IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.06.2021

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.10817 and 10818 of 2018
and
W.M.P.Nos.12757 and 12758 of 2018

Dr.Bharani R.Paluvai ... Petitioner in W.P.No.10817/2018

Bridget Bharani ... Petitioner in W.P.No.10818/2018

- Vs -

Income Tax Officer,
Non-Corporate Ward-11 (2),
Chennai. ... Respondent in both W.Ps.,

Common Prayer : Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the Respondent comprised in its notice dated 31.03.2018 issued to the Petitioner under Section 148 of the Income Tax Act, 1961, along with the Corrigendum dated 31.03.2018 issued thereto, and to quash the same as arbitrary, unjust and illegal, and to consequently forbear the Respondent from in any manner seeking to reassess the Petitioner's income under Section 147 of the Income Tax Act, 1961 with respect to the assessment year 2011-12.

For Petitioners : Mr.Suhrith Parthasarathy
for Arun Karthik Mohan

For Respondent : Mrs.Hema Muralikrishnan
Senior Standing Counsel for Income Tax

C O M M O N O R D E R

The notice issued under Section 148 of the Income Tax Act, 1961, in proceedings dated 31.03.2018, as well as the corrigendum to notice dated 31.03.2018, are under challenge in the present writ petitions.

2.The petitioner submitted his return of income which was assessed and an order of assessment was passed. However, the respondent issued notice under Section 148 of the Income Tax Act, for reopening of assessment on 31.03.2018. The learned counsel for the petitioner contended that the impugned notice as well as the corrigendum to notice are challenged on the ground that it was issued beyond the period of limitation, and therefore, the notices have no statutory sanction, thus, are to be set aside.

3.To substantiate the said ground, the learned counsel for the petitioner solicited the attention of this Court with reference to the postal cover, wherein, the stamp was franked by the Postal Department on 02.04.2018. It is contended that the last date for reopening of assessment under Section 147 of the Act was 31.03.2018, however, the despatch was made on 02.04.2018, and therefore, the impugned notice is liable to be set aside. It is contended that the corrigendum to notice, dated 31.03.2018, was ante-dated as the said corrigendum to notice was despatched on 07.04.2018. If at all, the corrigendum to notice was also despatched on 31.03.2018, it must have been franked along with the original notice on 02.04.2018, and therefore, by putting ante-date, the corrigendum under Section 148 of the Income Tax Act was issued. In the original notice issued under Section 148 of the Act, the Assessing Officer stated that he has reasons to believe that the income of the petitioner chargeable to tax for the Assessment Year 2010-11 has escaped assessment. If that is so, even the period of limitation expired on 31.03.2017 itself. However, the corrigendum to notice states that it was erroneously mentioned as 2010-11 and the reopening of the assessment is made for the assessment year 2011-12. Thus, the very initiation of proceedings under Section 147 of the Act and issuance of notice under Section 148 of the Act are beyond the period of limitation, and thus, the respondent has no jurisdiction to issue notice, and therefore, they are liable to be set aside.

4.The learned counsel for the writ petitioner relied on the judgment of the Gujarat High Court in the case of Kanubhai M Patel Huf Vs. Hiren Bhat or his Successors to Office and 4 others reported in (2010) 3 GLH 639, wherein, the Court allowed the writ petition on the ground that the notice was despatched beyond the period of limitation. The Hon'ble Supreme Court also held that reopening of assessment is to be done within the period of limitation contemplated under the Act. Any such notice issued beyond the period of limitation lacks sanction under the statute and to be construed as non-est in law.

5.The learned Senior Standing Counsel contested the grounds raised by the petitioner by stating that, admittedly, the assessment order was erroneously typed as 2010-11 instead of 2011-12. Thus, the respondent issued corrigendum to notice and corrigendum to notice cannot be construed as a point to reckon the period of limitation. As far as the original notice under Section 148 of the Act, is concerned, it was issued on 31.03.2018 on the last date for reopening of assessment for the Assessment Year 2011-12 and it was despatched on the same day, however, franking was done by the Postal Department on 02.04.2018. There was a delay of one day in franking the despatch cover in view of the fact that 01.04.2018 was Sunday and a holiday. Thus, there is no violation of statutory provisions and initiation of proceedings under Section 148 of the Act was done within the period of limitation, and thus, the writ petition is liable to be dismissed.

6.This Court has elaborately considered the difference between issuance of a notice under Section 148 of the Act and serving of the notice to the assessee concerned. The issuance of notice is one aspect and serving of notice is another aspect. Section 147/148 stipulates issuance of notice and not serving of notice. Thus, the principles to be adopted in the present case squarely falls within the parameters of the judgment delivered by this Court in W.P. Nos.13425, 13431, 13432 and 11399 of 2018, dated 26.04.2021, which are extracted hereunder:

> "15.This Court has to consider the relevant provisions of the Income Tax Act. Section 147 deals with 'Income Escaping Assessment' . Once the Assessing Officer 'has reason to believe' that any income chargeable to tax has escaped assessment for any assessment, he is competent to institute proceedings under Section 147 of the Act by complying with the requirements as contemplated under the provisions of the Act.
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> 16. Section 148 of the Act denotes 'issue of notice where income has escaped assessment'. Once the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, then he is empowered to issue notice under Section 148 of the Act and the procedures to be followed under Section 148 are well enumerated in the provision itself.
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> ...
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> 19. Section 149 of the Act denotes 'no notice under Section 148 shall be issued for the relevant assessment year if four years have lapsed, which reads as under:-

?149. Time limit for notice:

"(1) No notice under section 148 shall be issued for the relevant assessment year,?

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

Explanation.?In determining income chargeable to tax which has escaped assessment for the purposes of this sub~section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub~section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non~resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non~resident, the notice shall not be issued after the expiry of a period of six years from the end of the relevant assessment year.

Explanation.?For the removal of doubts, it is hereby clarified that the provisions of sub~sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.?"

20. Section 149 of the Act unambiguously stipulates that a notice is to be issued before four years from the end of the relevant assessment year. In certain cases beyond four years and within six years. Therefore, two circumstances are elaborated in the provisions. In certain cases, notices can be

issued within four years and in certain other cases, notices can be issued beyond four years but within six years.

21. The period of four years and six years as contemplated are enumerated under the provisions of the Act. However, the point to be considered is, whether the issuance of notice dispatched and the delivery of notice to the assessee, which is to be taken into consideration for the purpose of determining the period of limitation.

22. Section 149 of the Act contemplates that no notice under Section 148 shall be issued. Thus, it categorically enumerates the issuance of notice by the Competent Authority to the assessee, within a period of four years and six years, as the case may be. Thus, the language employed indicates ?issuance of notice?.

23. 'Issuance of Notice' means, the order of notice is signed by the Competent Authority. Once the order of notice is signed by the Competent Authority, that is sufficient that the actions are initiated. Thereafter, delivery or receipt of the order is irrelevant as far as the requirements contemplated under the provisions of the Income Tax Act is concerned. Thus, for the purpose of issuance of notice under Section 149 of the Income Tax Act, it is sufficient to establish that if such an order/notice is signed by the Authority Competent and if this fact is established, then it is to be construed that the provisions of the Act are complied with.

24. Let us now examine certain circumstances where there is a delay in delivering the goods either by the Process Server or by the Postal Department or on account of sudden declaration of holidays or due to public holidays etc. Various circumstances and situations are possible, which would cause delay in serving the consignment to the addressee. Various circumstances for causing delay in service of the consignment cannot be taken into consideration for the purpose of determining the period of limitation as contemplated under Section 149 of the Income Tax Act.

25. The assessees are taking advantage on account of certain unavoidable circumstances and happenings due to certain omissions on the part of

the Postal Department etc. It is possible that commissions and omissions are happening in the Postal Department also. Whether an assessee can take undue advantage from such commissions and omissions of the Postal Department or Process Servers. The answer is 'No'. If such commissions and omissions of another Department is taken into consideration for the purpose of quashing the entire proceedings under the Income Tax Act, equally it is possible for some miscreants to create such circumstances, so as to escape from the clutches of law. All these mitigating factors are to be considered by the Courts. Thus, a practical and a pragmatic approach with reference to the legislative intention is to be taken into consideration for the purpose of deciding the point of limitation.

26. Thus if the revenue is able to establish that an administrative decision is taken under Section 147 of the Income Tax Act and a notice under Section 148 is signed and issued by the Authorities Competent before the last date, then it is to be construed that the notice has been issued in compliance with the provisions of Section 149 of the Income Tax Act. Make it more clear that issue of notice is the requirement contemplated under the provisions and the service would be the next step and the same would have been done even after the last date and that will not change the character of issue of notice as completed within the meaning of Section 149 of the Income Tax Act. The case of the petitioner would be strong if the provision contemplates “?service of notice?” to the assessee, and such contemplation is traceable in some other provisions of the Act, for example Section 281 of the Income Tax Act.

...

28. 'Issue of Notice' by the Competent Authority is contemplated under Section 149 of the Income Tax Act. However, 'Service of Notice' to the assessee has not been contemplated under the said provision. Thus, the 'time limit' prescribed for 'issue of notice' under Section 148 of the Income Tax Act, would not fall under the definition of 'service' under Section 27 of the General Clauses Act, 1897. Thus, Section 27 of the General Clauses Act, 1897 may not have relevance with reference to Sections 147, 148 and 149 of the Income Tax Act, 1961.

29. 'Issue of Notice' and 'Service of Notice' to

the assessee cannot be compared at all. What is contemplated under Section 149 of the Income Tax Act is 'issue of notice' and not 'service of notice' to the assessee. The service part is to be complied with subsequently enabling the assessee to defend his case. Undoubtedly, the assessee can defend his case only after service. However, for reckoning the period of limitation 'issue of notice' is sufficient.”

7.In view of the facts and circumstances, this Court is of the considered view that, in the present case, the initial notice under Section 148 of the Income Tax Act was issued on 31.03.2018, which was despatched on the same day and the cover was franked by the Postal Department on 02.04.2018, in view of the fact that 01.04.2018 was a Sunday, thus, for all purposes, notice was issued for reopening of assessment within the period of limitation for the assessment year 2011-12, and therefore, the respondent is to proceed further in accordance with law by following the procedures contemplated under the Act as well as the directives issued by the Hon'ble Supreme Court of India in the case of GKN Driveshaft (India) Ltd.., Vs. Income Tax Officer, 259 ITR 19 (SC), and such an exercise is directed to be done as expeditiously as possible.

8.With these directions, the Writ Petitions stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

ssn/mkn
To

Income Tax Officer,
Non-Corporate Ward-11 (2),
Chennai.

+2cc to Mr.Arun Karthik Mohan, Advocate, S.R.No.30789
+2cc to Ms.Hema Murali Krishnan, Advocate, S.R.No.30507,30508

W.P.Nos.10817 and 10818 of 2018
and
W.M.P.Nos.12757 and 12758 of 2018

PCH(CO)
CB(02/08/2021)