

W.P.O. No. 558 of 2019

Judgement On :- 24 .12.2021

(i) Whether on the facts and in the circumstances of the case assumption of jurisdiction under Section 147 of the Income Tax Act, 1961 by the respondent/Assessing Officer and issuance of impugned notice under Section 148 of the Act after the expiry of 4 years from the end of the relevant

assessment year 2012-13 is bad and not tenable in the eye of law in view of non-fulfilment of criteria under the first proviso to Section 147 of the Act and in view of the fact that there was no omission or failure on the part of the petitioner in disclosing fully and truly all relevant material facts necessary in course of scrutiny assessment under Section 143 of the Income Tax Act, 1961?

(ii) Whether on the facts and in the circumstances of the case invoking of the provision of Section 147 read with Section 148 of the Act by the Assessing Officer on the self-same material which were very much available to the Assessing Officer at the time of scrutiny assessment under Section 143 (3) of the Income Tax Act, 1961, is justified by taking a view different from his predecessor who had allowed to tax the non-compete fees in question as “Long Term Capital Gain” in scrutiny assessment and by taking a view that the same should be treated as income from business under Section 28 (V-A) of the Income Tax Act, 1961 instead of “Long Term Capital Gain”?

(iii) Whether on the facts and in the circumstances of the case the respondent assessing Officer is legally justified in reopening the assessment under Section 147 of the Income Tax Act, 1961 by ignoring the fact that non-compete fees in question had already been treated and taxed as “capital gains” by the Assessing Officer during the scrutiny assessment proceedings under Section 143 (3) of the Act by accepting the claim of the petitioner after examining, verifying and scrutinising all the facts, relevant documents, details and particulars which were requisitioned by the assessing officer in course of scrutiny assessment and which are matters of records?

(iv) Whether on the facts and in the circumstances of the case reopening of assessment by invoking Section 147 and issuance of notice under Section 148 of the Income Tax Act, 1961, after expiry of 4 years from the end of relevant assessment year on the basis of information received from investigation wing which are nothing new and are the same materials which were already available before the Assessing Officer and were considered at the time of

scrutiny assessment under Section 143 (3) of the Act, and taking a different view on the self-same material is a mere change of opinion?

Facts involve in the instant case in brief as appear on perusal of relevant records available are as follow:

On 29th March, 2011 the petitioner company entered into a share purchase agreement with the purchaser for sale of shares of Andhra Pradesh Paper Mills Ltd. (Andhra Pradesh Paper) and the petitioner company also entered into a non-compete and business waiver agreement.

Petitioner filed his return of income relates to relevant assessment year 2012-13 on 30th September, 2012. In course of regular assessment proceeding under Section 143 of the Act, notices under Section 143 (2) and 142 (1) of the Act were issued to the petitioner company on 20th August, 2013. Thereafter, series of letters were issued by the Assessing Officer from time to time making requisitions for producing relevant documents relating to relevant agreements and non-compete fees in question and also asked the petitioner for providing explanation from time to time as appears from record and which are part of the Writ Petition and finally considering the relevant documents and explanations provided by the petitioner company in course of regular assessment, order under Section 143 (3) of the Act was passed on 31st March, 2015 and in the said regular assessment non-compete fees in question was treated as “Capital Gain”.

A rectification petition under Section 154 of the Act was filed by the petitioner before the Assessing Officer requesting him to correct the taxation of Long Term Capital Gain of Rs. 411.69 Crores from the sale of shares of Andhra Pradesh Paper at the rate of 20% instead of 10% as provided in Section 12 of the Act and on 16th April, 2015 order on the aforesaid rectification application order was passed by correcting computational error accordingly.

The respondent Assessing officer issued impugned notice under Section 148 of the Act on 29th March, 2019 relating to the relevant assessment year 2012-13 admittedly after expiry of 4 years from the end of relevant assessment year on the ground of escapement of income chargeable to tax on the non-compete fees in question by contending that it was taxable as business income under Section 28 (V-A) of the Act instead of income under the head “capital gain” and recorded reason was furnished to the petitioner on 19th June, 2019 to which the petitioner had made an objection on 19th September, 2019 which was rejected by the respondent Assessing Officer by his order dated 19th September, 2019 which is annexed to the Writ Petition being annexure P-15 at Page - 305 and Paragraph 3 of the said rejection order is very relevant in this case which is quoted hereunder:

“in this regard I would like to state that the assessee has itself confirmed that these transactions have taken place during the financial year under consideration and non-compete fees have been offered to taxation as LTCG. However, as per the provisions of Section 28 (V-A) of the Income Tax Act, 1961 these receipts of “non-compete fees” qualifies to be business receipt and should be taxed @ 30%.”

It appears from the aforesaid recording by the Assessing Officer that he himself in his ground of rejection of petitioner’s objection against impugned notice under Section 148 of the Act, admits that the income from non-compete fees in question were already disclosed by the assessee in course of regular assessment and it had offered for taxation as “Long Term Capital Gain” and as such there can be no question of suppression or non-disclosure of the said income and it is admitted position that it was accepted by his predecessor as income from “Long Term Capital Gain” and the only ground for reopening of assessment by the Assessing Officer by invoking Section 147 of the Act is that though under the scrutiny assessment it was treated as Long Term Capital Gain and offered for taxation but now his view is that it should be treated as

business receipt and should be taxed as income from business under Section 28 (V-A) of the Act.

This recording by the Assessing Officer in his order of rejection itself shows that the instant case does not fulfil the criteria of proviso to Section 147 of the Act of non-disclosure or failure or omission on the part of the assessee to disclose fully and truly all material facts necessary for its assessment or that there was any failure or omission on the part of the assessee petitioner company in the aforesaid regard. The aforesaid recording itself shows that the materials upon which the present Assessing Officer wants to invoke Section 147 of the Act were already available and records of the case show that the petitioner's claim of the aforesaid non-compete fee as "Long Term Capital Gain" was allowed in scrutiny assessment under Section 143 (3) of the Act and which was accepted after scrutinisation and verification of the documents and materials requisitioned by the Assessing Officer from time to time in course of regular assessment under Section 143 (3) of the Act. Invoking of Section 147 of the Act for the purpose of charging the tax under a different heading on the self-same material and the documents which were already available and considered during the course of regular assessment by the Assessing Officer is nothing but a mere change of opinion and the contention of the Assessing Officer that the materials upon which it wants to rely was the information received from the investigating wing subsequent to the regular assessment, is nothing new and it is the same material which were already available at the time of regular assessment and were considered.

It also appears from the order of rejection of the petitioner's objection to the impugned notice under Section 148 of the Act that the Assessing Officer himself has not referred or discussed at all or reiterated about his stand of reliance on the information received from the office of the investigating wing in his recorded reason and the Assessing Officer in this regard is totally silent in its order of rejection of the objection of the petitioner against the impugned

notice under Section 148 of the Act. In his order of rejection of objection of the petitioner he has simply justified the reopening of assessment under Section 147 of the Act only on the ground that the non-compete fees in question which were offered for taxation as Long Term Capital Gain was qualified for taxation under Section 28 (V-A) of the Act and under the heading “business receipt”.

Learned Advocate appearing for the petitioner in support of his contention has relied on the decision of the Hon’ble Supreme Court in the case of Assistant Commissioner of Income Tax & Ors. –vs- ICICI Securities Primary Dealership Ltd reported in [2012] 348 ITR 299 (SC) and relevant portion of the said decision is hereunder:

“In the facts of the present case, there is nothing new which has come to the notice of the Revenue. The accounts had been furnished by the petitioner when called upon. Thereafter, the assessment was completed under Section 143 (3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to Section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record. In the circumstances, we allow this petition in terms of prayer (a) and quash and set aside the notice dated March 27, 2006, directing reopening of the assessment for the year 1999-2000.”

Petitioner has also relied on another decision of the Hon’ble Supreme Court in the case of Income Tax Officer, Ward No. 16 (2) –vs- TechSpan India (P.) Ltd. reported in [2018] 92 taxmann.com 361 (SC) and relevant paragraph of the said decision is hereunder:

“The fact in controversy in this case is with regard to the deduction under Section 10A of the IT Act

which was allegedly allowed in excess. The show cause notice dated 10.02.2005 reflects the ground for re-assessment in the present case, that is, the deduction allowed in excess under Section 10A and, therefore, the income has escaped assessment to the tune of Rs. 57,36,811. In the order in question dated 17.08.2005, the reason purportedly given for rejecting the objections was that the assessee was not maintaining any separate books of accounts for the two categories, i.e., software development and human resource development, on which it has declared income separately. However, a bare perusal of notice dated 09.03.2004 which was issued in the original assessment proceedings under Section 143 makes it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 09.03.2004 was that the assessee was not maintaining any separate books of account for the said two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under Section 10A of the IT Act was well considered in the original assessment proceedings itself. Hence, initiation of the re-assessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under Section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings.”

Mr. Roychowdhury Learned Advocate appearing for the respondent Income Tax authority opposing the Writ Petition has simply relied on the recorded reason for reopening of the assessment in question and justified the order of rejection of petitioner's objection to the impugned notice under Section 148 of the Act in his submission and in the affidavit-in-opposition to the Writ Petition and he could not distinguish the decisions relied upon by the petitioners.

Considering the submission of the parties and facts as appear on perusal of relevant records available, provisions of law and the judgments referred above, I am inclined to quash the impugned notice dated 29th March, 2019 relating to assessment year 2012-13 issued under Section 148 of the Income Tax Act, 1961 and set aside all further proceedings on the basis of the aforesaid impugned notice by holding as follows:

(i) In the facts and circumstances of the case assumption of jurisdiction under Section 147 of the Income Tax Act, 1961 by the respondent/Assessing Officer and issuance of impugned notice under Section 148 of the said Act after the expiry of 4 years from the end of the relevant assessment year 2012-13 is bad and not tenable in the eye of law in view of non-fulfilment of criteria under the first proviso to Section 147 of the Act and in view of the fact that the respondent Assessing Officer could not establish from record that there was any omission or failure on the part of the assessee petitioner in disclosing fully and truly all relevant material facts necessary in course of scrutiny assessment under Section 143 (3) of the Income Tax Act, 1961.

(ii) In the facts and circumstances of the case invoking of provision of Section 147 read with Section 148 of the Act by the Assessing Officer for reopening the assessment of the assessee on the self-same material which were very much available to the Assessing Officer at the time of scrutiny assessment under Section 143 (3) of the Income Tax Act, 1961 is not justified by taking a view different from his predecessor who had already allowed to tax the non-compete fees in question as Long Term Capital Gain in scrutiny assessment

and by taking a view that the same should be treated as income from business under Section 28 (V-A) of the Income Tax Act, 1961 instead of Long Term Capital Gain.

(iii) In the facts and in the circumstances of the case the respondent assessing authority is legally not justified in reopening the assessment in question under Section 147 of the Income Tax Act, 1961 by ignoring the fact that non-compete fees in question had already been treated and taxed as capital gains by the Assessing Officer during the scrutiny assessment proceedings under Section 143 (3) of the Act by accepting the claim of the petitioner after examining, verifying and scrutinising all the facts, relevant documents, details and particulars which were requisitioned by the assessing officer in course of scrutiny assessment and which are matters of records.

(iv) In the facts and in the circumstances of the case reopening of assessment by invoking Section 147 and issuance of notice under Section 148 of the Income Tax Act, 1961, after expiry of 4 years from the end of relevant assessment year on the basis of information received from investigation wing which are nothing new and are the same material which were already available before the Assessing Officer and were considered at the time of scrutiny assessment under Section 143 (3) of the Act, and taking a different view on the self-same material is a mere change of opinion.

In view of the discussion made above, this Writ Petition being W.P.O No. 558 of 2019 is accordingly disposed of by allowing the same. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[MD. NIZAMUDDIN, J.]