

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved
on 19.02.2019

Orders pronounced
on 25.02.2019

CORAM:

THE HON'BLE Dr. JUSTICE ANITA SUMANTH

W.P.No.21919 to 21921 of 2018 and
W.M.P.Nos.25719 , 25720, 25721 & 34931 of 2018

M/s.A.Thangavel Nadar Stores,
227, R.K.Mutt Road,
Mylapore
Chennai-600 004
Pan No:AAAF7426Q
rep. by its partner

... Petitioner

--Vs--

The Income Tax Officer
Non-Corporate Ward 1(1)
Chennai-600 034

... Respondent

PRAYER in WPs: Writ Petitions filed under Article 226 of the Constitution of India praying for a writ of Certiorari calling for the records of the respondent in PAN No.AAAFA7426Q and quash the proceedings u/S 148 dated 31.03.2018 and the consequential order disposing objection raised against issue of notice u/S 148 for Assessment years 2013-14 to 2015-16 dated 30.07.2018 issued by the respondent.

For Petitioner : Mr.R.L.Ramani Senior
Counsel for Mr.B.Raveendran

For Respondent : Mr.Naveen Durai Babu
Standing Counsel

O R D E R

Heard Mr.R.L.Ramani, learned senior counsel for Mr.B.Raveendran, learned counsel for the petitioner and Mr.Naveen Durai Babu, learned Standing counsel for the respondent.

2. The writ petitioner has approached this Court challenging proceedings under Section 148 of the Income Tax Act, 1961 (in short 'Act') dated 31.03.2018 and an order disposing objections raised against issuance of the aforesaid notice, dated 30.07.2018, in respect of assessment years 2013-14 to 2015-16.

3. The facts in relation to all writ petitions are common. The petitioner is a partnership firm with two partners. Returns of income have been filed in respect of the three assessment years in question. Intimations under Section 143(1) of the Act had been issued by the respondent for all the years. A survey under Section 133A of the Act was initiated in the premises of the petitioner on 12.01.2018. There had been no incriminating material found in the course of the survey as can be seen from the Mahazarnama recorded on the day of survey by the surveying team.

4. A statement under Section 133A was recorded from one of the partners of the firm, one, Mr.A.T.Janakiraman. Since the re-opening of the assessments by the Income Tax Department is based entirely on the contents of the statement, I extract the relevant portions hereunder for better appreciation of the matter. In statement dated 12.01.2018 question nos. 6, 7 and 9 are as follows:

Q.6. Have you maintained any books of accounts supporting the turnover reported?

Ans. No I have not maintained any proper books of accounts in respect of the turnover reported. But I have maintained month-wise just sales summary ledger as. However individual bills were discarded after making a turnover entry. Hence I am not in a position to provide the individual bills/vouchers day wise.

Q.7. Since you have not maintained individual bills and you have provided sales turnover monthwise, your estimated turnover for Fin. Year 2017-18 is worked out to Rs.8 crores?

Ans. Yes my average monthly sales amounted to around Rs.65 lakhs approximately. Going by the same estimate my annual sales turnover will be around Rs.8 crores.

Q.9. Your sales voucher for 12.01.2018 were mapped with the corresponding purchase bills and it was estimated that your profit margin comes to around 25 percent and allowing expenses for a overheads and other purposes, your net profit works out to 18.75%?

Ans. As I have already mentioned that I have not maintained books for sustaining net profit margin, I agree with the Department that my net profit margin can be taken as 18.75% on my sales turnover.

5. After the proceedings for survey, the petitioner filed a letter dated 24.01.2018 signed by the other partner in the firm, one, Mr.A.Singarajan, disavowing the statement recorded from Mr.Janakiraman in full. According to Mr.Singarajan, he was informed by Mr.Janakiraman that the statement had been prepared by the surveying officials who had simply obtained his signatures on it. In any event, he would state that the firm had two partners and hence a statement taken from one would not bind the firm itself.

6. In the course of the survey, three cheques, post-dated to 25.01.2018, 25.02.2018 and 25.03.2018, for amounts of Rs. 15,00,000/- had been taken under duress from the petitioner by the surveying officials towards advance tax liability. By letter dated 05.02.2018, the petitioner sought return of the cheques since, according to it, the computation of taxes as effected by the petitioner was perfectly in order and the petitioner had been regular in defraying its tax liability. There was thus no necessity for the Department to have taken the cheques in advance and even without an assessment or demand pending.

7. This was followed by issuance of notices under Section 148 of the Income Tax Act dated 31.03.2018 on the ground that the assessing officer had reasons to believe that income had escaped assessment for the three assessment years in question and calling upon the petitioner to file returns of income within thirty days from the date of receipt of the notice, offering the correct income to tax.

8. The petitioner, in response to the notices under section 148, enclosed a copy of the returns already filed by it, being of the view that there had been no escapement of income and the original return reported its income truly and correctly. In line with the judgment of the Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO [(2003) 259 ITR 19], the petitioner sought a copy of the reasons on the basis of which the assessments had been re-opened vide letter dated 30.04.2018. The reasons were furnished by the respondent on 28.05.2018 and read as follows:

Ref: Your letter dated 25.04.2018. As requested by you the reason for reopening and issue notice under Section 148 of the IT Act

1961 for the Assessment Year 2014-15 is as furnished below.

A survey was conducted in this case on 12.01.2018. During the course of survey it was found that the assessee has not maintained any books of account either physically or in system. During the survey, the assessee has agreed with the department that the net profit margin can be taken as 18.75% on the sales turnover of the firm. On perusal of the Return of Income filed for the Asst. year 2014-15 it is observed that the net profit on the sales turnover as admitted by the assessee is only 0.55 on the sales turnover of Rs.2,27,14,446/- whereas in the sworn statement recorded during the course of survey the partner of the firm has admitted for the net profit margin @18.75%.

In the circumstances, I have reason to believe that the income chargeable to tax has escaped assessment for the Asst. Year 2014-15 within the meaning of section 147 of the Income Tax Act, 1961 and the case is reopened for assessment for the Asst year 2014-15 with the prior approval of the appropriate Authority.

9. The reasons are identical for all three years. The Supreme Court, in the case of GKN Driveshafts (supra) has outlined the procedure to be followed by the assessee as well as the department in the matter of re-assessments and in line with the same, preliminary objections to the notices under Section 148 were filed by the petitioner on 09.07.2018. The broad basis on which the notice was objected to was that (i) it was bereft of jurisdiction insofar as no approval had been obtained from the Joint Commissioner of Income Tax as required in terms of Section 151(2) and (ii) that the sworn statements recorded from the partner could not form the sole basis of the re-assessments. The petitioner also documented the fact that the post-dated cheques taken in the course of survey proceedings on 12.01.2018 had been returned by the Department to the petitioner only on 07.02.2018.

10. In response to the objections the Assessing Authority passed the impugned orders dated 30.07.2018 rejecting the objections. The orders are identical for all the three years. A reading of the same makes it amply clear that the re-assessment is based solely and wholly on the statement recorded from

Mr.Janakiraman. Paragraph no.4 of the impugned order makes this more than clear, as extracted below:

'During the course of survey it is found that the assessee Firm has not maintained any proper books of accounts. In statement recorded from partner of the firm Shri T.Janakiraman he has stated that "firm has not maintained any proper books of accounts in respect of the turnover reported. But I have maintained month-wise just sales summary ledger as. However individual bills were discarded after making a turnover entry. Hence I am not in a position to provide the individual bills/voucher day wise. The assessee has agreed with the Department that the net profit margin can be taken as 18.75% on the sales turnover of the Firm. On perusal of the return of income filed for the Asst. year 2013-14, it is observed that the net profit on the sales turnover as admitted by the assessee is only 0.49% on the sales turnover of Rs.2,47,88,729/-whereas in the sworn statement recorded during the course of survey, the partner of the Firm has admitted for the net profit margin @18.75%.'

11. It is also relevant to note that Mr.Janakiraman had himself retracted his statement under cover of his communication dated 24.01.2018. The letter states that Mr.Janakiraman was not fluent in English and he thus alleges that he was not aware of the contents of the statement that he was called upon to sign.

12. A counter has been filed by the Income Tax Department wherein, the first point agitated is that the writ petition is not maintainable. Mr.Naveen Duraibabu, learned counsel appearing for the Department states that due sanction has been obtained from the concerned authority and as such the allegation that the proceedings were without jurisdiction was incorrect. There is really no contest as far as this point is concerned and I thus, reject the contention that the proceedings are without jurisdiction on the ground of lack of sanction.

13. As far as the statement of Mr.Janakiraman is concerned, the Revenue contends that Mr.Janakiraman was well versed in English and in fact, the income tax returns filed by the firm are signed only by him. Thus, they would brush away the argument that the statements were recorded without knowledge of Mr.Janakiraman of the contents. According to the revenue, the retraction of the statement was an afterthought and the contents

of the statement make it very apparent that there was significant suppression of income by the petitioner. When confronted, the partner of the petitioner firm had rightly computed the gross profit on the undisclosed income and undertaken to pay advance on the same. This, according to the revenue, is sufficient to establish the necessity as well as validity of the proceedings for re-opening of the assessments.

14. The issue that I am called upon to decide is whether a notice/ proceedings for re-assessment can be sustained wholly on the basis of a sworn statement recorded in the course of survey in the absence of any other tangible evidence available with the Assessing Officer.

15. The petitioner relies on the decision of the Karnataka High Court in the case of Commissioner of Income Tax and Another Vs. Dr.N.Thippa Setty (322 ITR 525) where an order of re-assessment based entirely on statements recorded under Section 132(4) of the Act and subsequently retracted, was set aside by the court.

16. The Central Board of Direct Taxes has also issued a circular in F.No.286/2/2003 dated 10.03.2003 to the following effect:

'F.No.286/2/2003-IT(Inv)

Govt.of India,

Ministry of Finance & Company Affairs,

Department of Revenue,

Central Board of Direct Taxes,

No.254/North Block, New Delhi

10th March 2003

To

All Chief Commissioner of Income Tax

(Cadre Contra) &All Directors General of Income Tax
Inv.

Sir,

Subject: Confession of Additional income during the course of search & seizure and survey operation-Regarding.

Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search & Seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed seriously.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders.

Your faithfully

Sd/-xxxx

(S.R.Mahapatra) Under Secretary (Inv.II)'

17. The provisions of Sections 147 and 148 provide for the re-opening of assessments and re-assessment of income in cases where the Assessing Officer has reason to believe that income has escaped assessment. It is trite to state that the reasons recorded by the Assessing Officer should be based on tangible materials that have come to his notice/are in his possession. This aspect of the matter has been long settled by a series of judgment of the Supreme court as well as the High Courts commencing from ITO v. Lakhmani Mewal Das [(1976) 103 ITR 437]

to the judgment of the Supreme Court in the case of CIT, Delhi Vs. Kelvinator ltd. where the Bench states as follows:

'5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from April 1, 1989), they are given a go-by and only one condition has remained, viz., that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post April 1, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the assessing officer. Hence, after April 1, 1989, the assessing officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words 'reason to believe', Parliament reintroduced the said expression and deleted the word 'opinion' on the ground that it

would vest arbitrary powers in the assessing officer
...'

18. In the present case, there is no dispute on the position that the survey initiated by the Department on 12.01.2018 has yielded no tangible incriminating material. In fact, the Mahazarnama of even date reveals as much. Notwithstanding this, the Department has gone ahead with the impugned proceedings based solely upon the sworn statement recorded under Section 133A from one of the partners.

19. A statement recorded under Section 133A in the course of survey is different and distinct from a statement recorded under Section 132(4) recorded in the course of search and seizure and the evidentiary value ascribed to the two is not the same. The provisions of Section 133A(3) sets out the limits of power endowed upon an Income Tax Authority carrying out survey action as follows:

Power of Survey...

133A-....(3) An income-tax authority acting under this section may,-

- (i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom,
- (ii) impound and retain in his custody for such period as he thinks fit any books of account or other documents inspected by him:

Provided that such income-tax authority shall not-

(a) impound any books of account or other documents except after recording his reasons for so doing; or

19[(b) retain in his custody any such books of account or other documents for a period exceeding ten days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or Director General therefor, as the case may be,]]

(ii) make an inventory of any cash, stock or other valuable article or thing checked or verified by him,

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

20. Contradistinguish this with a statement recorded by the Assessing Officer under Section 132(4) as follows:

132(4): The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

[Explanation.-For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purpose of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.]

21. Thus, where, under Section 132(4), the statement recorded by the searching officer is specifically permitted to be used as evidence in any proceeding under either the 1922 or the present Act, there is no such sanctity conferred on a statement recorded under Section 133A(iii). The utility of a statement recorded in the course of survey is limited to the extent to which it is useful or relevant to any proceeding under the Act. Thus, a statement recorded in the course of survey can, at best, support a proceeding for reassessment; that is, where the Assessing Officer has material in his possession, based on which he comes to the conclusion that there has been escapement of income, such material being concrete and having a live link with the reasons recorded for re-assessment, the aforesaid material may find support from a statement recorded in the course of survey. Not so, in the case of a statement recorded in

the course of search which, by itself, would form primary evidence.

22. This issue has also been considered by a Division Bench of the Court in the case of CIT, Salem v. M/s.S.Khader Khan Son (2012) 254 CTR (SC) 228 : (2013) 352 ITR 480 (SC) : (2012) 210 TAXMAN 248 (SC) wherein the Bench states thus:

'7. From the foregoing discussion, the following principles can be culled out:

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 (SC) ;

(ii) In contradistinction to the power under Section 133A, Section 132(4) of the Income Tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income Tax Act. On the other hand, whatever statement is recorded under Section 133A of the Income Tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income Tax [2003] 263 ITR 101 (Ker) ;

(iii) The expression "such other materials or information as are available with the Assessing Officer" contained in Section 158BB of the Income Tax Act, 1961, would include the materials gathered during the survey operation under Section 133A, vide Commissioner of Income Tax v. G.K. Senniappan [2006] 284 ITR 220 (Mad)] ;

(iv) The material or information found in the course of survey proceeding could not be a basis for making

any addition in the block assessment, vide decision of this Court in T.C. (A) No. 2620 of 2006 between Commissioner of Income Tax v. S. Ajit Kumar;

(v) Finally, the word "may" used in Section 133A(3) (iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

8. For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated 10.3.2003, extracted above, for arriving at the conclusion that the materials collected and the statement obtained under Section 133A would not automatically bind upon the assessee, we do not see any reason to interfere with the order of the Tribunal.'

23. In the light of the detailed discussion above, and in the light of Circular F.No.286/2/2003 dated 10.03.2003 as well as the admitted position that there is not a shread of material apart from the statement recorded under Section 133A that forms the basis of the proceedings for reassessment, I am of the view that the reasons dated 28.05.2018 have no legs to stand. The impugned notices dated 31.03.2018, which trace their existence to the reasons dated 28.05.2018 must thus fail and I quash the same as well as the impugned orders dated 30.07.2018 rejecting the preliminary objections.

24. These writ petitions are allowed. The connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

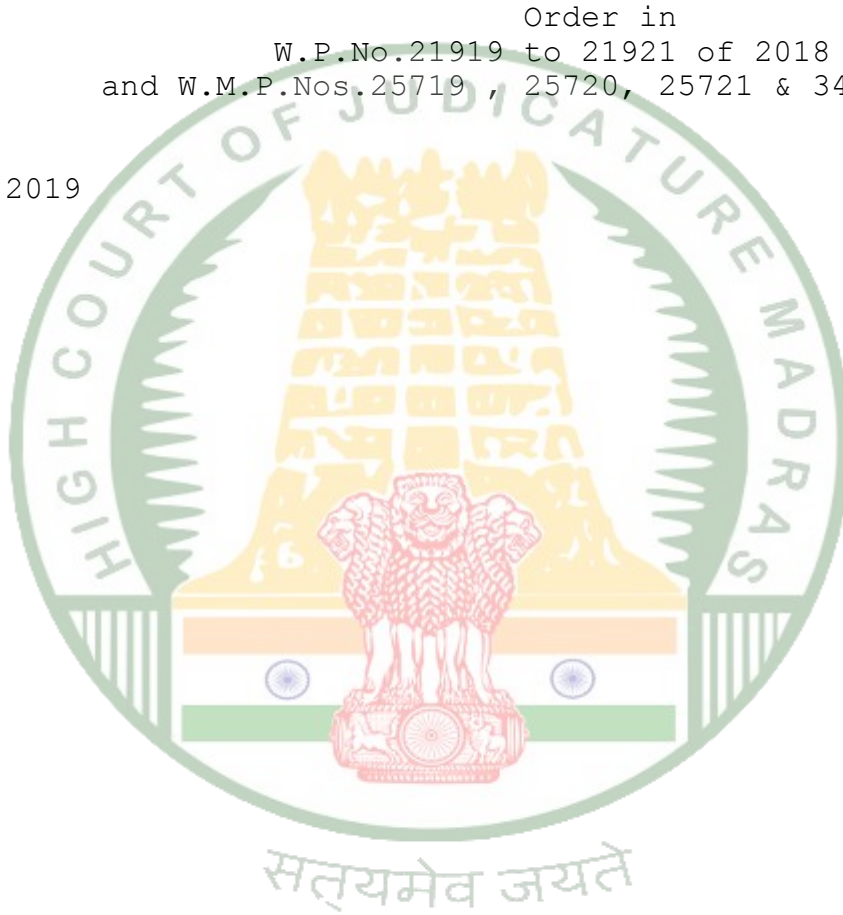
The Income Tax Officer,
Non-Corporate Ward 1(1), Chennai-600 034.

+1 cc to Mr.B.Raveendran, Advocate SR.No.17429

+1 cc to M/s.Hema Muralikrishnan, Advocate SR.No.17432

Order in
W.P.No.21919 to 21921 of 2018
and W.M.P.Nos.25719 , 25720, 25721 & 34931 of 2018

NRL (CO)
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