IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.02.2021
PRONOUNCED ON : 02.03.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.947 & 948 of 2012
and
M.P.Nos.1,1 and 2,2 of 2012

M/s.West Asia Maritime Ltd.,
Rep.by its Managing Director,
Abdul Qadir Abdur Rahman Buhari,
Buhari Towers,
No.5, Moores Road, Chennai 600 006. .. Petitioner in both W.Ps.

Vs

Assistant Commissioner of Income Tax,
Company Circle - III (3),
Aayakar Bhavan - New Block, 4th Floor,
121, Mahatma Gandhi Road,
Chennai 600 034. .. Respondent in both W.Ps.

Prayer in both W.Ps.: Writ petitions filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorari, calling for the records in PAN AAACW1023E dated 28.12.2011 relating to the Assessment Year 2004-05 and 2005-06 and quash the same.

For Petitioner : Mr.G.Baskar for (in both W.Ps.)
Mr.N.Muthukumar

For Respondent : Mr.Prabhu Mukunth Arun Kumar for
M/s.Hema Murali Krishnan
Sr.Standing Counsel(In both W.Ps.)

COMMON ORDER

By this common order both the writ petitions are being disposed of.

2. Petitioner is aggrieved by the impugned re-assessment orders passed by the respondent for the Assessment Years 2004-05 in W.P.No.947 of 2012 and Assessment Year 2005-06 in W.P.No.948 of 2012. Regular assessment for the respective assessment years were earlier completed on 19.12.2006 and on 31.12.2008 accepting the returns filed by the petitioner with slight modification.

3. The petitioner had made payments to the owners of the ship/liners under the Bare Boat Charter Cum Demise (BBCD), Voyage Charter and Time Charter to M/s.Dolphin Maritime Inc., Cyprus and to few others under Voyage Charter. However, the petitioner had failed to deduct tax at source under Section 195 of the Income Tax Act, 1961 on payments made to non-residents under these voyage agreements.

4. Issue relating party to failure to deduct tax on payments made to M/s.Dolphin Maritime Limited Cyprus under the Bare Boat Charter Cum Demise (BBCD) was one of the issue which was handled by the Income Tax Officer (International Taxation).

5. By a communication dated 31.8.2004, the petitioner was called upon to furnish the details of payment made to the above company along with Emirates Trading Agency LLC, UAE and Shipping and Trading Associates LLC UAE. The petitioner had claimed the benefit of Double Taxation Agreement (DTA) with Cyprus insofar as payments made to Dolphin Maritime Ltd., Cyprus was concerned.

6. The petitioner replied to the same which eventually culminated in an order dated 27.04.2005 of the Income Tax Officer (International Taxation) for the assessment year 2003-04 & 2004-05. Information was

called for payment made up to the date of notice dated 31.8.2004. The petitioner had paid a sum of Rs.1,46,51,000/- and was held liable to pay tax under section 201 (1) of the Income Tax Act, 1961.

7. The petitioner preferred an appeal against the said order before the Commissioner of Income Tax (Appeals) for the Assessment Years 2003-04 and 2004-05 alone. The Commissioner of Income Tax (Appeals) upheld the order dated 27.4.2005 of the Income Tax Officer (International Taxation). Aggrieved by the same, the petitioner preferred the appeals before the Income Tax Appellate Tribunal, Chennai.

8. The Income Tax Appellate Tribunal by its order dated 19.5.2006, upheld the order passed by the Commissioner of Income Tax (Appeals) in its order reported in West Asia Maritime Ltd. vs The Income-Tax Officer, (2008) 297 ITR 202.

9. It is during the pendency of these proceedings, the original assessment for the assessment year 2004-05 and the Assessment year 2005-2006 orders vide dated 19.12.2006 and 31.12.2008 came to be passed by the respondent.

10. By the assessment order dated 19.12.2006 for the assessment year 2004-05, the respondent disallowed an expense of Rs. 6,08,98,646/-under Section 40(a)(i) of the Income Tax Act, 1961 being the amount paid towards BBCD hire charges to M/s. Dolphin Maritime, Cyprus.

11. However the, assessment order did not deal with the balance amount of Rs. 62,79,15,227/- paid under Voyage Charter party to Shipping Trading Associates LLC, Emirates Trading LLC, EAS International Ltd UK ad West Asia Maritime Overseas Pte Ltd Singapore though in the notice issued to the petitioner under Section 143 (2)/142 (1) of the Income Tax, 1961 specifically called upon the petitioner to give particulars of the payment entire payment of Rs.68,89,14,292/- made to these companies-for the Assessment Year 2004-05 before the assessment order was passed on 19.12.2006. Over and above the aforesaid amounts, the petitioner had paid a total sum Rs.62,79,15,227/- to some of the party’s named above which is now thought to be disallowed vide the impugned order.

12. For the Assessment Year 2005-06, similar particulars of payments made to under BBCD hire charges to M/s. Dolphin Maritime Incorporated, Cyprus alone was called. The petitioner informed payment of Rs.4,35,64, 010/-. The said amount alone was disallowed under Section 40a(1) of the Income Tax Act, 1961 in the Assessment order dated 31.12.2008. Over and above the aforesaid amounts, the petitioner had paid a total sum of 2,12,28,88,338/- to some of the party’s named above which is now thought to be disallowed.

13. It is submitted that the assessment was completed by the Income Tax Officer for the Assessment Year 2004-05 vide order dated 19.12.2006 with the concurrence of the Assistant Commissioner of Income Tax.

14. It is submitted that the notices dated 28.03.2011 issued to the petitioner for the respective Assessment Years were without jurisdiction. It is submitted that for the Assessment Year 2004-2005, not only the jurisdictional Income Tax Officer but also the Assistant Commissioner of Income Tax had scrutinised while holding a concurrent jurisdiction over the files of the petitioner and that the Income Tax Officer passed the assessment order on 19.12.2006 after due scrutiny by the said officer as well.

15. It is further submitted that the Income Tax Officer (International Taxation) had also issued a notice dated 31.8.2004 which culminated in an order dated 27.4.2005 as mentioned above. It is therefore submitted that three different officers had applied their mind and scrutinised the payments made to non-residents and therefore there was no case made out for issuing notice under Section 148 of the Income Tax Act, 1961 for the purpose of invoking proviso to Section 147 of the Income Tax Act, 1961 and therefore the impugned order dated 28.12.2011 was also liable to be quashed.

16. As far as the Assessment Year 2005-06, is concerned, again all the information necessary for the assessment were furnished by the petitioner during assessment and that the notice under Section 148 of the Income Tax Act, 1961 again notice was issued after the expiry of normal period of limitation. It is submitted that the notice has been issued on account of change of opinion. It is submitted that all the details were furnished by the petitioner at the time of assessment and therefore the impugned order was liable to be quashed. It is submitted that there were no new material available for reopening the assessment under Section 148 of the Income Tax Act, 1961.

17. It is submitted that the only reason for reopening the assessment reason given in the communication dated 27.4.2011 merely states that the petitioner failed to deduct tax under Section 195 of the Income Tax Act, 1961. For the Assessment Years read as under:

> Asst.Year 2004-05:
>
> On perusal of the Return of Income for the Asst.Year 2004-05, it is understood that you have made a payment to the tune of Rs.62,79,15,227/- to a Non-resident company viz, Emirates Trading LIC, UAE towards charter Hire Charges, but you have not deducted tax on the said payment made to the Non Resident company as per the provisions of Section 195 of the Act. Since, you have failed to deduct tax, the said sum to be disallowed u/s.40(a)(i).
>
> Asst.Year 2005-2006
>
> On perusal of the Return of Income for the Asst. Year 2005-06, it is learnt that you have made payment to Non Resident companies viz, Damico Dry Ltd., Dublin, West Asia Maritime Overseas Pvt.Ltd, and Emirates Trading LIC,UAE totaling of Rs.212,28,88,338/- towards Charter Hire Charges, but you have not deducted tax on the said payment made to the Non Resident companies as per the provisions of section 195

of the Act. Since you have failed to deduct tax, the said sum needs to be allowed u/s.40(a)(i).

18. Under these circumstances, the learned counsel for the petitioner relied on the following decisions of the Supreme Court and that of this Court as follows:-

i).CIT Vs.Eco Media (P) Ltd (2012)81CCH 85 (Chen HC)
ii).Calcutta Discount Co Ltd Vs.Income Tax Officer, (1961) 41 ITR 191(SC)
iii).Jeans Knit Pvt. Ltd Vs. Deputy Commissioner of Income Tax, Bangalore (2017) 77 taxmann.com 176 (SC)
iv).Vishwanath Engineers Vs. Assistant Commissioner of Income Tax (2012) 21 taxmann.com 5 (Gujarat)
v).Asianet Star Communications (P) Ltd. Vs Assistant Commissioner of Income Tax-Non Corporate Circle 20(1), W.P.Nos.25328, 25331, 25336 of 2018
vi) Principal Commissioner of Income Tax, Coimbatore vi. Bharathi Constructions, (2020) 121 taxmann.com 302 (Madras)
vii).Transperk Industry Ltd Vs. Deputy Commissioner of Income Tax, , (2017) 80 taxmann.com 83 (Gujarat)
viii).Income Tax Officer vs. Techspan India (P) Ltd. (2018) 92 taxmann.com361(SC): 2018) 302 CTR 74 (SC)
ix).Commissiner of Income Tax Vs. Kelvinator of India Ltd. (2002) 256 ITR 1 (Delhi)
x).Commissioner of Income Tax Vs.Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)
xi).E-Infochips Ltd Vs. Deputy Commissioner of Income Tax, (2017) 380 ITR 449 (Gujarat)
xii) .QX KPO Services(P) Ltd. Vs Deputy Commissioner of Income Tax, (2019) 414 ITR 429 (Gujarat)
xiii).Deputy Commissioner of Income Tax v. QX Kpo Services(P)Ltd, (2018) 259 Taxman 317 (SC)
xiv) State Bank of India Vs. Assistant Commissioner of Income Tax, Circle-2(2)(1), Mumbai, (2019) 411 ITR 664 (Bombay)

19. That apart, the petitioner was also made to the following three decisions:

i) .New Delhi Television Ltd. Vs. Deputy

Commissioner of Income Tax (2020) 116 taxmann.com 151 (SC)
ii).Jarun Pharmaceuticals Pvt.Ltd Vs. Income Tax Officer
Special Leave Application No.19008/2018
iii).Hitech Outsourcing Services Vs. Commissioner of Income Tax (2019) 102 taxmann.com 128 (Gujarat)

20. The learned counsel for the petitioner drew my attention to the decision of the Supreme Court, in Commissiner of Income Tax Vs. Kelvinator of India Ltd. (2002) 256 ITR 1 (Delhi), it has been held as follows:

"13. We are, with respect, unable to subscribe to the afore-mentioned view. If the contention of the Revenue is accepted the same, in our opinion, would confer an arbitrary power upon the Assessing Officer. The Assessing Officer who had passed the order of assessment or even his successor officer only on slightest pretext or otherwise would be entitled to re-open the proceeding. Assessment proceedings may be furthermore re-opened more than once. It is now trite that where two interpretations are possible, that which fulfills the purpose and object of the Act should be preferred.

14. It is well settled principle of interpretation of statute that entire statute should be read as a whole and the same has to be considered thereafter Chapter by Chapter and then Section by Section and ultimately Word by Word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistake as contained in Section 154 of the Act. The power of rectification of mistake conferred upon the ITO is circumscribed by the provisions of Section 154 of the Act. The said power can be exercised when mistake is apparent. Even mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Income-tax Appellate Tribunal has limited jurisdiction under Section 254(2) of the Act. Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.

15. It is a well settled principle of law that what cannot be done directly cannot be done

indirectly. If the ITO does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of re-assessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue.

16. In Bawa Abhai Singh's case (supra) a Division Bench of this Court of which one of us (D.K. Jain, J.) is a Member, clearly held:

"The crucial expression is "reason to believe". The expression predicates that the Assessing Officer must hold a belief ... by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran and Sons P. Ltd. v. ITO (1981) 130 ITR 1 (SC), the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material. In S. Narayanappa v. CIT

(1967) 63 ITR 219, it was noted by the apex court that the expression "reason to believe" in Section 147 does not mean purely a subjective satisfaction on the part of the Assessing Officer, the belief must be held in good faith; it cannot be merely a pretence. It is open to the court to examine whether the reasons for the belief have a rational nexus or a relevant bearing to the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To that limited extent, the action of the Assessing Officer in initiating proceedings under Section 147 can be challenged in a court of law."

21. Defending the impugned order, the learned counsel for the Income Tax Department submits that these petitions were liable to be dismissed in asmuchas the petitioner has not questioned the jurisdiction for reopening of the assessment

under Section 147 r/w Section 148 of the Income Tax Act, 1961. It is submitted that petitioner has an alternate remedy by way of an appeal before the Commissioner of Income Tax (Appeals) against the impugned re-assessment orders dated 28.12.2011.

22. It is submitted that though the petitioner company had filed its return for the Assessment Year 2004-05 admitting income of Rs.2,03,09,640/- and a book profit under Section 115 JB at Rs.3,62,95,681/- in the return for the Assessment Year 2005-06 filed on 31.10.2005, the petitioner had declared nil income after setting off the loss suffered during the assessment years. It is submitted that the original assessment orders dated 19.12.2006 and 31.12.2008 for the respective assessment years only dealt with the BBCD hire charges which were disallowed under Section 40 (a) (i) of the Income Tax Act, 1961. It is submitted that there was no true and full disclosure and therefore there was sufficient reasons for reopening the assessment.

23. Reliance was placed on the following decisions by the learned counsel for the respondent:-

i. Poombuhar Shipping Corporation Ltd Vs. Income Tax Officer [2013] 38 taxmann.com 150 (Madras)

ii. Home Finders Housing Ltd., vs. Income Tax Officer, Corporate Ward 2(3)*, [2018] 94 taxmann.com 84 (SC);

iii. Mohan Ravi vs. Income Tax Officer No,-Corporate Ward 20(5), Chennai *, [2019] 112 taxmann.com 373(Madras)

24. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent. I have also perused the documents filed by the petitioner.

25. For the assessment year, the assessments were re-opened after the expiry of normal period of limitation just three days before the expiry of limitation under proviso to Section 147 of the Income Tax Act, 1961 in 2004-05 and two months before for the Assessment Year 2005-06. If there was any failure to truly and fully disclose all information that were required for assessment under Section 139 of the Income Tax Act, 1961, invocation of the machinery under Section 148 read with proviso to Section 147 of the Income Tax Act, 1961 can be said to be justified.

26. In this case, at the time of assessment, for the Assessment Year 2004-05 the details were called for from the petitioner vide notice dated 17.8.2006 issued under Section 143 (2)/142 (1) of the Income Tax Act, 1961. In its reply dated 30.8.2006, the petitioner declared that it had paid a total sum of Rs.68,89,14,292/- as freight. During assessment, only a sum of Rs.6,08,98,646/-from the aforesaid amount was disallowed under Section 40(a)(1) of the Income Tax Act, 1961. Thus, there is no case made out for suppression of facts or failure to truly and fully disclose information by the petitioner.

27. Therefore, invocation of the machinery prescribed under the Act for reopening the assessment beyond the normal period of limitation was not available to the respondent. Though, the petitioner has an alternate remedy before the Commissioner of Income Tax (Appeals), this court is inclined to interfere by quashing the impugned order dated 28.12.2011 for the Assessment Year 2004-05, as there was no failure on the part of the petitioner to truly and fully disclose all materials that are required for assessment by the assessment officer. Accordingly, W.P.No 947 of 2012 stands allowed.

28. Coming to the Assessment Year 2005-06, again it is noticed that notice under Section 148 of the Income Tax Act, 1961 has been issued for the purpose of re-opening of the assessment on 28.4.2011 after a lapse of four years from the end of the assessment year 2005-06. The notice for reopening the assessment was issued on 28.3.2011.

29. The only reason given for re-opening of the assessment is on account of the failure on the part of the petitioner to pay tax on the freight under voyage charter. In the notice issued under section 143 (2) of the Income Tax Act, 1961 and the consequent communication dated 15.11.2007 of the Assistant Commissioner of Income Tax the petitioner was called upon to furnish the details in writing to the questionnaire attached to the said notice. The questionnaire specifically called upon the petitioner only to furnish details of BBCD hire charges paid to M/s.Dolphin Maritime Inc.Cyprus, with the details of tax deducted at source.

30. The petitioner not only produced the details but also furnished the details of the payment made towards charter hire for a sum of Rs.2,12,28,88,338/-. By another communication dated 3.12.2007 also these details were furnished again by the petitioner. The Asst Commissioner of Income Tax in the assessment order dated 31.12.2008 merely disallowed the BBCD hire charges for a sum of Rs.4,35,64,010/-. This was perhaps on account of the order dated 27.4.2005 passed by the Income Tax

Officer (International Taxation) Division. Thus, there was no failure to truly and fully disclose all information required for assessment.

31. Thus, the decision cited by the petitioner are applicable as there is a change of opinion. As extracted above, the reason for reopening the assessment only on on account of change of opinion. Therefore, W.P.No.948 of 2012 also deserves to be allowed for the same reasons stated for allowing W.P.No.947 of 2012.

32. In the result, both the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kkd

To
Assistant Commissioner of Income Tax,
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+1cc to M/s.N.Muthukumar, Advocate, sr no.12540
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W.P.Nos.947 & 948 of 2012 and
M.P.Nos.1,1 and 2,2 of 2012

AAB(CO)
RMP(18/03/2021)