IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.10846 of 2016

and

W.M.P.Nos.9468 & 9469 of 2016

and

W.M.P.Nos.23278 & 23279 of 2017

M/s.Thriveni Earthmovers Pvt. Ltd.,
Represented by its Executive Director and
Authorized Signatory
Sri.B.Karthikeyan,
#22/110, Greenways Road, Fairlands,
Salem - 636 016

.. Petitioner

vs

1.The Assistant Commissioner of Income Tax,
Central Circle,
#3, Gandhi Road, Salem - 636 007.

2.The Deputy Commissioner of Income Tax,
Central Circle,
#3, Gandhi Road, Salem - 636 007.

3.The Deputy Commissioner of Income Tax,
Circle - 1
#3, Gandhi Road, Salem - 636 007.

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the entire records of the 1st respondent contained in its impugned order bearing Proceedings No.AABCT6759R/2008-09, dated 23.02.2016, and to quash the same, and to consequently forbear the respondents or any of their subordinates, agents or any other person claiming under the respondents, from in any manner re-assessing the petitioner's income for the assessment year 2008-09 under Section 147 of the Income Tax Act, 1961.

For Petitioner : Mr.R.V.Easwar
Senior counsel
Assisted by M/s.Rubal Bansal and
Mr.Suhrith Parthasarathy

For Respondents : Mr.A.P.Srinivas
Senior Standing counsel
[For Income Tax]

O R D E R

The writ on hand is filed, challenging the proceedings dated 23.02.2016, passed by the Assistant Commissioner of Income Tax, disposing of the objections raised by the petitioner against the initiation of action under Section 147 of the Income Tax Act with reference to the Assessment Year 2008-09.

2. The petitioner is a Company, registered under Companies Act, 1956 and it is engaged in the business of iron ore mining services, transportation and handling of iron ore and limestone, quarrying of blue metals boulders and sale of blue metals. The petitioner company filed its return of income on 30.09.2008, declaring a total income of Rs.117,55,95,560/- and the said return was processed and intimation under Section 143(1) was issued from the respondents. The case of the petitioner was selected for scrutiny and notice under Section 143(2) was issued to the petitioner on 23.09.2009. In the said intimation notice, it was stated that income tax computed at higher rate against the actual rate and actual rate, and credit for tax deducted at source was given only to the extent of Rs.8,51,06,508/- as against the actual TDS of Rs.9,04,19,747/-, which was claimed by the petitioner. The petitioner on 05.04.2010, had filed a rectification application before the 2nd respondent to rectify the same. The 2nd respondent passed an order under Section 154 of the Income Tax Act on 28.12.2010 and a revised demand was issued to the petitioner, reducing the total demand to the tune of Rs.38,05,14,782/-, Subsequently, the Department passed an order under Section 143(3), wherein again TDS was given only to the extent of Rs.8,51,06,508/-. On 20.07.2011, the petitioner filed another rectification petition before the Learned Deputy Commissioner of Income Tax (DCIT) to rectify the order passed under Section 154 for Assessment Year 2008-09, it was submitted by the petitioner that since the TDS amount of Rs.55,65,195/- had not been taken into account, interest levied under Section 234B would be reduced and hence, no tax was payable to the petitioner.

3. The respondent Department on 20.02.2015, issued a notice under Section 148 of the Income tax Act, to reopen the petitioner's income tax assessment for the Assessment Year 2008-09. It is contended that the said notice was issued beyond four years and after the end of relevant Assessment Year. On 21.04.2015, the petitioner wrote a letter to the DCIT, seeking the reason for reopening of the impugned Assessment Year. On 12.10.2015, the reasons were furnished by the DCIT for reopening. The petitioner has stated that he has disclosed fully and truly all the material particulars during the original Assessment proceedings. Thus, the petitioner on 23.11.2015, filed a detailed written submission, objecting to the reopening of its assessment under Section 147. However, the DCIT passed the impugned order on 23.02.2016, rejecting the explanations and objections given by the petitioner. Thus, the petitioner is constrained to move the present writ petition.

4. The respondents filed a counter affidavit stating that order, considering the objections of the petitioner, is not a final order and it is just one stage in the adjudication process and the writ petition is pre-mature as the Department is yet to pass the Assessment order and therefore, the petitioner has a right of appeal.

5. The assessee's case was selected for scrutiny under CASS and assessment under Section 143(3) was completed on 31.12.2010 by Additional Commissioner of Income Tax, Range I, Salem. The cases are selected through this process to investigate the specific issues. The contention of the petitioner that the assessment under Section 143(3) was concluded on the basis of the detailed examination of the various Books of Accounts and other informations provided by the petitioner's own statements, is not supported by any evidence. Mere production of Books of Accounts by the assessee cannot tantamount to full and true disclosure as per the explanation to the Proviso to Section 147. Regarding TDS Credit, the same is given only as per the credit available in the OLTAS (Online Tax Accounting System), which reflects the correct TDS available to the petitioner at the given point of time. The assessment under Section 143(3) was completed on 31.12.2010. The notice under Section 148 was issued on 20.02.2015 in accordance with the provisions of Section 147 of the Income Tax Act. Regarding the delay for furnishing the reasons are concerned, the movement of records from the transferor officers to the transferee officers was the reason for the delay in furnishing of reasons by the Department. The respondents contended that the powers given to the Assessing Officer under the amended provisions of Section 147 with effect from 01.04.1989 are wide. Therefore, in the event of any reason to believe that income has escaped assessment, it is enough to

confer jurisdiction to reopen the assessment. The Amended Section provides that the Assessing officer may assess, or reassess such income (believed to have escaped assessment) and also any other income chargeable to tax, which has escaped assessment and which comes to the notice of the Assessing Officer. Subsequently in the course of the proceedings under Section 147 of the Act. Explanations 1 to 3rd proviso is abundantly clear to indicate that mere production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure. The records do no show any opinion formed by the Assessing Officer during the course of original assessment proceedings on the issues, which have been mentioned in the reasons recorded for reopening of the assessment under Section 147. In fact, no opinion had been formed by the Assessing Officer during the course of the original assessment on the issues under consideration. Thus, it is to be construed as new material traced out for the purpose of reopening of assessment. The respondents reiterated that the informations, which is stated to be available cannot be stated to be fully and truly disclosed by the petitioner. Be that as it may, the assessment was reopened under Section 147 as the Assessing Officer had 'reason to believe' that income chargeable to tax had escaped assessment. Thus, the reopening has been done as per the statutory provisions of the Income Tax Act. The written submissions had been duly and carefully considered by the Assessing officer.

6. The assessment reopened in the case of the petitioner as there was huge difference between data reflected in Form 26AS and assessee's statement. Form 26AS is constantly updated from time to time. The figures reflected in Form 26AS may increase or decrease based on TDS statements filed by the deductors. In Form 26AS, rate of TDS deducted and total payments made to the deductee are vital. Although the amount of TDS credited in assessee's account may vary according to the TDS statements filed by the deductor, the amount of gross receipts received/receivable by the assessee during the relevant financial year is available with the assessee as it follows the mercantile system of accounting.

7. The assessee had credited in his P & L account income of Rs.377,87,93,055/- only out of the total receipts of Rs.419,47,44,777/-. Thus, there is a huge difference in assessee's submission before the Assessing Officer during the course of assessment and the figures reflected in form 26AS. Thus, it is evident that the petitioner did not submit the

correct figures before the Assessing Officer. The facts came to the knowledge of the Assessing Officer, when petitioner filed the rectification application and form 26AS was downloaded by the Assessing Officer. Thus, there is failure on the part of the assessee to disclose fully and truly all the materials before the Assessing Officer and the reopening of the assessment is in order. As the assessee has not made full and true disclosure during the assessment proceedings under Section 143(3), the reassessment can be initiated after the expiry of 4 years from the end of the relevant assessment year. The assessment is reopened in the case of the petitioner for this assessment year, after getting the prior approval of the Commissioner of Income Tax, Salem as per the relevant provisions.

8. The respondents relied in comparison with Form 26AS and the rectification application filed by the petitioner on 20.07.2011, found that there is a huge mismatch in receipts appearing in 26AS vis-a-vis receipts credited in P & L Account. Thus, the Assessing Officer had tangible material to reopen the income tax assessment and the same was legally done as per the provisions of Section 147 of the Income Tax Act by issuing a notice under Section 148 of the Income Tax Act.

9. Further, the Assessing officer came into possession of certain other information which also lead to the 'belief' that income chargeable to tax had escaped assessment. As per the MB Shah Commission's report (Annexure-D to Report-I of Volume -I) has tabulated the list of 146 lessees who were involved illegal and excess production of iron ore during 2000-01 to 2009-10. It is reported that the State Government of Odisha issued show cause notices to various parties for recovery of mineral value. KJS Ahulwalia, one of the lessese who employed assesee as raising contractor, has been issued for recovery of Rs.2022,00,72,213/- for the above said period. The notice has been issued for excess production which was produced illegally and not disclosed to appropriate authorities. Since assessee is doing extraction work for the lessee, the contract charges corresponding to the value of excess production was believed to have been suppressed. Hence, the Assessing officer has rightly reopened the assessment.

10. In view of the facts and circumstances, the respondents prayed for the dismissal of the writ petition.

11. The learned Senior counsel appearing on behalf of the writ petitioner made a submission that the escaped discrepancy

with reference to Form 26AS regarding TDS, the petitioner company itself filed a rectification application under Section 154 of the Act on 20.07.2011. The said rectification application was filed in order to rectify the mistakes occurred and therefore, the Assessing Officer ought not to have rushed to a conclusion that the petitioner has not disclosed true and full income. The petitioner, when themselves identified certain errors and submitted a rectification application twice, then there is no reason to believe that the Department has formed an opinion for reopening of assessment.

12. The learned Senior counsel contended that the notice issued under Section 148 of the Income Tax Act is vague and no material reasons are available for the purpose of reopening of assessment. Therefore, the very initiation is perverse and not in consonance with the mandatory requirement to be complied with under Section 147 of the Income Tax Act.

13. Secondly, the learned Senior Counsel pointed out that as per MB Shah Commission's report (Annexure-D to Report-I of Volume -I) has tabulated the list of 146 lessees, who were involved illegal and excess production of iron ore during 2000-01 to 2009-10. It is reported that the State Government of Odisha, issued show cause notices to various parties for recovery of mineral value. KJS Ahulwalia, one of the lessee, who employed assesee as raising contractor, has been issued for recovery of Rs.2022,00,72,213/- for the above said period. The notice has been issued for excess production which was produced illegally and not disclosed to appropriate authorities. With reference to the said allegations of the Department, the learned Senior counsel made a submission that regarding the illegal mining activity in the State of Odisha, the petitioner is unconnected and he was a raising contractor and in respect of his business transactions, he made full and true disclosure. Thus, the petitioner is no way connected with the illegal mining and as a raising contractor, he has performed his job and submitted the materials, which all are true and full for the purpose of assessment. Thus, the impugned order is liable to be scrapped.

14. The learned Senior counsel mainly raised objections regarding the alleged mismatch with reference to the discrepancies identified for forming an opinion in the matter of escaped income. Mere reference made with Form 26AS, would not be the sufficient factor for the purpose of reopening of assessment as the petitioner themselves filed an application for rectification under Section 154 of the Act and therefore, they

have made true and full disclosure. Thus, the very reason to believe as contemplated has not been met with and in fact, it amounts to change of opinion by the competent authority. As far as the MB Shah Commission report is concerned, the illegal mining to a larger scale was identified and the petitioner is no way connected and he being a raising contractor of one of the lessee namely KJS Ahulwalia, he has submitted his income for the purpose of assessment and thus, the other reasons stated is also incorrect and the same would not constitute any reason to believe for the purpose of reopening of assessment.

15. The learned Senior standing counsel appearing on behalf of the respondents objected the contentions seriously by stating that as per the Amended provisions of Section 147 with effect from 01.04.1989, the Power of the Assessing Officer is wider enough regarding reopening the assessment, if any new materials are identified. Thus, if the Assessing officer has reason to believe that the income has escaped assessment, that is sufficient to confer jurisdiction to reopen the assessment. Explanation 1 to third Proviso to Section 147 is abundantly clear to indicate that mere production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure. Thus, the Assessing officer is vested with the power of proceed with the reopen in the event of any new informations or materials and there is a reason to believe.

16. Regarding the rectification application filed by the petitioner assessee on 20.07.2011, the learned Senior standing counsel contended that the information in Form 26AS, which is a statement of TDS deducted and deposited was itself was not used as a reason for reopening of the assessment. It may not be out of place to mention that this observation was made from the rectification petition filed by the petitioner on 20.07.2011, claiming additional credit for tax deduction, albeit corresponding income receipts had not appeared in the Profit & Loss Account filed by the petitioner along with the return of income. Thus, the Assessing officer disposed off the objections of the petitioner against the reopening of the assessment under Section 147 of the Income Tax Act, after carefully considering the merits of these factors. The said belief has been formed by the Assessing Officer on the income chargeable to tax had been escaped assessment based on the information, which came to light during the process of Section 154 rectification filed by the petitioner. Thus, there is a valid reason for the purpose of reopening of assessment and the informations provided and evidences produced by the petitioner / assessee, cannot be construed as full and true and therefore, the petitioner has to co-operate for the reassessment proceedings for the Assessment

Year 2008-09, enabling the authorities to adjudicate and pass reassessment orders.

17. Considering the arguments, this Court is of the considered opinion that the scope of Section 147 of the Income Tax Act are unambiguous. Reopening of Assessment under Section 147 within four years and beyond four years, but within 6 years are well enumerated in the provision itself. Thus, the case of the petitioner falls under the category of beyond four years, but within six years as the Assessing officer found that the disclosure made by the assessee was not full and true and the petitioner has not submitted all material facts necessary for the assessment for the relevant year. This apart, in the present case, the respondents have culled out certain factors, based on the rectification application filed by the petitioner under Section 154 of the Act. Mismatching found with reference to Form 26AS, also a ground to reason to believe. The Assessing Officer having found discrepancies and amount involved are mismatching and there are huge difference with reference to the income disclosed and the income escaped from assessment, then the proceedings under Section 147 of the Income Tax Act was initiated and 148 Notice was issued and reasons for initiated are also furnished to the petitioner.

18. The learned Senior Standing counsel appearing on behalf of the respondents, relying on Explanation 1 to Section 147, made a submission that the informations and materials provided by the assessee in the case will not necessarily amount to disclosure within the meaning of Proviso to Section 147. Further, Explanation 1, in clear terms, contemplates that production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

19. In the present case, the learned Senior standing counsel appearing on behalf of the respondents relied on the Tabular Column, which they have extracted in ground (f) of the counter affidavit filed by the respondents, which reads as under:

> "F. The reasons recorded for reopening of the assessment u/s.147 of IT Act are elaborate and clearly show that the petitioner has not made a full and true disclosure of all materials facts required. A part of the reasons recorded which show that there was a failure on the part of the petitioner to disclose fully and truly all material facts is extracted from the reasons recorded and reproduced below:

"…….Similarly parties from whom assessee stated to have received contract charges but not appearing in 26AS are tabulated below:

S.No & Deductor		As per Assessee's submission vide rectification application dated 20.07.2011		As per 26AS	
		Amount Credited	Amount of TDS	Amount Credited	Amount of TDS
1	Tata Steel Limited	127089680	2879852	16678156	377927
2	Topworth Steel Private	18047097	408948	Nil	
3	Rajesh Jaiswal & Co	4472001	101336	Nil	
4	Rashmi Cement Limited	16852646	381391	Nil	
5	Shree Virangana Steels	5818292	131843	Nil	
6	Sunflag Iron & Steel Ltd	5102596	105113	Nil	
7	Tata Sponge Iron Limited	722341	16369	Nil	
Total		17,81,04,653	40,24,852		

20. In the case of Jayaram Paper Mills Limited, Vs. Commissioner of Income Tax, reported in [2010] 191 Taxman 38 (Madras), it is held as follows:

"6. It is now well settled that the term "escaped assessment" includes both non-assessment and under assessment. (see Tax Officer-cum-Regional Transport Officer vs. Durg Transport Company (Pvt) Ltd --1975 (4) SCC 43 and CIT vs. Sun Engineering Works (P) Ltd- 1992 (4) SCC 363). In a long line of decisions, the Supreme

Court has held that this court, under Article 226 of the Constitution, has power to set aside a notice under section 147 of the Income Tax Act, 1961, if the conditions precedent for the exercise of the jurisdiction do not exist."

21. Thus, it is sufficient if there are certain additional materials available, which satisfies requirements of Section 147 of the Act, then it is sufficient for the Assessing officer, has reason to believe for the purpose of reopening of assessment.

22. In the present case, let us now consider the reasons for issuance of notice under Section 148 dated 20.02.2015 for the Assessment Year 2008-09. It is seen from the Form 26AS downloaded that assessee was in receipt of income of Rs.419,47,44,777/-, whereas the total amount credited in P & L account is Rs.387,30,50,376/-. In this context, the Assessing officer relied on the breakup details. In view of large discrepancy and mismatch, the Assessing officer has reason to believe that income of Rs.41,59,51,722/- has escaped assessment within the meaning of Section 147 due to the failure on the part of the assessee to disclose all and true material facts necessary for assessment. In fact, the rectification application dated 20.07.2011, submitted by the assessee company was also considered by the Assessing Officer and the Assessing Officer verified the informations provided in the rectification application and found that very Form 26AS that was downloaded in view of assessee's application for the rectification, it was found that there was huge mismatch in receipts appearing in 26AS vis-a-vis receipts credited in P & L Account. Therefore, the Assessing Officer has reason to believe that the income of the assessee as escaped assessment and decided to reopen the assessment. This apart, the Assessing officer relied on the MB Shah Commission, set up by the Government of India to enquire into the cases of illegal mining in the State of Odisha. The petitioner/assessee was a raising contractor, employed by one KJS Ahulwalia, who was a lessee found in the Shah Commission report. For all these reasons, the Assessing officer has reason to believe for reopening of assessment.

23. The respondents have placed on record the materials and informations and evidences that gave them reason to believe that there is escapement of income.

24. The grounds placed before this Court for reopening of assessment is "sufficient reason" to believe that there is escapement of income and the "sufficiency" of the reasons cannot be gone into by the High Court in a writ proceedings under Article 226 of the Constitution of India. The contents of the breakup details, evidences, documents, invoices etc., have to be

adjudicated during the course of hearing and certainly, not by the High Court in a writ proceedings. Thus, there is no illegality or irregularity as such, which can be attached to the reasoning of the competent authority for arriving a conclusion that there is a reason to believe for reopening of assessment. Thus, the grounds raised in the present writ petition are neither candid nor convincing and the petitioner has to co-operate with the Assessing Officer in the reassessment proceedings by availing the opportunities to be provided as contemplated under the Statute.

25. Thus, the writ petition is devoid of merits and stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

Kak

To

1.The Assistant Commissioner of Income Tax,
Central Circle,
#3, Gandhi Road, Salem - 636 007.

2.The Deputy Commissioner of Income Tax,
Central Circle,
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3.The Deputy Commissioner of Income Tax,
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+1CC to Mr.A.P.Srinivas, Advocate, Sr.No.25394
+1CC to Mr.Arunkarthik Mohan, Advocate, Sr.No.25279

LN (CO)
A.SK (12.07.2021)