

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 15.12.2020

Delivered on 21.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Appeal Nos.1632, 1633 and 1635 of 2019

and CMP.Nos.11109, 11090 and 11092 of 2019
(heard through video conferencing)

M/s.Seshasayee Paper & Boards
Ltd., Erode-7 rep.by its Deputy
Managing Director & Secretary
Sri V.Pichai

(cause title accepted vide order of court
dated 25.4.2019 made in
CMP.Nos.9981, 10130 & 9980 of 2019
WA.SR.Nos.47600, 47601 & 47599 of
2019 by VKJ & CVKJ)

...Appellant in
all the appeals

Vs

1. Union of India, rep.by the
Commissioner of Income Tax
(Central II), No.108, Uthamar
Gandhi Road, Chennai-34.

2. The Assistant Commissioner of
Income Tax, Central Circle II(1),
No.108, Uthamar Gandhi Road,
Chennai-34.

...Respondents in
in all the appeals

APPEALS under Clause 15 of the Letters Patent against the
common order dated 25.1.2019 made in W.P.Nos.12604, 33239 and
12603 of 2002 presented under Article 226 of the constitution of
India the issue a Writ of Certiorari the call for the records
from the respondent in respect of the notice bearing

(1)PA No:4-S/AAC/CS 1192G, dated 13.03.2002 for the
assessment year 1996-97.

(2)PA No:4-S/97-98, dated 4.7.2002, for the assessment
year 1997-98 and

(3)PA No:4-S/AAC CS 1192G, dated 13.03.2002, for the
assessment year 1995-1996, issued by the second respondent,
under section 148 of the Income Tax Act 1961 and quash the same.

For Appellant : Mr.A.L.Somayaji, SC for
Mr.G.Baskar &
Mr.M.P.Senthilkumar
For Respondents : Mr.A.P.Srinivas, SSC assisted by
Mr.A.N.R.Jayaprathap, JSC

COMMON JUDGMENT

T.S.SIVAGNANAM, J

These appeals are directed against the common order dated 25.1.2019 made in W.P.Nos.12603, 12604 and 33239 of 2002 filed by the appellant.

2. All the three writ petitions were filed by the appellant challenging the notice issued by the second respondent herein under Section 148 of the Income Tax Act, 1961 (for brevity, the Act).

3. The facts, which are essential for the disposal of these appeals, are as hereunder :

The appellant (hereinafter referred to as the assessee) is a public limited company, which had questioned the proceedings issued by the second respondent - Assessing Officer. The assessment years, which are subject matter of consideration, are 1995-96, 1996-97 and 1997-98. Since the facts are identical for all the three assessment years, it would suffice to refer to the facts relating to the assessment year 1995-96.

4. The assessee filed the return of income for the assessment year 1995-96, in which, transactions relating to purchase of assets, lease back of the assets to the seller, availing hire purchase finance, acquiring the said assets from various financial companies were disclosed by the assessee in the audited financial statements for the year ended March 31.3.1995. A search was conducted in the premises of the assessee on 08.7.1996 and a block assessment was framed for the period from 01.4.1986 to 08.7.1996. The block assessment was concluded by order dated 31.7.1997 wherein the depreciation claimed by the assessee was held to be an undisclosed income. The assessee challenged the said order dated 31.7.1997 before the Income Tax Appellate Tribunal, Chennai 'B' Bench (for brevity, the Tribunal), which, by order dated 18.2.2002, allowed the appeal and held that the claim of depreciation would not fall within the meaning of the expression 'undisclosed income'.

5. In fact, initially, there was a differing opinion between the Judicial Member and the Accountant Member of the Tribunal and therefore, the matter was referred to a third Member namely the Senior Vice President of the Tribunal, who, by order dated 31.1.2002, agreed with the decision of the Judicial Member, which was in favour of the assessee. Ultimately, the appeal stood allowed based on the majority opinion by order dated 18.2.2002. The Revenue did not challenge the said proceedings and the same attained finality.

6. Parallely, for all the three years, the assessment was concluded by order dated 30.3.1998 (AY 1995-96), 22.3.1999 (AY 1996-97) and 22.3.2000 (AY 1997-98). So far as the claim for depreciation is concerned, in the said scrutiny assessment, the Assessing Officer held that already the claim for depreciation had been held to be an undisclosed income in the block assessment and therefore, the necessity once over again for consideration would not arise. As against the findings under other heads, the assessee, being aggrieved, filed an appeal before the Commissioner of Income Tax (Appeals) concerned, who, by order dated 07.5.1999, allowed the appeal and remanded the matter to the file of the Assessing Officer to redo the assessment.

7. It will not be very relevant to take note as to how the assessments were completed on remand. What would be relevant is with regard to the action initiated by the Commissioner of Income Tax, Central 2, Chennai (for short, the CIT), who issued a notice under Section 263 of the Act dated 12.3.2001. Though the assessee objected to the invocation of power under Section 263 of the Act by the CIT, the objections were rejected, directions were issued to the Assessing Officer and ultimately, the assessments were done, which were against the interest of the assessee. Therefore, the assessee carried the matter on appeal to the Commissioner of Income Tax (Appeals) concerned, which also met the same fate. On further appeal to the Tribunal, the order of the Commissioner of Income Tax (Appeals) concerned was confirmed. Challenging the said order, the assessee filed appeals before this Court in TCA.Nos.2292 and 2293 of 2006. Those appeals were pertaining to the assessment years 1995-96 and 1996-97. A Division Bench of this Court, to which, one of us (TSSJ) was a party, by a common judgment dated 03.12.2013, allowed the said appeals filed by the assessee and held that the CIT fell in error in invoking the power under Section 263 of the Act. The said common judgment dated 03.12.2013 attained finality.

8. It is thereafter the notices under Section 148 of the Act were issued to the assessee for all the three assessment years dated 13.3.2002, 13.3.2002 and 04.7.2002. The assessee submitted a representation seeking to furnish reasons for reopening for the assessment year 1995-96, but was not favoured with any reply. A similar request was made for the assessment year 1997-98, for which, the assessee was informed by the Department that there was no necessity to divulge the reasons to the assessee. This stand was taken on account of the fact that at the relevant point of time, the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO [reported in (2003) 259 ITR 19], was not available.

9. Be that as it may, the assessee stated that the issuance of notice for reopening was not tenable and it was a clear case of change of opinion. However, they did not file any return of income pursuant to the notice issued under Section 148 of the

Act. The assessee, on the other hand, filed writ petitions challenging the notices. However, the writ petitions were dismissed by the common impugned order and this is how the assessee is before us by way of these appeals.

10. We have heard Mr.A.L.Somayaji, learned Senior Counsel assisted by Mr.G.Baskar and Mr.M.P.Senthilkumar, learned counsel on record for the appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel assisted by Mr.A.N.R.Jayaprathap, learned Junior Standing Counsel appearing for the respondents.

11. The first objection raised by the Department before the learned Single Judge was that the proceedings, which were impugned in the writ petitions, were notices simplicitor issued under Section 148 of the Act and that the assessee should avail the remedy available under the Act, seek reasons for reopening in terms of the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., file their objections and pursue other remedies available to them under the Act.

12. In other words, the Department contended that the writ petitions were premature.

13. The assessee, on the other hand, would contend that the notices issued under Section 148 of the Act having admittedly been issued beyond a period of four years, unless and until the Department is able to establish that there was failure on the part of the assessee to fully and truly disclose all the material information, the assessments could not be reopened and if done, it would be a case of change of opinion.

14. The Department resisted such a plea by contending that the reasons having not yet been disclosed to the assessee, such a plea could not be raised by them. The Department placed reliance on the decision rendered by one of us (TSSJ) while sitting singly, in the case of T.V.Mylsamy Vs. DCIT, Central Circle 2, Coimbatore & another [W.P.No.27598 of 2008 dated 29.1.2018]. However, the learned Single Judge sustained the objections raised by the Department and dismissed the writ petitions.

15. It is to be noted that the said writ petitions were pending before this Court from the year 2002 and there was an order of interim stay in operation. However, the Department had not taken any steps to file counter nor sought to vacate the interim order and the writ petitions came to be dismissed even without a counter affidavit filed by the Department.

16. In the affidavits filed in support of the said writ petitions, the assessee raised factual and legal contentions. The facts remained uncontroverted till the writ petitions were dismissed largely on the ground that a writ petition challenging the notice under Section 148 of the Act was premature. After the dismissal of the said writ petitions, the Department furnished reasons for reopening to the assessee and the reasons have now been set out in the counter affidavit filed on behalf of the

respondents by the Assistant Commissioner of Income Tax, Circle-I, Namakkal, who is the Assessing Officer of the assessee.

17. The argument of Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the Department is that though the re-assessment proceedings had been proposed after a period of four years, yet, it was within the period of six years, that sufficient material was available with the Department gathered during investigation and that the Proviso to Section 147 of the Act stood attracted. It is further submitted that the impugned orders in the said writ petitions were only notices and that the assessee having not filed a return of income pursuant to such notices, they are now precluded from raising such a plea on the merits of the proposed reassessment.

18. The learned Senior Standing Counsel appearing for the Department has referred to the observations made by the Tribunal and more particularly the order passed by the third Member, which ultimately led to the majority decision and submitted that the block assessment was set aside not on merits, but on the ground that the claim for depreciation could not be treated as an undisclosed income and the provisions of Section 158B(b) of the Act would not stand attracted. It is further submitted that if the said writ petitions were to be entertained at this stage, it will open flood gates and that several cases will be filed challenging the notices without even filing a return pursuant to the notice under Section 148 of the Act and without even seeking to furnish the reasons. Hence, the learned Senior Standing Counsel is pressing to sustain the common impugned order passed in the said writ petitions.

19. Per contra, the argument of the learned Senior Counsel appearing for the assessee is that the Department was not correct in stating that the merits of the matter were not dealt with by the Tribunal. That apart, the Department had not produced any record to show that there was a tangible material available to reopen the assessment and more so when all the 14 lease transactions were the subject matter of block assessment, which was set aside and thereafter, it was the subject matter of the directions issued by the CIT under Section 263 of the Act, which was also set aside by the Hon'ble Division Bench of this Court by common judgment dated 03.12.2013 and once over again, the assessment could not be reopened for the same issue and it was a clear case of change of opinion.

20. In support of his contentions, the learned Senior Counsel appearing on behalf of the assessee has referred to the decision of the Bombay High Court in the case of Smt.Mira Ananta Naik Vs. DCIT (Investigation) [reported in (2008) 76 CCH 1001]. Reliance is also placed on the decision of a learned Single Judge of this Court in the case of Fenner (India) Ltd. Vs. DCIT [reported in (2000) 241 ITR 672] and the decision of the Division Bench of this Court in the case of CIT Vs Elgi Finance Ltd. [reported in (2006) 286 ITR 674].

21. To consider the issue as to whether the Department was right in their submission with regard to effect of the order passed by the Tribunal in respect of block assessment, we have carefully gone through the order passed by the Tribunal. On going through the order, we find that the Department was not right in contending that the merits of the matter were not considered by the Tribunal. This is evident from the order passed by the Judicial Member dated 06.9.2000, which ultimately stood confirmed by the third Member resulting in the order dated 18.2.2002 quashing the block assessment. The order passed by the Tribunal, in depth, analyzed the transactions done by the assessee and in this regard, it would be relevant to extract paragraphs 4.29, 4.30, 4.31, 4.33 and 4.35 of the said order, which read as hereunder :

"4.29 : There is no dispute about the fact that the transactions, which are subject of consideration, are all reflected in the books of accounts. The agreements, the insurance documents, the sales tax records, the confirmation of the finance broker, confirmation of the parties providing finance are a part of record and support the version depicted by entries in books of account. Excepting five parties who have denied the transaction, all other parties have confirmed the transaction. The department in the course of search had found detailed correspondence, which supports the transactions. There is no denying the fact that all transactions are through banking channel. Entries in the banks documents confirm this position. The Revenue has not rebutted the contention made on behalf of the assessee that the five parties, who have denied the transaction, have been proceeded against by way of a civil suit, the outcome of which is as yet awaited. According to learned counsel, though the parties had denied the transactions, they have declared the commission received from the transactions as their income from undisclosed sources. They have admitted to sign the documents. The crux of the allegation is that in substance they never intended the transaction. At present we are not concerned with the form or substance of the transactions. The concern at present only is whether the amounts accruing to the appellant as a result of the transactions can be said to be undisclosed income. The

criteria of form, substance may be relevant in regular assessment and this inquiry can certainly be made therein, subject, however, the law permitting the same. In the circumstances, the mere fact that some parties have denied the transaction cannot lead to existence of undisclosed income, especially when all particulars of the transaction have duly been furnished to the department or rather found by them in the course of search. The extent to which a party to a written contract can deny the transaction is found in the provisions of the Indian Evidence Act, in Sections 91-92 thereof. The Sections categorically prohibit a party to a written contract to deviate from the same.

.....

4.30 : In the instant case, there is no denying the fact that the appellant in the return filed for the assessment year 1995-96 as well as in the accounts finalized prior to date of the search for the AY 1996-97, has reflected all the 14 transactions. This is therefore a case where one need not examine the likelihood of future disclosure because the disclosure has already been made. In such circumstances, it is indeed very difficult to accept the argument of the department that there exists undisclosed income in respect of these very transactions.

.....

4.31 : At pages 27 to 29, the appellant has attached the sequence of accounting entries in respect of the transactions. The said pages only contain an example. The accounting entries include, capitalization of fixed assets, reflection of the higher management fees, reflection of lease management fees, receivables from the party, entries containing assignment of the lease management fee to the financier; the fact that initial payment has been made to the financier, the fact that lease rents have been received and the fact that lease rent is adjusted against the H P instalments and last but not the least, transfer of proportionate amount from the unexpired finance charges to finance charges account.

....
4.33 : In view of the overwhelming evidence, it is not possible to accept the argument of the Department that there exists undisclosed income in the present case. The argument of the D.R., that a case where taxable income has not been properly disclosed comes within the purview of undisclosed income is not tenable.

....
4.35 : In the absence of undisclosed income, there was complete lack of jurisdiction with the Department to proceed under Chapter XIV-B in the form of a block assessment. The exercise not being warranted by facts and law has to be declared invalid as such. The present assessment as a consequence is liable to be quashed in its entirety."

22. With the above reasoning and some more, the block assessment was quashed and the third Member agreed with the opinion recorded by the Judicial Member. Therefore, it will be too late for the Department to contend that the assessee was successful before the Tribunal with regard to the block assessment on a technical ground.

23. There can be no quarrel over the proposition that this Court, exercising jurisdiction under Article 226 of The Constitution of India, would be very slow in interfering with a show cause notice. This is a self imposed restriction in tune with various decisions of the Hon'ble Supreme Court. This is more so when a matter arises under a Taxation Statute. Nevertheless, if the show cause notice suffers from the vice of lack of jurisdiction, Courts are entitled to consider the challenge to such notices. Therefore, there is no absolute bar in entertaining writ petitions against show cause notices. But, Courts will be very slow and cautious in exercising its jurisdiction and would carefully take note of the fact situation before stepping in to interfere with the show cause notices. With this guarded principle in mind, we have examined the factual position.

24. As noticed above, the issue pertaining to the claim for depreciation was the subject matter of block assessment. Totally, 14 lease transactions were examined and the stand taken by the Department was negatived. Though there may be certain observations, which were referred to by Mr.A.P.Srinivas, learned Senior Standing Counsel in the opinion of the third Member, if the orders of the Judicial Member as agreed by the third Member of the Tribunal are read as a whole, the entire merits of the matter were considered by the Tribunal and the block assessment was quashed. However, the Department did not stop with that and

the CIT exercised his power under Section 263 of the Act and issued directions to the Assessing Officer, which ultimately led to an assessment of those transactions in the hands of the assessee, which was unsuccessful before the CIT(A) and the Tribunal.

25. On appeal before this Court in TCA.Nos.2292 and 2293 of 2006, the substantial question of law framed for consideration was as to whether the Tribunal was right in law in confirming the order under Section 263 of the Act passed by the CIT for the assessment years 1995-96 and 1996-97. The Division Bench of this Court, to which one of us (TSSJ) was a party, considered the entire matter including the findings recorded by the Tribunal qua the block assessment, allowed the appeals filed by the assessee and quashed the proceedings, the relevant portions of which read thus :

"26. A reading of the order of the learned Senior Vice President reveals that he concurred with the views of the Vice President that the seized materials did not disclose any concealed income, as the transactions were very much available in the books of accounts of the assessee. He further pointed out that the crux of the allegation, namely, the transactions were only in form but not in substance was not considered necessary because the only issue was whether the transactions could have resulted in undisclosed income. He further pointed out that the learned Vice President had touched upon the documents seized and on the facts found in the books of accounts, learned Vice President held that except to make allegation on the depreciation claim as false and not allowable under the provisions of the Act, there was no evidence to suggest that the entries were false or the assessee had falsified the accounts.

27. In the background of the findings thus reached, the learned Senior Vice President held that he concurred with the Vice President on the facts found that when the transactions were already there in the books of accounts, there was no such thing as undisclosed income for the purpose of bringing under Chapter XIV-B of the Income Tax Act. Thus, if any item of income could not fall within the meaning of "undisclosed income", it could not be aggregated at all. He further viewed that the question whether the assessee would be entitled to

depreciation or not was a matter to be considered in the regular assessment and if the Assessing officer had granted the relief, it is always open to the Assessing Officer to touch the assessment under Sections 147 and 148 of the Income Tax Act. The block assessment procedure was strictly based on the income which was found to have been suppressed or not to have been disclosed and to come to that conclusion, the Revenue must have materials seized at the time of search proceedings. In that view of the matter, the Third Member agreed with the learned Vice President.

28. Thus, the sum and substance of the proceedings in the appeal arising out of the block assessment was that the transactions were held to be genuine and were reflected in the books of accounts, in which event, the question of granting depreciation or a deduction, which is available to an assessee, could not be denied at all. It is no doubt true that on any matter which was not subject matter of block assessment, it is always open to the Commissioner to exercise his Authority under Section 263 of the Income Tax Act to revise the assessment if the same is erroneous or prejudicial to the interests of the Revenue, unlike in the case considered by this Court in an unreported decision in the case of R.Srinivasan V. The Assistant/Deputy Commissioner of Income Tax, Central Circle I, Coimbatore in T.C.(A)No.354 of 2006 dated 11.9.2012, where the block assessment itself was subjected to revisional proceedings under Section 263 of the Income Tax Act, the present case is whether the Commissioner of Income Tax has jurisdiction to exercise his revisional powers as regards the regular assessment made. Strictly speaking, there is no wanting of any jurisdiction if there are merits in exercise of such an authority. However, as far as the facts in the case on hand is concerned, as is evident from the notice of revision, the basis disclosed in the notice is the block assessment proceedings, wherein, lease and buy back transactions were found to be bogus. Consequently, the Commissioner viewed that

the assessee was not entitled to deduction on margin money and hire management fee, apart from the grant of 100% depreciation.

29. The Revenue does not deny the fact that the block assessment was a subject matter of appeal before the Tribunal and the majority view had become final. Even though the Revenue made strenuous argument that the depreciation was not the subject matter, we fail to understand such a line of argument, since the order of the Tribunal as well as the block assessment order clearly point out that the claim on depreciation was also considered on account of doubt on the genuineness of the transactions. We may also point out herein that the assessee in its reply specifically pointed out that the claim on depreciation in respect of 13 transactions were disallowed leaving out M/s.Morgan Industries Limited. Thus, the Department had consciously allowed the claim of the assessee on depreciation in respect of M/s.Morgan Industries Limited. Paragraph No.12.1 of the assessee's reply dated 10.3.2000 clearly pointed out to this fact, which is not disputed so far by the Revenue. The margin money and hire management fee related to hire purchase transaction entered into by the company were during the assessment years 1995-96 and 1996-97. With the claim of the Revenue on the genuineness of the transaction itself negatived by the Tribunal in the first round of litigation in the appeal filed before the Tribunal, it is no longer now open to the Revenue to cling on to the block assessment order to contend that the proceedings would nevertheless be justifiable under the provisions of Section 263 of the Income Tax Act based on the genuineness of the transactions.

30. In the background of the facts found by the Tribunal that the transactions were reflected in the books of accounts and they were all genuine transactions and that the order of the Tribunal on the block assessment appeal having become final, the sole reliance on the findings in the block assessment thus not being available to the Revenue, on merits, we have no hesitation in holding that the Tribunal had committed

serious error in not considering the facts in a proper perspective. It is rather ironical that the Tribunal ignored the findings of its own order in the block assessment appeal, which clearly points out to the genuineness of the transactions and the disclosure of the transactions in the books of accounts and consequently on the sustainability of the claim on the depreciation, which was also the subject matter of consideration in the block assessment."

26. This order passed under Section 263 of the Act was quashed on the ground that there was no material for the CIT to exercise his jurisdiction under the said provision to deny the assessee on the deduction as well as on the depreciation claim considered by the Assessing Officer in the assessments related to the relevant assessment years. The said common judgment dated 03.12.2013 made in TCA.Nos.2292 and 2293 of 2006 attained finality.

27. In the background of these facts, the Department issued notices under Section 148 of the Act. Since the decision in the case of GKN Driveshafts (India) Ltd., was rendered by the Hon'ble Supreme Court on 25.11.2002, we cannot fault the Department for having taken a stand that there was no necessity for them to divulge the reasons for reopening. Nevertheless, the said decision in the case of GKN Driveshafts (India) Ltd., has come into force and it binds both the Department as well as the assessee.

28. The endeavour of the learned Senior Standing Counsel appearing for the Department is to convince us not to exercise our jurisdiction on the ground that the assessee should be asked to file their objections to the reasons for reopening, which had already been furnished after the dismissal of the said writ petitions and thereafter work out their remedies in accordance with law.

29. Under normal circumstances, this Court might have considered such a plea raised by the Revenue. But, the case on hand has a chequered history from the year 1996. The assessee has been successful in obtaining orders not only quashing the block assessment, but also in the proceedings initiated under Section 263 of the Act. Therefore, if there are materials available before this Court as to what are the reasons for reopening, it cannot be stated that the Court cannot look into those reasons and see as to whether there was any justification for reopening the assessments.

30. Even assuming that we accept the stand taken by the learned Senior Standing Counsel appearing for the Department, it will lead to another round of litigation, in which, the defences raised by the assessee in these proceedings will be once over

again raised and it may take another decade for a finality to be arrived at. That apart, the said writ petitions were pending from the year 2002 and the Department did not take any steps to file counter in the said writ petitions and only in the writ appeals, a brief counter has been filed touching upon the merits of the matter.

31. The issue as to whether the assessee should be driven to avail other remedies available to them has to be considered on the facts and circumstances of each case. Therefore, we have examined the facts, which have been placed on record by the Assistant Commissioner of Income Tax, Circle-I, Namakkal. The reasons for reopening are stated in paragraph 10, which are as hereunder :

"Meanwhile, a notice under Section 148 was issued to the assessee on 13.3.2002 after getting previous approval of the CIT (Central), Chennai-II on 12.3.2002.

Reasons to reopen the assessment is

The assessee claimed 100% depreciation on the below mentioned assets purchased from the following persons amounting to Rs.12,50,30,000/- and claimed depreciation of Rs.12,50,30,000/- (100%) on the assets purchased. The machineries purchased from the below parties have been leased back to the seller companies

Name of the company	Value (Rs.)
Ponni Sugars & Chemicals Ltd.	4,97,30,000
Prakash Industries Ltd.	1,66,00,000
-do-	2,51,25,000
-do-	83,75,000
Oloklin Plants & Equipments	2,52,00,000
	<u>12,50,30,000</u>

The investigation wing of the Department has made certain enquiries and investigation to verify the genuineness of the transactions related to purchase and lease back of the machineries from the above parties and the corresponding claim of depreciation by the assessee in relation to those assets."

32. From the above, it is seen that the notices have been issued after getting the prior approval of the CIT. In fact, the CIT passed an order under Section 263 of the Act, which was quashed. Once over again, he granted approval for issuance of

notice for reopening. The reasons for reopening were to examine the five transactions where the assessee claimed 100% depreciation.

33. The respondents would state that the Investigation Wing of the Department made certain inquiries and investigation to verify the genuineness of the transactions relating to purchase and lease back of the machineries from the above stated parties and the corresponding claim of depreciation in respect of those assets could not be accepted. Thus, the five transactions, which have been referred to as the reasons for reopening the assessment, were, indeed, the very same transactions, which formed part of the 14 transactions, which were considered in the block assessment as well as in the proceedings under Section 263 of the Act.

34. In this regard, we have perused the return of income filed by the assessee for the relevant assessment years, in which, the claim for depreciation had been disclosed. Therefore, it is clear that the assessee disclosed all material information to the Assessing Officer. That apart, there is no allegation made by the Department against the assessee that they failed to truly and fully disclose all relevant material. Thus, without any such allegation against the assessee, the Department would not be justified in reopening the assessment by exercising its power by issuing notices under Section 148 of the Act.

35. More or less identical circumstances were the subject matter of the decision in the case of Smt.Mira Ananta Naik wherein it was held that it was not in dispute that the block assessment was carried out and the block assessment was the subject matter of the proceedings and that notices merely stating that there was reason to believe that income chargeable to tax for the relevant assessment year escaped assessment without anything more could not be stated to be something, which would enable the Authorities to invoke Section 147 of the Act.

36. In the decision of this Court in the case of Fenner (India) Ltd., it was pointed out that the duty of an assessee is limited to fully and truly disclose all material and he is not required to prepare a draft assessment order. We find that the assessee disclosed all relevant facts and the Assessing Officer considered them and after the search, which was conducted on 08.7.1996, the block assessment was framed, which was ultimately set aside. Parallely, the regular scrutiny assessments were done under Section 143(3) of the Act and thereafter the CIT exercised his power under Section 263 of the Act and passed an order, which was also set aside.

37. Therefore, the material, which was already placed on record, and considered in earlier two rounds of litigation can hardly be a reason to reopen the assessment and all that we can say is that the attempt of the Department is to reopen a settled issue solely based upon change of opinion. The Department is silent and has not disclosed as to what is the tangible

material, which is now available with them more than those that were available with the Department in the earlier two rounds of litigation. Therefore, we can safely hold that what the Department seeks to do is not to reopen the assessment, but to review the earlier orders, which had attained finality. That apart, the tax case appeals filed by the assessee having been allowed by judgment dated 03.12.2013, the decision is binding upon the Department and the same reasons, for which, the CIT exercised his power under Section 263 of the Act, cannot be used for issuing the notices for reopening.

38. The decision relied upon by the Department and referred to by the learned Single Judge in the common impugned order in T.V.Mylsamy was a case where the fact situation was different. Admittedly, the said case arose out of reopening proceedings, which were initiated after the judgment in the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., and in that case, there was no earlier round of litigation culminating in a judgment in tax case appeals as in the cases on hand.

39. Therefore, on facts, the said decision is distinguishable. That apart, the assessee in the said case, on certain assumptions, sought to canvass the issue that the reopening was bad in law. The Court considered the fact situation, directed that the assessee should submit his objections to the reasons for reopening and then proceed in accordance with law. Therefore, on the fact situation, which was prevailing in the decision in the case of T.V.Mylsamy, the decision rendered by this Court was correct. Nevertheless, when it comes to reopening of assessment, the Court has to consider totality of the circumstances especially when the assessee contends that the reopening of the assessment is without jurisdiction.

40. Hence, the Department need not have any apprehension that interference with a notice under Section 148 of the Act even without a return being filed by the assessee would open a flood gate of litigation. An assessee shall not be permitted to bypass the procedure prescribed under the Act and he is required to file a return of income pursuant to the notices under Section 148 of the Act or inform the Assessing Officer that his original return may be treated as a return in response to the notice under Section 148 of the Act. However, the case on hand is a peculiar case, which has convinced us to examine the entire issue in a holistic manner.

41. If we are to give a seal of approval to the reopening proceedings, it would fall foul of the findings of the Tribunal in the block assessment, which has attained finality and the findings rendered therein are binding on the Department. It will also fall foul of the judgment of the Division Bench of this Court dated 03.12.2013, which has quashed the order passed under Section 263 of the Act relating to the very same claim for

depreciation and the said judgment having attained finality, it binds the Department. Therefore, the Department is wholly unjustified in initiating reassessment proceedings in the fact situation prevailing in these cases. The assessments for the years under consideration were completed on 31.3.1996, 31.3.1997 and 31.3.1998 respectively. The four year period came to an end on 31.3.2000, 31.3.2001 and 31.3.2002 respectively. The notices for reopening were issued on 13.3.2002, 13.3.2002 and 04.7.2002 respectively, which are admittedly beyond the period of four years. Therefore, unless and until the Department is able to demonstrate or even allege that the assessee failed to disclose fully and truly all material facts necessary for the assessment, the Proviso under Section 147 of the Act will not stand attracted. Consequently, the notices for reopening have to be held to be without jurisdiction. The above conclusion is in terms of the decisions of the Hon'ble Supreme Court in the cases of

- (i) CIT Vs. Kelvinator of India Ltd [reported in (2010) 320 ITR 561];
- (ii) ITO Vs. TechSpan India (P) Ltd. [reported in (2018) 92 Taxmann. Com 361];
- (iii) ITO Vs. Sanjeev Ghei [reported in (2019) 104 Taxmann.com 81]; and
- (iv) ACIT Vs. ICICI Securities Primary Dealership Ltd. [reported in (2012) 348 ITR 299].

42. As pointed out by us earlier, the reason for reopening as culled out from the counter affidavit filed by the Department is with regard to the genuinity of the transactions with (i) Ponni Sugars & Chemicals Ltd.; (ii) Prakash Industries Ltd. (three transactions); and (iii) Oloklin Plants & Equipments. These transactions formed part of 14 such transactions done by the assessee and the genuineness of the transactions were examined by the Tribunal while considering the validity of the block assessment and it was noted that there was no denying the fact that all transactions were done through banking channels, the entries in the bank documents confirmed the position and the Department could not rebut the contentions made on behalf of the assessee.

43. It appears that five of the parties denied the transactions. This was also considered by the Tribunal and it was noted that they had been proceeded against by way of a civil suit and the outcome of the civil suit was awaited. The Tribunal further noted that though the parties denied the transactions, they declared the commission received from the transactions as their income from undisclosed sources and they admitted to have signed the documents. Therefore, the Tribunal held that the mere fact that some of the parties denied the transaction could not lead to existence of undisclosed income especially when all the

particulars of transactions have duly been furnished to the Department or rather found them in the course of search.

44. The Tribunal further noted that the assessee filed return of income as well as accounts and they had reflected all the 14 transactions. The third Member, who agreed with the opinion rendered by the Judicial Member, had examined the merits of the transactions and held that the various documents that were found consequent to the search gave no indication to the fact that the entries in the books of accounts were fraudulent or not so made with reference to any documents that were found during the course of search and that the various material seized were with reference to various transactions and with reference to the claim of depreciation at 100%.

45. The learned Senior Standing Counsel appearing for the Department has argued that the third Member, while concurring with the Judicial Member of the Tribunal, made an observation that whether the claim for 100% depreciation is justifiable or not may be a question to be considered in a regular assessment, for which, a separate procedure is there or as per the procedure prescribed under Sections 147 and 148 of the Act and therefore, the Department is entitled to issue the notice for reopening.

46. This submission is not tenable for more than one reason. Firstly, the decision of the Tribunal has to be read as a whole and the Department cannot pick and choose a few sentences and observations made by the Tribunal, which are not relatable to the assessee's case, but probably an opinion regarding the statutory provision. The Tribunal recorded a finding that the transactions were not fraudulent, that the assessee disclosed all the transactions and that all the transactions were through banking channels.

47. In such circumstances, unless there is a fresh tangible material available with the Department, the question of reopening the assessments based on the material already available on record is impermissible. As pointed in the decision of the Hon'ble Supreme Court in the case of Kelvinator of India Ltd., what is to be borne in mind is the conceptual difference between the power of review and the power to re-assess, that the Assessing Officer has no power to review, but he has a power to reassess, that the reassessment should be based on fulfillment of certain preconditions and that if the concept of change of opinion is removed, then in the garb of reopening the assessment, review would take place. This is precisely what the Department seeks to do in the cases on hand.

48. For all the above reasons, we have no hesitation to hold that the reopening of assessment is without jurisdiction, bad in law and liable to be set aside and consequently, the same is set aside.

49. In the result, the writ appeals are allowed and the common impugned order dated 25.1.2019 passed by in the writ petitions is set aside. W.P.Nos.12603, 12604 and 33239 of 2002

are allowed and the notices impugned in the said writ petitions are quashed. No costs. Consequently, the connected CMPs are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner of Income Tax (Central II), No.108, Uthamar Gandhi Road, Chennai-34.

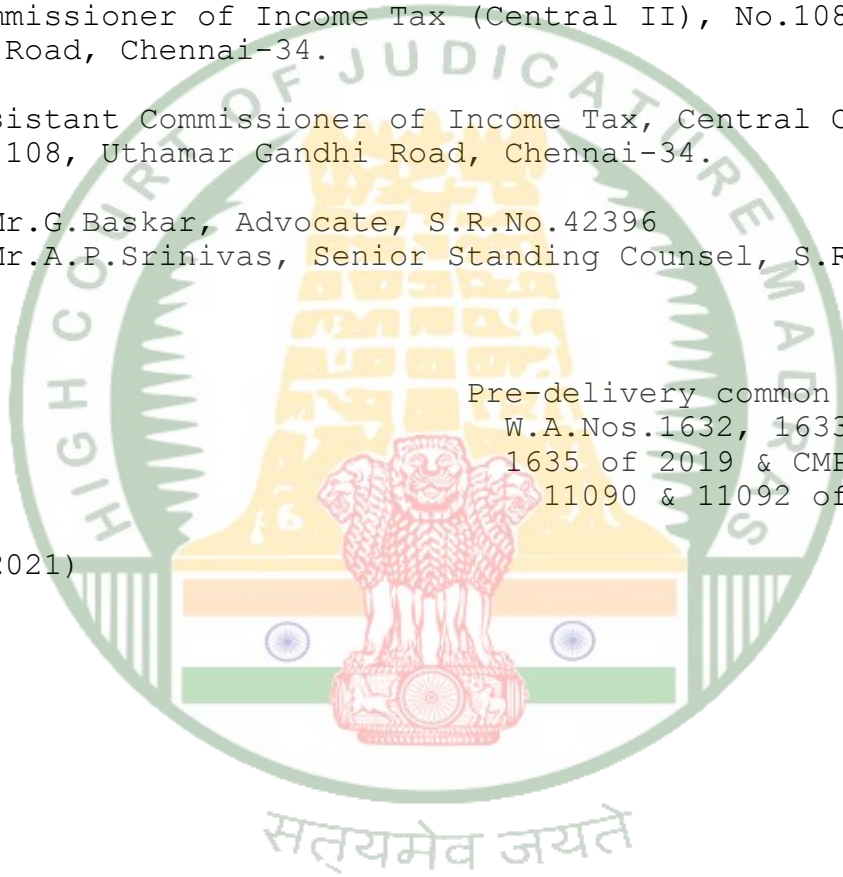
2. The Assistant Commissioner of Income Tax, Central Circle II (1), No.108, Uthamar Gandhi Road, Chennai-34.

+3ccs to Mr.G.Baskar, Advocate, S.R.No.42396

+1cc to Mr.A.P.Srinivas, Senior Standing Counsel, S.R.No.42297

Pre-delivery common judgment in
W.A.Nos.1632, 1633 and
1635 of 2019 & CMP.Nos.11109,
11090 & 11092 of 2019

NRL(CO)
RV(27.01.2021)



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