

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.12.2020

Pronounced on : 06.01.2021

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 19565 of 2008

M/s. Sima Agencies,
16/2, (Old No. 8/2), Vepery High Road,
Periamet,
Chennai - 600 003.

... Petitioner

-vs-

The Income Tax Officer,
Business Ward XII (2),
611, Anna Salai, 7th Floor,
Kannamai Building,
Chennai - 600 006.

... Respondent

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records in P.A. No. AAOFS4340P/BW XII (2) dated 18.09.2007 on the file of the Respondent for the assessment year 2005-2006 and quash the same.

For Petitioner : Mr. K.Mohan
for M/s. Pass Associates
For Respondent : Mrs. Hema Muralikrishnan,
Standing Counsel

O R D E R
(through video conference)

Heard Mr. K.Mohan, Learned Counsel appearing for the Petitioner and Mrs. Hema Muralikrishnan, Learned Standing Counsel appearing for the Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Writ Petition challenges the proceedings in P.A. No. AAOFS4340P/ BW XII (2) dated 18.09.2007 issued by the Respondent

to the Petitioner, which is a notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'IT Act' for short) informing that he has reason to believe that the income of the Petitioner chargeable to tax for the assessment year 2005-2006 has escaped assessment within the meaning of Section 147 of the IT Act, for which he proposes to re-assess income for that assessment year and the Petitioner was required to deliver within 30 days from the date of receipt of that notice, a return in the prescribed format for his income for that assessment year.

3. It must, at once, be recapitulated here that the Hon'ble Supreme Court of India in *Jeans Knit Private Limited -vs- Deputy Commissioner of Income Tax, Bangalore* [(2018) 12 SCC 36] has held that challenge to such notice under Section 148 of the IT Act in a Writ Petition is maintainable and would have to be examined on its own merits keeping in view the scope of judicial review while entertaining such matters as laid down in various decisions. Further, the Hon'ble Supreme Court of India in *GKN Driveshafts (India) Ltd., -vs- Income Tax Officer* [(2003) 1 SCC 72] has laid down the procedure to challenge the re-assessment proceedings as follows:-

"5.when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order...."

It is borne out from the materials placed on record that on receipt of the impugned notice dated 18.09.2007, the Petitioner had requested the Respondent by letter dated 24.09.2007 to furnish the reasons for re-opening the assessment for the assessment year 2005-2006. In response thereto, the Respondent by letter dated 25.09.2007 had sent a copy of the reasons recorded for re-opening of the assessment under Section 147 of the IT Act for the assessment year 2005-2006 and the relevant portions are extracted below:-

" In the return of income filed for the asst. year 2005-2006, the assessee has not disclosed the freight receipts from the Exporters and the net freight payment made to La Freightlift Pvt. Ltd. Although the assessee has not disclosed the freight receipts, they have claimed refund by enclosing all the TDS Certificates issued by the exporters and IATA agents. By not disclosing the freight receipts, the assessee has avoided filing of Form No.3 CD required to be filed u/s 44 AB.

The freight payment by the assessee to La Freightlift Pvt. Ltd. is covered u/s 194C as payment to a sub-contractor. The assessee is however deducting tax on this payment from the A.Y. 2006-07 only. During the year 2004-05, relevant for the asst. year 2005-06, the assessee had paid a total sum of Rs.3,21,79,805/- as freight charges. However the assessee has failed to deduct tax at source from these payments. The entire sum of Rs.3,21,79,805/- will have to be disallowed u/s 40(a)(ia).

As the assessee has filed to disclose both the freight receipts and the freight payments in the Income and Expenditure Statement filed along with the return of income for the asst. year 2005-06, the income chargeable to tax, by way of disallowance u/s 40(a)(ia), has escaped assessment. As I have reason to believe that the income chargeable to tax to the tune of Rs.3,21,79,805/- has escaped assessment for the asst. year 2005-06, the case is reopened u/s 147(c)."

The Petitioner had been thereafter corresponding with the Respondent explaining that the freight rates from the exporters were actually payment received on behalf of the La Freightlift Private Limited to whom the said payment has been made and who has also paid the tax amount. However, since the Respondent had not accepted the explanation made by the Petitioner in that regard, the Petitioner has approached this Court.

4. It is brought to the notice of this Court by the Learned Counsel for the Petitioner that after the filing of the Writ Petition, there has been amendment to Section 40(a)(ia) of the IT Act and that the Hon'ble Supreme Court of India in Commissioner of Income Tax, Kolkata XII -vs- Calcutta Export Company [(2018) 16 SCC 686] has held that the said amendment would have retrospective applicability from the date of its insertion with effect from the assessment year 2005-2006 in order to remove the unintended consequences which were causing grave and genuine hardships to the assessee and remedy that position. It is further contended that the Delhi High Court had also earlier expressed the same view in Commissioner of Income Tax-1 -vs- Ansal Land Mark Township (P) Ltd., (Order dated 26.08.2015 in I.T.A. Nos. 160 and 161 of 2015). That apart, reliance is placed on another ruling of the Delhi High Court in Commissioner of Income Tax -vs- Cargo Linkers (Order dated 25.03.2008 in ITA No. 218 of 2008), where in recognition of the fact that similarly placed clearing and forwarding agents in the industry had not been deducting tax at source till 31.03.2005, it was held that since the contract is actually between the exporter and the airline, and the clearing and forwarding agent

is only an intermediary, it is not the person responsible for the deduction of tax at source in terms of Section 194-C of the IT Act. It is submitted that in view of the aforesaid change in the statutory provision, which has been held to be declaratory and curative in nature having retrospective effect from 01.04.2005, the impugned proceedings ought not to be permitted to proceed further, which would have the effect of depriving the Petitioner of the benefits conferred by the same.

5. There is substantial force in the aforesaid contentions made by the Learned Counsel for the Petitioner, which deserves acceptance and at the same time, it would be appropriate that the Respondent has a re-look of the matter in the light of the said amendment and take a decision after affording an opportunity of personal hearing to the Petitioner in that regard. In that view of the matter, the Petitioner is permitted to make written representation by 31.01.2021 to the Respondent with supporting materials substantiating the objections for the continuance of proceedings under Section 147 of the IT Act to re-assess the income of the Petitioner for the assessment year 2005-2006. Taking into account the peculiar features of this case, it shall be incumbent upon the Respondent to afford opportunity of personal hearing to the Petitioner and thereupon, the Respondent shall deal with each of the contentions raised by the Petitioner, uninfluenced and uninhibited by the earlier views expressed by the Respondent in the matter, and pass reasoned orders on merits and in accordance with law and communicate the decision taken to the Petitioner under written acknowledgment. Though obvious, it is made clear that till the aforesaid exercise is carried out, the Respondent shall not take any action which entails adverse civil consequences to the Petitioner by re-opening the assessment of income tax for the assessment year 2005-2006 in pursuance of the order impugned in this Writ Petition.

In the result, the Writ Petition is disposed on the aforesaid terms. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vjt/dm

To

The Income Tax Officer,
Business Ward XII (2),
611, Anna Salai, 7th Floor,
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Chennai - 600 006.

W.P. No. 19565 of 2008

CO (SRII)
BDL/08/01/2021



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