

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.01.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.23768 of 2018

and

WMP. Nos.27723 to 27725 of 2018

M/s.Shivsu Canadian Clear Waters Limited
Represented by Mr.C.Satish Kumar

...Petitioner

Vs

Income Tax Officer,
Corporate Ward 6(2),
Room No.504, Wanaparthi Block,
5th Floor,
121, MG Road, Nungambakkam,
Chennai 600 034.

... Respondent

Prayer: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, calling for the records of the Respondent contained in its notice issued under Section 148 of the Income Tax Act, 1961, for PAN:AAICS2574C, for the assessment year 2014-15, dated 17.08.2017, and all proceedings in furtherance thereof, including but not limited to the order dated 14.08.2018 passed by the Respondent disposing of the petitioner's objection to the re-opening of the income tax assessment for the assessment year 2014-15, and to quash the same as arbitrary, unjust and illegal, and to consequently forbear the Respondent from in any manner reassessing the Petitioner's income under Section 147 of the Income Tax Act, 1961, for the Assessment Year 2014-15.

WEB COPY

For Petitioner : Mr.Suhrith Parthasarathy

For Respondents : Mr.ANR.Jayapratap,
Standing Counsel

O R D E R

The petitioner challenges proceedings for re-assessment in respect of Assessment Year 2014-15 commencing with notice for re-opening issued under Section 148 of the Income Tax Act, 1961 (in short 'Act') dated 17.08.2017 and all subsequent proceedings. The petitioner had filed a return of income within time that was accompanied by relevant financials. The notes on accounts detail the reserves and surplus position as follows:

'2. Reserve and Surplus

(a) Share Premium

1,00,000 (One Lakh) 3% Cumulative Convertible Preference Shares of face value of Rs.10/- each, at premium of Rs.490/- per share	4,90,00,000	4,90,00,000
2,17,870 3% Cumulative Convertible Preference Shares of face value of Rs.10/- each, at premium of Rs.488/- per share.	10,63,20,560	---
Total	15,53,20,560	4,90,00,000'

2. The assessment was taken up for scrutiny by issue of notice under Section 143(2) and questionnaire under Section 142(1). After discussion of all relevant issues, an order of assessment under Section 143(3) came to be passed on 30.12.2016, wherein at paragraph 2 (internal page No.2 of the assessment order), the Officer deals with the share premium on the first lot of 1,00,000 shares. An addition under Section 56(2) (viib) came to be made in this regard. The petitioner states that the order of assessment is under challenge by way of statutory appeal.

3. While this is so, a notice under Section 148 of the Act was issued on 17.08.2017. Admittedly, this notice has been issued within a period of four years from the end of the relevant assessment year. The assessee, on 28.10.2017 complied with the notice under Section 148 and sought the reasons, on the basis of which the re-assessment had been initiated. Reasons were supplied, which read as follows:

'It is seen from the records that during the F.Y relevant to AY 2014-15 the assessee has issued on 2,17,870 numbers of 3% cumulative convertible preference shares of face value of Rs.10/- each, at premium of Rs.488/- per share. However, the market

value of each shares calculated as per Rule 11UA(2) (a) the I.T rules is Rs.2520 /- only. The consideration received from issue of shares that exceeds the face value of such shares requires to be assessed to tax u/s. 56(2) (viib) of the I.T. Act. This was omitted to be considered in the assessment order U/s.143(3) of the I.T. Act dated 30.12.2016'

4. The Assessing officer in the impugned proceedings seeks to bring to tax the second lot of shares numbering 2,17,870 details of which were available on record even at the time of original proceedings. The petitioner thus raised an objection to assumption of jurisdiction in line with the procedure prescribed in GKN Driveshafts (India) Limited V. Income Tax Officer and others (259 ITR 1) which came to be rejected by order of the respondent dated 14.08.2018. The Assessing Authority, in rejecting the objections raised, relies on the provisions of Section 147 of the Act pointing out that he has 'reason to believe' that the income in relation to 2,17,870 shares has escaped assessment insofar as the computation of fair market value of the shares was, according to the Officer, incorrect. He relies on the judgment of the Supreme Court in the case of Assistant Commissioner of Income Tax V. Rajesh Jhaveri Stock Brokers (P) Ltd. (291 ITR 500) and the decision of the Delhi High Court in the case of Consolidated Photo & Finvest Ltd. V. Asstt. CIT [(2006) 151 Taxman 41 (Delhi)]. It is as against the aforesaid proceedings dated 14.08.2018 that the present Writ Petition is filed.

5. The impugned proceedings have no doubt, been initiated within a period of four years. However, there is, admittedly no tangible or fresh material that has come to the notice of the Assessing Authority and this is an admitted fact as may be seen from the reasons that have been extracted elsewhere in this order. The relevant phrase in Section 147 is 'reason to believe', and it has been the consistent stand of the Supreme Court that such reason must emanate from tangible or new material that has come to the notice of the Assessing Officer and should not tantamount to review of the material already available on record. If this were to be permitted, there would be no end to the number of times when successive officers might apply and re-apply their mind to the same stale material coming to different conclusions every time.

6. In the present case, the financials annexed to the return of income disclose two lot of shares, one numbering 1,00,000 and second numbering 2,17,870. The valuation thereof is also stated clearly. This has not escaped the attention of

the Assessing Authority at the original instance and he has in fact made a modification to the valuation of the first lot of shares. For reasons best known to him, the second lot has been left untouched. Admittedly, there is no material that has come to the notice of the Assessing Authority in 2018 to warrant re-assessment. The proceedings impugned before me are thus nothing but a change of opinion, impermissible in law.

7. A Full Bench of the Delhi High Court in the case of CIT V. Kelvinator of India Limited ((2002) 256 ITR 1) went into the question of whether a re-assessment that is nothing but a change of opinion on available facts is permissible and within the contours of the Act and held as follows:

' 40. In the event it is held that by reason of Section 147 if ITO exercises its jurisdiction for initiating a proceeding for re-assessment only upon mere change of opinion, the same may be held to be unconstitutional. We are therefore of the opinion that Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate re-assessment proceeding upon his mere change of opinion.

41. We, however, may hasten to add that if "reason to believe" of the assessing Officer is founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power under Section 147 read with Section 148 of the Act.

42. We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessed. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessed himself.

43. We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of Sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said Sub-

section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of Clause (e) of Section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong.'

8. This decision has been affirmed by the Supreme Court in CIT V. Kelvinator of India Limited ((2010) 320 ITR 561) where the Bench states as follows:

' On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment 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 1st April, 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 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 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.--A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same.'

9. Reliance by the Officer to the judgement of the Supreme Court is Rajesh Javeri (supra) does not advance his case as the Supreme Court was, in that case, concerned with the re-assessment initiated in the case of an intimation passed in terms of Section 143(1) of the Act and not an order of scrutiny passed in terms of Section 143(3) thereof. Then again, his reliance upon the decision of the Delhi High Court in Consolidated Photo (supra) is also clearly misplaced insofar as a subsequent Bench of the Delhi High Court in the case of KLM Royal Dutch Airlines V. Asst. Director of Income-tax ((2007) 292 ITR 49) has dissented from the view expressed by the Bench in Consolidated Photo (supra) pointing out that the judgment of the Supreme Court in Kelvinator (supra) and the ratio thereof have been omitted to be taken into consideration in that decision. The relevant paragraph is as follows:

12. The Full Bench of this Court in Commissioner of Income Tax v. Kelvinator of India Ltd.

MANU/DE/2365/2002 : [2002] 256 ITR 1 had opined that the amendments introduced into Section 147 with effect from 1.4.1989 have not altered the position that a mere change of opinion of the AO was not sufficient ground for embarking on a reassessment. Calcutta Discount was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the AO concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income Tax MANU/DE/0424/2006 : [2006]281ITR394(Delhi) , inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section of Section 143, but under the third Sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view in this case that of the Gujarat High Court as in Gruh Finance Ltd. v. Joint Commissioner of Income Tax (Assessment) MANU/GJ/0027/2000 : [2000]243ITR482(Guj) , Praful Chunilal Patel v. M.J. Makwana, Assistant CIT MANU/GJ/0059/1998 : [1999]236ITR832(Guj) and Garden Silk Mills Ltd. v. Deputy CIT (No. 1), MANU/GJ/0030/1996 : [1996]222ITR27(Guj) . The Full Bench of this Court has taken into consideration both Praful Chunilal Patel as well as Garden Silk Mills. In Kelvinator the Full Bench had also analysed the earlier Division Bench decisions, namely, Jindal Photo Films Ltd. v. Deputy Commissioner of Income Tax MANU/DE/0729/1998 : [1998]234ITR170(Delhi) presided over by R.C. Lahoti J. (as learned Chief Justice of India then was) and Bawa Abhai Singh v. Deputy Commissioner of Income Tax MANU/DE/0302/2001 : [2002] 253 ITR 83 comprising Arijit Pasayat and D.K. Jain (as their Lordships then were). It is quite possible that had the Court in Consolidated Photo been made aware of the consistent opinion of this Court in Jindal Photo and Bawa Abhai Singh, their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court.'

10. The existence of new and tangible material is a jurisdictional fact. This fact must necessarily exist in order to validate the assumption of jurisdiction in law. The Supreme Court in the case of Parashuram Pottery Works Co. Ltd.

vs. Income Tax Officer, Circle I, Ward A, Rajkot (1977 AIR SC 429) considered the power to re-open concluded assessments and, in an oft quoted paragraph, states as follows:

'15. It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realisms that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under Section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, this cannot be said in the present case.'

11. Though rendered in the context of a re-assessment beyond four years, the observations of the Court above, seen in the context of the march of the law, are equally applicable in the case of a review of assessment, couched as a re-assessment. Thus and in the light of the discussion as above, the impugned proceedings fail and are quashed. This Writ Petition is allowed. No costs. Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sl

To

Income Tax Officer,
Corporate Ward 6(2),
Room No.504, Wanaparthi Block,
5th Floor, 121, MG Road, Nungambakkam,
Chennai 600 034.

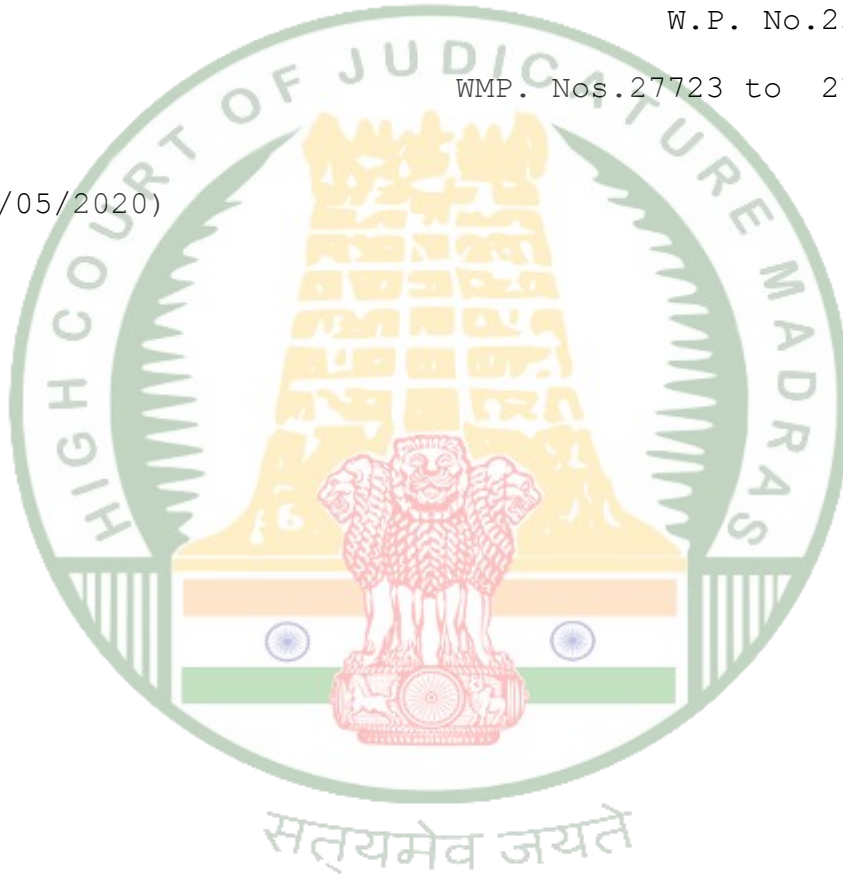
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No. 4708

W.P. No.23768 of 2018
and

WMP. Nos.27723 to 27725 of 2018

CP (CO)

Maya (28/05/2020)



WEB COPY