

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.07.2019

DATE OF DECISION : 09.08.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.No.11648 of 2019

and

W.M.P.No.11879 of 2019

S.Ajit Kumar

..Petitioner

Vs.

The Assistant Commissioner of Income-tax,
Non-Corporate Circle-20(1),
Room No.311, 3rd Floor,
Wanaparthi Block,
Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai-600 034.

..Respondent

This writ petition is filed under Article 226 of the Constitution of India praying to issue a Writ of certiorari or any other writ, direction or order in the nature of a writ calling for the records in F.No.ACDPK0418K / Penalty / 158BFA (2) / ACIT / NCC-20(1)/CHN dated 12.03.2019 for the Block Assessment period from 01.04.1996 to 17.07.2002 on the file of the respondent and quash the same and pass such order or further orders as the High Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.G.Ashokapathy
for M/s.Pass Associates

For Respondent : Mr.J.Narayanaswamy
Standing Counsel

ORDER

Mr.G.Ashokapathy of M/s.Pass Associates (Law Firm) on behalf of writ petitioner and Mr.J.Narayanaswamy, learned Standing Counsel for the lone official respondent were before this Court, main writ petition was taken up and heard out with the consent of both learned counsel.

2 Owing to the trajectory of the hearing or in other words, owing to what unfurled in the hearing, scope of the instant writ petition stands considerably narrowed down. In the

light of the submissions made by learned counsel on both sides, the entire writ petition now turns on a lone question, i.e., limitation. To state with specificity, the sole question in instant writ petition now is whether an order dated 12.03.2019 bearing reference F.No.ACDPK0418K/Penalty / 158BFA(2) / ACIT/NCC-20(1) / CHN made by sole respondent (hereinafter 'impugned order' for brevity) is barred by limitation. Notwithstanding several averments made, grounds / contentions raised in the affidavit filed in support of the writ petition and the counter affidavit filed by the lone official respondent, both learned counsel before this court agreed without any disagreement or disputation that the entire writ petition now turns on limitation issue and arguments were advanced on this basis.

3 In the light of the narrow compass on which instant writ petition now turns, short facts shorn of micro details will suffice and the same is given infra under the caption 'Factual Matrix in a Nutshell'.

4 Factual Matrix in a Nutshell :

(a) Subject matter of instant writ petition arises under the 'Income Tax Act, 1961' ('IT Act' for brevity).

(b) Genesis of this writ petition was on 17.07.2002 when a search by the Income Tax Officials commenced in the office and residential premises of the writ petitioner. This search lasted till 21.8.2002.

(c) In the course of search, evidences were collected and according to Income Tax Department, there was understatement of real income in the regular returns filed. To be noted, this is for block period from 01.04.1996 to 17.07.2002 (hereinafter 'said block period' for the sake of clarity and convenience).

(d) Assessment proceedings commenced and an assessment order dated 31.8.2004 came to be passed by the assessing officer. This assessment order was made under section 158BC read with Section 143(3) of IT Act. Vide aforesaid assessment order, undisclosed investment in two immovable properties and cash payment to a construction company out of undisclosed income were quantified and it was held that writ petitioner is liable to pay a little over Rs.60.57 lakhs as Tax together with interest of little over Rs.4.54 lakhs totalling Rs.65.11 lakhs.

(e) Writ petitioner assailed the aforesaid assessment order by way of a statutory appeal under the IT Act being ITA No.206/ 2004-05. Appellate

authority is the Commissioner of Income Tax (Appeals)-I, Chennai and the appellate authority in and by order dated 15.2.2005 confirmed the order of assessing officer with regard to tax liability, but with regard to interest alone, the appellate authority directed assessing officer to charge interest for only five months and not for six months.

(f) Writ petitioner assessee as well as 'Income Tax Department' (hereinafter 'Revenue' for brevity) carried the matter in appeal by way of statutory appeals under section 253 of IT Act to the 'Income Tax Appellate Tribunal' (Bench in Chennai) which shall hereinafter be referred to as 'ITAT' for the sake of brevity.

(g) ITAT vide common order dated 28.4.2006 allowed the appeal filed by the writ petitioner assessee and dismissed the appeal filed by the Revenue. Thereafter, revenue filed a statutory appeal under section 260A of IT Act being TCA No.2620 of 2006 and a Hon'ble Division Bench of this Court by order dated 22.11.2006 dismissed the tax case appeal and did not interfere with the order of ITAT. Revenue carried the matter to Hon'ble Supreme Court of India vide Civil Appeal No.10164 of 2010 and Hon'ble Supreme Court in and by order dated 2.5.2018 allowed the Civil Appeal. This in effect means that the order made by the original authority, i.e., assessment made by the assessing officer on 31.8.2004 stood resuscitated qua tax liability and interest. To be noted, in the order made by the original authority on 31.8.2004, it was made clear that penalty proceedings under Section 158BFA(2) of IT Act will be initiated separately qua undisclosed income for the said block period. While this was mentioned in the assessment order itself, a separate 'Show Cause Notice' ('SCN' for brevity) was also issued on the same day, i.e., 31.8.2004 calling upon assessee to appear in person on date and time specified therein to show cause as to why penalty under section 158BFA(2) of IT Act should not be imposed.

(h) This SCN also did not progress owing to assessment order going through four levels of appellate adjudication, i.e., before appellate authority, ITAT, Hon'ble Division Bench of this Court and Hon'ble Supreme Court of India, the details and trajectory of which have been set out supra.

(i) Therefore, after the order of Hon'ble

Supreme Court of India on 2.5.2018, when the original assessment order made by the original authority on 31.8.2004 stood resuscitated, respondent issued a notice dated 12.9.2018 calling upon the writ petitioner Assessee to appear on a specified date and time (17.9.2018, 3.30 p.m.) to show cause as to why penalty should not be imposed under Section 158BFA(2) of IT Act.

(j) A perusal of this communication dated 12.9.2018 makes it clear that it is a continuation of SCN qua penalty which was already issued on 31.8.2004. To be noted, 31.8.2004 SCN has been cited in the reference and the writ petitioner Assessee has been called upon to appear on the aforementioned date and time.

(k) Writ petitioner assessee sent a reply dated 1.3.2019 and the same culminated in impugned order made by respondent. To be noted, vide impugned order, respondent has levied minimum penalty, i.e., 100% of tax qua undisclosed income. Therefore, the penalty was little over Rs.60.57 lakhs. It was Rs.60,57,286.00 to be precise. Assailing the impugned order, this writ petition has been filed and as mentioned above, instant writ petition now turns on the lone pivotal ground that impugned order is barred by limitation.

5 Having set out the factual matrix in a nutshell, this court now embarks upon the exercise of discussion of rival submissions under the caption 'Discussion and Dispositive reasoning' infra. Before the same is done, it is deemed pertinent to make it clear that learned counsel on both sides submitted without any disputation that arguments advanced are not covered by any case law and therefore, no case law was cited or pressed into service by both sides.

6 Discussion and Dispositive reasoning :

(a) Primary contention of learned counsel for writ petitioner is that the impugned order is barred by limitation in the light of section 158BFA(3)(c) of IT Act. Furthering his submission in this direction, learned counsel submitted that time limit prescribed / applicable to this case, for initiating penalty proceedings is six months from the date of receipt of ITAT order. As exact date of receipt is not available, it is to be reckoned from the date of ITAT order which is dated 28.4.2006 is his say. Though obvious, for the sake of clarity, it is mentioned that the earliest date of receipt of ITAT

order can only be the date of order itself. From the date of ITAT order, limitation expires on 27.10.2006.

(b) However, as would be evident from the trajectory which the assessment order took in the instant case, assessment proceedings did not stop with the order of ITAT. The order of ITAT was carried in appeal to this court by the Revenue under Section 260A of IT Act unsuccessfully and thereafter Revenue had carried it to Hon'ble Supreme Court successfully.

(c) One important and significant aspect of the matter is both sides submitted without any disputation that all appeals, i.e., first appeal by writ petitioner Assessee, two appeals by writ petitioner assessee and Revenue to ITAT, Tax Case Appeal to this court by Revenue and S.L.P in Hon'ble Supreme Court were all filed within the prescribed time limits.

(d) Adverting to the aforesaid provisions of law, learned counsel for writ petitioner contended that the statute (to be precise, section 158BFA(3) (c)) very clearly mentions about the order of first appellate authority, namely Commissioner of Appeals-I in this case and ITAT, but does not talk about TCA in this court or further proceedings in Hon'ble Supreme Court.

(e) In an attempt to buttress this submission, learned counsel for writ petitioner placed reliance on section 275 of IT Act, as also The Taxation Laws (Amendment) Bill, 2005 being Bill No.74 of 2005.

(f) With regard to Section 275 of IT Act, it was submitted that penalty under section 271(1)(c) of IT Act has a time limit, which is different from that of penalty under section 158BFA(2) of IT Act. Adverting to Bill No.74 of 2005, it was submitted that the possibility of widening the period of limitation for penalty under section 158BFA(2) of IT Act was also examined, but the same was not done.

(g) Responding to the aforesaid submission, learned Revenue counsel submitted that the order of ITAT in the instant case has not been given legal quietus. In other words, the assessment order had not attained finality with the order of ITAT on 28.4.2006. It was submitted that in any case, ITAT had allowed the appeal of writ petitioner assessee and dismissed the Revenue appeal. Therefore, the question of any penalty proceedings pursuant to ITAT order does not arise, as penalty proceedings can survive only when the assessment order is sustained. Furthering his submission in this direction, learned Revenue counsel submitted that this court also in

aforementioned TCA had dismissed the same and therefore, there was no assessment order for penalty proceedings to proceed. Ultimately, the assessment order was resuscitated only on 2.5.2018 when Hon'ble Supreme Court allowed the civil appeal and therefore, the reckoning date for computing limitation should be 2.5.2018 being the date of order of Hon'ble Supreme Court and not 28.4.2006 being the date of the order of ITAT.

(h) This Court has carefully considered the submissions on both sides. While it is clear that relevant provision relied on by learned counsel for writ petitioner talks only about first appeal to the first appellate authority, the order of ITAT and stops with the same, there is another provision which deals with a scenario which does not fall in such a factual setting. That provision is Section 158BFA(3) (e) of IT Act. A careful analysis of this provision makes it clear that this provision itself provides for two periods of limitation qua penalty under section 158BFA(2). One period is the end of assessment year in which assessment proceedings came to be passed. In this case, assessment order came to be passed on 31.8.2004 and therefore, that financial year ended on 31.3.2005. In the considered view of this court, this limb of time frame does not apply to instant case on hand as two successive appeals, namely statutory appeal to Commissioner (Appeals) and statutory appeal to ITAT under Section 253 of IT Act did not get completed in less than a year.

(i) The next limb talks about a period, from the date on which penalty proceedings are initiated. In the instant case, if it is construed that penalty proceedings were initiated on 31.8.2004, as already alluded to supra, the same could not be continued owing to writ petitioner assessee's appeal before first appellate authority. To be noted, first appellate authority confirmed the tax levy, but reduced the interest component, resulting in both assessee and Revenue carrying the matter in appeal to ITAT. Obviously, Revenue had to wait for the outcome of appeals before ITAT. As already mentioned supra, the outcome of appeals before ITAT was in favour of writ petitioner assessee. Absent assessment order, the question of penalty proceedings does not arise and therefore, penalty proceedings initiated on 31.8.2004 continued to lie dormant. This court also dismissed the TCA and assessment order got

resuscitated / revived only when Hon'ble Supreme Court allowed the Civil Appeal on 2.5.2018 and therefore, further notice dated 12.9.2018 continuing penalty proceedings which was involuntarily lying dormant was issued. This 12.9.2018 notice is well within six months from the date of the order of Hon'ble Supreme Court and therefore, it cannot be gainsaid that impugned order is barred by limitation.

(j) On a demurrer, even if the proposition is to be tested by assuming that 12.9.2018 communication is not a continuation of penalty proceedings initiated on 31.8.2004, section 158BFA(3)(e) saves the situation for the Revenue. The Revenue has six months time to initiate penalty proceedings. Therefore, if one were to test limitation, it is to be construed that penalty proceedings commenced on 31.8.2004, but was lying dormant till 2.5.2018 when Hon'ble Supreme Court sustained / resuscitated the assessment order.

(k) With regard to the provision relied on by the writ petitioner, i.e., section 275 of IT Act, it is to be noted that said provision in its present form was brought into the statute books on 01.04.1971 when section 260A of IT Act which provides for a statutory appeal to this court was not there in the IT Act. To be noted, section 260A of IT Act was brought into statute books only on 01.10.1998. To be noted, what is of utmost significance is, section 158BFA(3)(c) also was inserted / brought into statute books only on 1.1.1997. Therefore, as on the date on which limitation was statutorily prescribed, the last forum was ITAT.

(l) For the purpose of enhanced clarity and specificity, this Court deems it appropriate to mention that limitation qua penalty proceedings under IT Act is prescribed under two provisions with regard to two different types of penalties. With regard to penalty under section 271(1)(c), limitation is statutorily prescribed in section 275, with regard to penalty under section 158BFA(2) as in the instant case, limitation is statutorily prescribed under section 158BFA(3)(c). With regard to both these provisions, namely Sections 275 and 158BFA(3)(c) which prescribe different periods of limitation for two different types of penalties, both these provisions were brought into statute books in their present form before section 260A of IT Act was

brought into statute books. To be noted, section 260A of IT Act provides for a statutory appeal to High Court and this was brought into statute books only on 01.10.1998. To put it differently, when two different periods of limitation for two different kinds of penalties were statutorily prescribed under IT Act, ITAT was the last forum qua statutory appeals.

(m) There is one more way of looking at this aspect of the matter. Section 260A appeal to this court is on substantial question/s of law only and therefore ITAT is in any case the last forum on facts.

(n) One more way of looking at the matter, albeit on a demurrer premise is, even if 12.9.2018 notice is not construed as continuation of 31.8.2004 SCN, impugned order will not be hit by limitation as section 158BFA(3)(e) does not talk about penalty proceedings 'already initiated' in past tense, but it talks about penalty proceedings in praesenti. To be noted, the term used is 'is' and not 'was'.

(o) Be that as it may, though an attempt made by learned counsel for writ petitioner by placing reliance on Bill No.74 of 2005 comes across as an attractive argument, it is not an argument which can be accepted for reading into a provision of law. The question of debate and deliberation qua the Bill and looking into the same may arise only when there is ambiguity, but in the instant case, as this court comes to the conclusion that the provision is unambiguous and not even ambivalent, this argument does not carry the case of writ petitioner any further.

(p) The last point which requires to be considered is the doctrine of merger. Leading case in this regard is Kunhayammed case being Kunhayammed and others Vs. State of Kerala and another reported in (2000) 6 SCC 359. The order of this court made in TCA No.2620 of 2006 certainly merges with the order of Hon'ble Supreme Court as the order of Hon'ble Supreme Court dated 2.5.2018 has been passed post leave, i.e., in the latter half part of Article 136 of the Constitution of India. Impugned order says that the order of Hon'ble Supreme Court merges with that of the ITAT. This may not be happily worded, but as this order of ITAT which merges with the order of Hon'ble Supreme Court, merely because it is not happily worded, the proposition does not become preposterous, warranting interference. Suffice to say that the doctrine of merger in any event operates.

7 Conclusion :

The discussion and dispositive reasoning leads us to an inevitable conclusion that the impugned order is not barred by limitation and the same is not liable to be set aside as time barred.

8 Decision :

Writ petition is dismissed. Considering the nature of the matter, parties are left to bear their respective costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner of Income-tax,
Non-Corporate Circle-20(1),
Room No.311, 3rd Floor,
Wanaparthi Block,
Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai-600 034.

+1 cc to M/s.J.Narayanaswamy, Advocate Sr.No. 69415

AKM/16.09.19/9P-3C /

order in
W.P.No.11648 of 2019