again is a false statement. Also, it is to be noted that the 44B report was prepared on 12.01.2011, nearly 4 months after the last date

for preparing the same and there is absolutely no plausible reason given for such delay. The notice under Section 148 was issued on 31.03.2017 after getting the necessary administrative approval from the higher authorities. The notice under Section 148 had been issued within the due date as per Section 149. The averment that no opportunity was provided is not accepted, as after the issue of 143(2) notice, there was no response from the petitioner. No other details except those produced during the scrutiny proceedings, and details filed in response to Section 148 notice, reply stating objections for the issue of notice under Section 148 were provided. Since this is a case of reopening and order rejecting the objections of the assessee was also passed on 29.09.2017 meeting all averments and the issue being carry forward of loss requiring no further details, order under Section 143(3) read with Section 147 was made on 12.12.2017 in accordance with the reasons provided to the petitioner and also in conformity with the conditions found satisfied by the higher authorities. Hence, there had been no violation of natural justice and fair play. The condition of reopening after four years from the end of the Assessment Year 2010-11 had been found satisfied and the notice under Section 148 has been issued i.e. before the end of 6 years, on 31.03.2017, which is well within the condition for reopening. It is wrong to say that all material facts necessary for assessment had been truly and fully disclosed, when the material fact of date of audit report was a false disclosure in the return of income. In the petitioner's case, it is an issue of wrong input in return of income by incorporating a bogus date for completion of Audit Report under Section 44AB, which has no connection with disclosure of materials. It is also submitted that the issue to be considered is whether the representation in the return about the Audit report is true or not. It is submitted that from the averments of the petitioner, it is very clear that the petitioner had wantonly mentioned a wrong date of audit report in its return of income. The averment that there was a typographical error in the return of income cannot be accepted as the concerned audit report had been prepared after delay of 4 months and even in the revised return, the date of audit report is wrongly mentioned as 29.09.2010 so that the CPC as well as the assessing Officer are led to believe that the audit report had been completed and prepared within the stipulated time. The averment that "reopening based on same material made available at the time of scrutiny assessment is not valid" is refuted herein and it is submitted that there had been excessive allowance of loss which should not be carried forward and the subject excessive allowance is covered by the proviso to Sec.147. The averment that information received from the audit part cannot be the basis for reassessment proceedings is denied by the fact that there had been no mandatory compliance of filing the audit report under Section 44AB within

the due date.

4. A rejoinder affidavit is filed by the petitioner reiterating the contentions already raised. It is also stated therein that there is no statutory bar on carrying forward the loss, when return is filed within time limit under Section 139 (1) of the Act, even if the audit under Section 44AB was not completed within the due date. It is further stated that the issue whether reopening is permissible on the basis of audit objection is a relevant issue in deciding the jurisdiction to make reassessment under Section 147. Therefore, the writ petition is maintainable.

5. Mr.N.V.Balaji, learned counsel for the petitioner submitted as follows:

i) The impugned order of assessment is challenged mainly on three grounds viz.,

a) Reopening is based on change of opinion;

b) Reopening is barred by limitation;

c) Before passing the assessment order, the petitioner was not issued with notice under Section 142(1) and thus, the impugned order was passed without providing reasonable opportunity. Though the Assessing Officer has issued notice under Section 143(2), he failed to issue notice under Section 142(1). Since the return cannot be filed online without filling up the date of the audit report, the petitioner has wrongly given 29.09.2010, as the date of audit report, as an adhoc date. However, though the Audit Report was made on 12.01.2011 and when a revised return is filed on 05.02.2011, once again the date of Audit Report was referred to as 29.09.2010. However providing wrong date of audit report cannot be a reason to reopen the assessment, when the petitioner has placed all the material facts and relevant documents before the Assessing Officer at the time of original assessment. On 11.07.2012, the Assessing Officer called for documents and the petitioner filed the Audit Report before the Assessing Officer on 27.08.2012. When a notice under Section 148 dated 31.03.2017 was issued, the petitioner filed return in response to such notice, however, again by making the same mistake regarding the date of Audit Report, which is not intentional and on the other hand, by way of inadvertence. The Assessing Officer sought to reopen the assessment by claiming that the petitioner had given false information regarding Audit Report and that the Audit Report filed was belated one. The Assessing Officer also seeks to reopen the assessment for levying penalty, which cannot be a ground for reopen. There is no allegation that there is failure on the part of the assessee to disclose truly and fully the material details. The petitioner filed their objections against the reasons for reopening, however, the same was not considered properly. Unless Section 139(9) is put into operation, no

return can be declared invalid and on the other hand, it could be only a defective return. The Assessing Officer found the return filed by the petitioner as invalid only because wrong date of Audit Report was given. There is no live link between the reasons for reopening and the material relied for such reasons. Even though an alternative remedy of appeal is available against the impugned assessment order, still the writ petition is maintainable, since the petitioner is questioning the very reopening also. If the Assessing Officer assumes jurisdiction under Section 147 without satisfying the mandatory requirement, the Writ Court can go into it, instead of driving the petitioner to seek alternative remedy. In this connection, the decisions of the Hon'ble Supreme Court reported in (1961) 41 ITR 191 (SC), Calcutta Discount Co. Ltd., vs. Income Tax Officer and 2017 (77) taxmann.com 176 (SC), Jeans Knit (P) Ltd., vs Deputy Commissioner of Income Tax, are relied on.

ii) On merits, it is to be noted that a return of income will not become invalid by reason of mistake as contemplated under Section 292B. Mistake does not affect the material information regarding the escapement of assessment. Giving a wrong date of audit report is not a false claim and it is purely a mistake. Board Circular dispense with the production of audit report with return. However, the Assessing Officer says it is mandatory under Section 139(9).

iii)The following case laws are relied on in support of the above contention:

a) (2018) 92 taxmann.com 361, (SC), Income Tax Officer vs. Techspan India (P) Ltd.,

b) 2002(256) ITR 1 (Del), Commissioner of Income Tax vs. Kelvinator of India Ltd.,

c) (2010) 320 ITR 561 (SC), Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd.

d) (2003) 129 Taxmann.com 967(Mad), Director of Income Tax vs. Spic Educational Foundation;

e) (1992) 40 ITD 300 (Bom), Income Tax Officer vs. Sabine Laboratories (P) Ltd.,

f) 2007 163 Taxmann 154 (Raj), Bajrang Oil Mills vs. Income Tax Officer.

g) (2015) 378 ITR 380 (Mad), Commissioner of Income Tax vs. Schwing Stetter India (P) Ltd.,

h) (2017) 88 Taxmann 256 (Mad), Madras Suspensions Ltd., vs Deputy Commissioner of Income Tax;

i) (2018) 97 Taxmann.com 179 (Mad), Principal Commissioner of Income Tax-6 vs. Santech Solutions (P.) Ltd.

6. Per contra, Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents submitted as follows:

i) The writ petition itself is not maintainable, since as against the impugned assessment order, a statutory appellate remedy is available to the petitioner and therefore, without exhausting such remedy, the petitioner is not justified in filing the present writ petition. Challenge made in this writ petition is against 148 notice and the consequential order of assessment. The petitioner has not questioned the order rejecting the objections filed by the petitioner against the reasons for reopening. The case laws relied on by the petitioner in support of the maintainability of the writ petition are factually distinguishable and thus, not applicable to the present case. The recent decision of the Apex Court reported in 2018(3) SCC 85, State Bank of India vs. K.C.Mathew, is relied on against the maintainability. None of the ingredients referred to in 2014(1)SCC 603, CIT vs. Chhabil Dass Agarwal, is attracted to maintain the writ petition.

ii) On merits, it is to be noted that the petitioner is blowing hot and cold. The petitioner gave a false statement, as if the audit report has been obtained. Therefore, it is evident that there is no true and full disclosure of material details at the time of original assessment. Consequently, the reopening is justified. Whether it is a bonafide mistake or not, is a factual aspect, which has to be pleaded and proved before the next fact finding Authority, viz., the Appellate Authority. If the assessee failed to bring to the notice of the Assessing Officer the relevant fact, the assessment can be reopened. In this connection, the decision of this Court reported in 2018(99) Taxmann.com 340 (Mad), A.Sridevi vs. ITO, confirmed in 2018 (100) taxmann.com 434 (Madras) (DB), A.Sridevi vs. ITO, is relied on.

iii) The other case laws are relied on by the learned counsel for the petitioner in support of his contention on merits are also factually distinguishable and thus, they are not applicable to the present case. Moreover, the facts and circumstances of each case relied on by the learned counsel would show that they are either filed against the very 148 notice immediately before ever the assessment order passed or after going through the regular process of filing appeal before the concerned statutory appellate authorities.

7. Heard the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents. Perused the materials placed before this Court.

8. Challenge made in this writ petition is against the notice issued under Section 148 of the Income Tax Act, 1961 and the consequential order of assessment passed under Section 143 (3) read with Section 147 of the said Act dated 12.12.2017. The relevant assessment year is 2010-2011. In respect of the relevant assessment year, original return was filed by the

petitioner on 08.10.2010. In the said return, the assessee had shown the date of audit report as 29.09.2010, while filing the relevant columns therein under the head Audit Information. Again, a revised return was filed by the assessee on 05.02.2011, wherein also, the date of audit report was specifically stated as 29.09.2010. The Assessing Officer, based on the return filed by the petitioner, completed the assessment and issued an order of assessment on 13.03.2014, followed by a notice of demand under Section 157 of the said Act dated 14.03.2014. After a period of three years, the Assessing Officer issued notice under Section 148 of the Income Tax Act, 1961, to reopen the assessment on the reason that the Assessee's income chargeable to tax for the relevant assessment year has escaped assessment. Accordingly, the Assessing Officer called upon the petitioner to file a return in the prescribed form. In response to the said notice, the assessee filed return dated 21.04.2017. Even while filing the said return pursuant to notice under Section 148, the petitioner referred the date of audit report as 29.09.2010. The petitioner through communication dated 26.04.2017, requested the Assessing Officer to provide with the reasons recorded for reopening the assessment. Consequently, the Assessing Officer through communication dated 15.06.2017, furnished the reasons for reopening the assessment, which reads as follows:

> " The assessee filed the return of income for the A.Y.2010-11 on 08/10/2010 declaring a loss or Rs.10,93,69,356. Subsequently, the case was selected for scrutiny and assessment was completed on 13.03.2014 accepting the same.
>
> It is seen that the assessee company had shown the current year losses as below are carry forward to subsequent year, in the income statement:
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> | | |
> |---|---|
> | Unabsorbed depreciation loss | Rs. 88,35,494 |
> | Business Loss | Rs.10,05,33,863 |
> | | Rs.10,93,69,356 |
>
> It is seen from the annual accounts and Form 3CD, it is found that the Annual accounts and audit certificate u/s 44AB were prepared and certified on 12 January 2011. However, in the revised return filed by the assessee on 05/02/2011, it was stated that the audit certificate u/s 44AB was signed on 29/09/2010. From the above it is evident that the information given by the assessee is false with regard to audit certificate u/s 44AB. Further, the annual accounts are certified only on 12/01/2011. Hence, the return filed by the assessee on 08/10/2010 stating that loss of Rs.10,93,69,356/- is invalid one. Therefore, the carry forward of business loss is required to be disallowed.

> Further, failure to furnish report within due date relating report u/s 44AB and 92E attract penalty u/s 271B and 271BA. Both the reports were audited and certified by the Chartered Accountants only after the due date specified u/s 139(1) of IT Act. Hence penalty u/s 271B and 271BA are to be levied.
>
> From the foregoing, it is seen that the material fact, has not been disclosed fully and truly during the course of assessment proceedings. Further, reliance is placed on Explanation 1 of Section 147 which clarifies that, "Production before the Assessing Officer of accounts books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of foregoing proviso." Therefore, I have definite reason to believe that income to the tune of Rs.10,93,69,356- has escaped assessment."

9. Perusal of the above said reasons for reopening the assessment would show that it is the specific allegation of the Revenue that the return filed by the assessee with regard to the date of audit report is with false information and that the return so filed is invalid one. It is also alleged that the petitioner has not disclosed the material fact fully and truly during the course of assessment. The Assessing Officer sought to rely upon Explanation (1) of Section 147 to contend that mere production of accounts, books or other evidence before the Assessing Officer will not necessarily amount to disclosure within the meaning of the relevant provision.

10. The Assessee through the communication dated 01.08.2017, filed their objections against the reasons for reopening. It is their contention that there is no new material available to reopen the assessment and that the mere change in opinion cannot justify reopening of the assessment. It is also contended by the assessee that non furnishing of audited accounts and audit report under Section 44AB does not render the return invalid. It is their further contention that the return of income cannot be regarded as invalid in view of Section 292B of the said Act. However, the assessee has admitted that the date of audit report was inadvertently mentioned as 29.09.2010, as against the actual date viz., 12.01.2011. According to the assessee, it is purely a clerical error made without any malafide and however, it does not make the total income or tax liability of the assessee. The Assessing Officer, after considering the objections filed by the assessee against reopening, passed a detailed order on 29.09.2017, rejected the

objection and found that the reopening is valid. The Assessing Officer, while rejecting the objections, observed that the assessee has furnished a false information regarding the date of audit report and therefore, the assessee cannot claim that they have truly and fully disclosed all the material facts necessary for the assessment. The Assessing Officer also pointed out that the assessee has failed to furnish the audit report within the due date relating to report under Section 44AB and 92E, which also attracted penalty under Section 271B and 271 BA of the said Act. The Assessing Officer further pointed out that the reasons given for effecting reassessment were not the matters considered by the Assessing Officer, while passing the assessment order and therefore, when no opinion was formed in this regard earlier, the question of change of opinion does not arise.

11. The above said order dated 29.09.2017, rejecting the objections against reopening was not put to challenge and on the other hand, the assessee, in response to the said order, participated in the assessment proceedings and allowed the Assessing Officer to complete the assessment and pass the impugned order dated 12.12.2017.

12. Under the above stated facts and circumstances, this Court has to consider and decide as to whether the impugned proceedings viz., the notice under Section 148 and the consequential assessment order passed under Section 143(3) read with Section 147 need to be interfered with by going into the merits of the matter, when admittedly the petitioner has not questioned the order rejecting the objections filed by the petitioner against reopening.

13. At this juncture, it is relevant to note the observation made by the Apex Court reported in (2003) 259 ITR 19, GKN Driveshaft's (India) Limited vs ITO. As per GKN Driveshaft's case, it is open to the assessee to seek for reasons for reopening and if such request is made, the Assessing Officer is bound to furnish the reasons within a reasonable time. It is further observed therein that on receipt of the reason, the assessee is entitled to file objections against the reasons and that the Assessing Officer is bound to dispose of the same by passing a speaking order. The very observation made by the Apex Court that the Assessing Officer should pass a speaking order on the objections raised against reopening would undoubtedly show that it is an order by itself in so far as the process of reopening is concerned, commencing from the issuance of notice under Section 148 to passing an order either accepting or rejecting the objections raised against the reopening. Depending upon the order passed by the Assessing Authority against the objections raised on the reasons for reopening, it is open to the assessee to work out their remedy either to

challenge the said order immediately before the Assessing Officer goes to the next step of issuing notice under Section 143(2), calling upon the assessee to participate in the assessment proceedings or to participate in the assessment proceedings and allow the Assessing Officer to pass revised order of assessment.

14. In this case, admittedly, the petitioner has not questioned the order dated 29.09.2017, rejecting the objections. It is pertinent to note at this juncture that even in this writ petition, the challenge made is against notice under Section 148 and the order of assessment. In between, the order rejecting the objection stares at the petitioner, which was not questioned. No doubt, the petitioner, while questioning the order of assessment, can also question the reopening. But the forum of such change is relevant to be noted at this juncture.

15. The petitioner has chosen to challenge the notice under Section 148 and the consequential assessment order by filing the present writ petition. I have already pointed out that the impugned assessment order is the consequence of reopening the assessment under Section 147. Therefore, the question whether the reopening is valid or not, is to be considered and decided based on the reasons for reopening, objections filed by the assessee against such reasons and order passed thereon rejecting such objections. As already pointed out that the assessee has not chosen to challenge the rejection order, on the other hand, they participated in the assessment proceedings.

16. Therefore, in my considered view, the reasons for reopening and the consequential order rejecting the objections against those reasons now got merged with the subsequent order of assessment and therefore, it would not be proper for this Court to go into the question of reopening alone and decide about its validity by exercising the jurisdiction of this Court under Article 226 of the Constitution of India. By going into such question, if it is found that the reopening is valid, this Court has to necessarily go into the merits of the assessment as well and find out as to whether the same can be sustained or not. Needless to state that such exercise involving consideration of factual aspects of the matter, needs to be done only by the next fact finding authority viz., Appellate Authority. It is well settled that in fiscal matters, invoking the jurisdiction of this Court under Article 226 of the Constitution of India, straight away to challenge the order of the Original Authority and not be encouraged and on the other hand, the parties must be directed to resort to the statutory appellate remedy under the relevant statute.

17. At this juncture, the recent decision of the Apex Court reported in (2018) 3 SCC 85, Authorized Officer, State Bank of Travancore vs. Mathew K.C., is relevant to be quoted, wherein at paragraph No.5, it is observed as follows:

> "5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal, 2014 (1) SCC 603, as follows:
>
> "15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an 5 order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

18. As rightly pointed out by the learned Counsel for the Revenue that none of the exceptions referred to in the above decision is attracted in this case to exercise the discretionary jurisdiction of this Court under Article 226 of the Constitution of India to examine the correctness or otherwise of the impugned order of assessment. The learned counsel for the petitioner relied on (1961) 41 ITR 191 (SC), Calcutta Discount

Co. Ltd. vs. Income Tax Officer and (2017) 77 taxmann.com 176 (SC), Jeans Knit (P) Ltd. vs. Deputy Commissioner of Income Tax, in support of his submission on the maintainability of the writ petition. As rightly pointed out by the learned counsel for the Revenue, the facts and circumstances of both the cases would show that challenge made in those cases before the Court was against notice issued for reopening the assessment, even before an order of assessment was passed. There is no doubt that the petitioner is entitled to approach this Court and challenge the very reopening proceedings, provided they approach the Court well before the Assessing Officer proceeded to the next stage of passing the order of assessment. In other words, if the assessee failed to challenge the reopening at the appropriate time before the Court, he is not entitled to seek such indulgence, after allowing the Officer to pass the order of assessment and thereby, allowing the reopening proceedings to get merged with the order of assessment, since the Writ Court cannot sit as an Appellate Authority and decide the merits of the assessment. It is not that this Court is powerless to decide the merits but the question is whether such power is need to be exercised, while invoking the discretionary jurisdiction under Article 226 of the Constitution of India. My considered view is that under the guise of questioning the reopening, an assessee should not be encouraged to challenge the order of assessment straight away before this Court by filing a writ petition, when he miserably failed to challenge the reopening at the appropriate time. In fact, I myself considered the issue in a case reported in (2018) 99 taxmann.com 340 (Mad), A.Sridevi vs. ITO and found that providing certain materials earlier cannot be equated with the disclosure of true and full material facts necessary for assessment, unless such material was already placed on record at the time of filing the original return itself. The above said decision was confirmed by the Division Bench of this Court reported in (2018) 100 taxmann.com 434 (Mad), A.Sridevi vs. ITO.

19. The admitted fact remains that the assessee has quoted a wrong date viz., 29.09.2010 as the date of audit report not only in the original return but also in the revised return before reopening and also in the return filed in response to the notice issued under Section 148. The assessee claims that it is an inadvertent mistake or clerical mistake. Assuming that it is a mistake, committing the same mistake again and again, prima facie, does not appear to this Court as inadvertent, when the assessee was fully aware of the fact that the date of audit report is 12.01.2011 and not 29.09.2010, as claimed in the returns filed as stated supra. In fact, while the original return was filed on 08.10.2010, admittedly the audit was not completed and a report was not available before the assessee. However they have chosen to indicate the date of audit report as

29.09.2010, while filing the original return on 08.10.2010. Therefore, it is evident that the date of audit report furnished in the original return is not a true information or disclosure of material facts and therefore, the reasons for reopening the assessment indicating that there is a failure on the part of the assessee to disclose truly and fully material facts, cannot be stated as a reason without any basis. At the same time, the question as to whether such mistake in furnishing the date of audit report will go to the root of the matter and affect the assessment proceedings is a different issue, which has to be considered and decided only by the next fact finding Authority.

No doubt, the learned counsel for the petitioner contended that the wrong committed by the assessee must have live link to say that income has escaped assessment. I have already pointed out that the above issue is not a simple issue on law and on the other hand, it is on facts. Therefore, whether the wrong committed by the assessee in referring to the date of audit report will certainly have a live link to say that the income has escaped assessment or not, is to be considered by the next fact finding authority, as this Court is not expressing any view on the said issue raised by the petitioner, as it is fully convinced that this matter is to be agitated before the Appellate Authority not before this Court. Thus, I find that all the issues raised by the petitioner in this writ petition need to be raised only before the next fact finding Authority viz., Appellate Authority by filing a regular appeal, which in turn, shall consider the same and pass orders on merits and in accordance with law. Since this Court has not gone into the merits of the contentions raised by the petitioner touching upon the merits of the assessment and expressed any view on the same, the case laws relied on by the learned counsel for the petitioner are not considered for the present, as this Court is relegating the petitioner to avail the alternative remedy of appeal. Even otherwise, it is seen that the case laws relied on by the learned counsel for the petitioner are factually distinguishable, more particularly, when some of the cases are against very 148 notice at the first instance and some of the cases, where the assessee therein had gone through the regular statutory appellate remedy. Therefore, when this Court finds that the petitioner has to avail such alternative appellate remedy and raise all the points, it is not necessary to deal with facts and circumstances of each case laws relied on by the petitioner for the present.

20. Accordingly, this writ petition is disposed of, by directing the petitioner to file regular appeal against the impugned order of assessment before the concerned Appellate Authority within a period of four weeks from the date of receipt of a copy of this order. It is open to the petitioner to raise

all the contentions raised in this writ petition before the Appellate Authority in the said appeal. The Appellate Authority shall consider such appeal on its own merits and pass orders in accordance with law, including the challenge made by the petitioner against the reopening. Any of the observations made in this writ petition shall not influence the mind of the Appellate Authority to decide the appeal on its own merits and in accordance with law. No costs. The connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To
1.The Deputy Commissioner of Income Tax,
Corporate Circle-1(1),
121, Mahatma Gandhi Road,
Chennai 600 034.

2.The Assistant Commissioner of Income Tax (OSD)
Corporate Range 1,
121, Mahatma Gandhi Road,
Chennai 600 034.

3.The Principal Commissioner of Income Tax-1,
121, Mahatma Gandhi Road,
Chennai 600 034.

+1cc to Mr.N.V.Balaji , Advocate SR.No. 98148
+1cc to M/s.Hema Murali krishnan, Advocate SR.No. 97034

W.P.NO.539 OF 2018

A.SK(17/12/2019)