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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2020

C O R A M

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.3241 of 2011
&
WMP.No.3 of 2011

PPN Power Generating Company Pvt. Ltd.,
Rep.by its authorised representative
III Floor, Jhaver Plaza,
1A Nungambakkam High road,
Chennai 600 034. ... Petitioner

Vs.

1. The Commissioner of Income Tax,
Aayakar Bhavan,
121, Uthamar Gandhi Salai,
Chennai 600 034.

2. The Assistant Commissioner of Income Tax,
Company Circle V(II),
121, Uthamar Gandhi Salai,
Chennai 600 034.

3. The Deputy Commissioner of Income Tax,
Transfer Pricing officer V (I/C),
121, Uthamar Gandhi Salai,
Chennai 600 034. ... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records comprised in the impugned reassessment notice dated 25.02.2010 for the Assessment year 2004-05 issued by the second respondent and received by the petitioner only on 08.09.2010 Under Section 148 of the Income Tax Act, 1961 and the consequential proceedings initiated by the third respondent by the impugned notice dated 27.01.2011 bearing reference C.R.No.P.507/TPO-V/A.Y.2004-05 pursuant to a reference under S.92CA of the Act by the second respondent in respect of Assessment Year 2004-05 and quash the same as wholly without jurisdiction, illegal,



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arbitrary and contrary to the express mandates set out under the provisions of the Income Tax Act, 1961.

For Petitioner : M/s. Janani Shankar for Mr.R.Parthasarathy

For Respondents : Mr. A.N.R.Jayaprathap, Standing Counsel

O R D E R

In this writ petition, the petitioner has challenged the impugned re-assessment notice dated 25.02.2010 issued by the 2nd respondent under Section 148 of the Income Tax Act, 1961 reopening of the Assessment Year 2004-05 and consequential impugned notice dated 27.01.2011 issued by the 3rd respondent.

2. An order dated 30.03.2005 came to be passed by the 3rd respondent under Section 143(1) of the Income Tax Act, 1961. It was granted a refund of Rs.37,49,210/- to the petitioner. Pursuant to the aforesaid order, the petitioner had also filed Revised Return on 31.10.2005.

3. Thereafter, notices were issued under Section 142(1) and (2) on 16.6.2006, 12.07.2006 and 03.11.2006. The petitioner also replied to the same. By a communication dated 13.11.2006, the petitioner requested the Additional Commissioner of Income Tax, to complete the Transfer Pricing Assessment on the merits.

4. The Additional Commissioner of Income Tax, Transfer Pricing Officer - II (I/C) has thereafter passed an order dated 17.11.2006 and confirmed that no adjustment is considered necessary to the value of international transaction entered into by the petitioner. Accordingly, an assessment dated 29.12.2006 was passed and the petitioner was directed to pay a sum of Rs.1,93,92,029/-.

5. The petitioner therefore preferred an appeal before the Commissioner of Income Tax (Appeals) -V, against the above assessment order dated 29.12.2006 passed under Section 143(3) read with Section 92CA(4) of the Income Tax Act, 1961.

6. The Commissioner of Tax (Appeals)-V by an order dated 30.07.2007 passed a detailed order and partly allowed the appeal filed by the petitioner.

7. By a communication dated 12.09.2007, the Income tax



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Officer also given effect to the order of the Commissioner of Income Tax (Appeals). Revenue thereafter preferred an appeal before the Income Tax Appellate Tribunal in I.T.A No.2393/Mds/2007. The Revenue's appeal was partly allowed by the said Tribunal vide its order dated 02.03.2009.

8. The petitioner had thereafter filed T.C.A before this Court. During interregnum, the impugned notice dated 25.02.2010 has been issued under Section 148 of the Income Tax Act, 1961 to the petitioner, to reopen the assessment. By a letter dated 16.09.2010, the reasons for reopening of the assessment has been communicated. The relevant portion of the said communication reads as follows:-

> "It is noticed the provisions for anticipated contract losses of Rs.7474 lakhs to be added back in computing the book profit under Section 115 JB as the same is only provision and not an ascertained liability."

9. Meanwhile, the 3rd respondent by a communication dated 27.01.2011 has called upon the petitioner to furnish information in terms of Section 92D and Section 92E of the Income Tax Act, 1961 as per the questionnaire enclosed.

10. It is the contention of the learned counsel for the petitioner that the proceedings initiated by the impugned notice dated 25.02.2010, to reopen the assessment was contrary to the law settled by the Honourable Supreme Court in CIT Vs. Kelvinator of India, (2010) 2 Scc 723 and that of another decision of the Honourable Supreme Court in Asst Commissioner of Income Tax Vs. Rajesh Jhavari Stock Brokers Private Limited (2007) 161 Taxman 316.

11. Heard learned counsel for the petitioner and the learned standing counsel for the respondents.

12. There are several disputed questions of fact which connot be considered by a Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

13. The reason for reopening the assessment appears to be on account of operational expenses claimed by the petitioner while filing returns.

14. Issue as to whether there was true and full disclosure at the time of filing of returns or not and whether the respondent could reopen the assessment under Section 148 of the Income Tax Act, 1961 and whether the reasons for reopening



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the assessment was on account of change of opinion or not has to be only decided by the respondents.

15. Further, as per Section 147 of the Income Tax Act, 1961, if the circumstances contemplated under the 1st proviso are not satisfied, the assessing officer cannot further proceed as the expression used is "unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

16. Therefore, I direct the petitioner to participate in the adjudication mechanism prescribed under the provisions of the Income Tax Act, 1961 before the respondents. Petitioner is also directed to furnish the information called for by the 3rd respondent in the questionnaire enclosed along with the notice dated 27.01.2011 within such period. Petitioner may also file its representations and raise all the objections/defences if any, both on facts and law that are available to, within a period of thirty days from date of receipt of a copy of this order, before the respondents.

17. Respondents are thereafter directed to pass appropriate order in accordance with law within a period of three months from date of receipt of a copy of this order keeping in mind the express requirement of the proviso to Section 147 of the Income Tax Act, 1961 and the settled principles of law.

18. This Writ Petition stands disposed with the above observation. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

av/jen

To

1. The Commissioner of Income Tax,
   Aayakar Bhavan, 121,
   Uthamar Gandhi Salai, Chennai 600 034.



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2. The Asst. Commissioner of Income Tax,
   Company Circle V(II), 121,
   Uthamar Gandhi Salai, Chennai 600 034.

3. The Deputy Commissioner of Income Tax,
   Transfer Pricing officer V (I/C),
   121, Uthamar Gandhi Salai, Chennai 600 034.

+1cc to Mr.A.P.Srinivas, Advocate SR.9384
+1cc to Mr.R.Parthasarathy, Advocate SR.9280

W.P.No.3241 of 2011

RLD(CO)
CB(13/07/2020)



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