



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.06.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.No.8050 of 2015

and

M.P.No.2 of 2015

M/s.Thambbi Modern Spinning Mills Ltd.,
Rep., by the Managing Director,
Omalar Road, Jagir Ammapalayam,
Salem-636 302.

.. Petitioner

-vs-

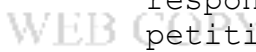
1. The Commissioner of Income Tax,
Income Tax Department,
No.3, Gandhi Road, Salem-636 007.
2. The Assistant Commissioner of Income Tax
Circle 2, Income Tax Department,
No.3, Gandhi Road, Salem-636 007.
3. The Deputy Commissioner of Income Tax
Circle (1), Income Tax Department,
No.3, Gandhi Road, Salem-636 007.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records of the second respondent and quash the impugned order No.148/Circle-2, SLM/2014-15 dated 02.03.2015 issued in terms of Section 148 of the Income Tax Act, 1961 on the assumption of jurisdiction under Section 147 of the said Income Tax Act, 1961 for framing re-assessment in relating to the Assessment Year 2007-08 in PAN: AAAC7676G of the 3rd respondent and further direct the second respondent to drop the proceedings initiated under Section 147 of the Act for the said assessment year 2007-08.

For Petitioner : Mr.S.Sridhar

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel



ORDER

The order dated 02.03.2015, passed by the second respondent, rejecting the objections filed by the writ petitioner is under challenge in the present writ petition. Further direction is sought for to drop the reopening proceedings initiated by the second respondent under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. The petitioner was incorporated under the Companies Act, 1956 with the object to carry on the business of manufacturing and sale of cotton yarn and other activities as described in the Memorandum of Articles of Association.

3.The petitioner filed its return of income for the assessment year 2007-08 on 28.10.2007 disclosing the total taxable income at Rs.NIL under normal computation provisions as well as under the book profits computation for imposing Minimum Alternate Tax under Section 115JB of the Act, after claiming the set off brought forward business loss as well as the unabsorbed depreciation. The said return of income was taken up for scrutiny by the second respondent and a notice under Section 143 (2) of the Act was issued to the petitioner and the petitioner-company furnished all the details as called for by the second respondent in the said scrutiny assessment proceedings and the Assessing Officer passed the final order of assessment dated 27.07.2009 after completion of the procedures.

4. The second respondent initiated proceedings under Section 147 of the Act and a notice under Section 148 of the Act was issued on 28.03.2014 beyond the period of four years, but within a period of six years. On receipt of Section 148 notice, the petitioner responded vide letter dated 14.04.2014 with a request to treat the original return of income as return of income filed in response to the notice issued under Section 148 of the Act. The Assessing Officer sent reminder letter dated 27.08.2014 for filing the return of income in response to the notice issued under Section 148 of the Act dated 21.03.2014. Once again the second respondent issued a reminder letter on 14.10.2014 seeking response from the assessee. In response, the assessee vide letter dated 20.10.2014, informed the Assessing Officer about the filing of return of income to the notice of re-opening dated 21.03.2014. Thereafter, notice under Section 143(2) of the Act was issued on 24.10.2014 directing the petitioner to appear on 03.11.2014 at 11.30 am either in person or by a representative duly authorized in writing and produce documents, accounts and any other evidence on which the assessee may rely in support of the return of income filed.



5. At the request of the petitioner, the Assessing Officer vide letter dated 27.10.2014, furnished reasons for reopening of assessment for the assessment year 2007-08. However, the petitioner filed its objections and thereafter, filed W.P.No.31294 of 2014 challenging the notice dated 21.03.2014 issued under Section 148 of the Act. The writ petition was finally disposed of by this Court on 01.12.2014 directing the second respondent therein to consider the objections raised by the petitioner, afford an opportunity of personal hearing and thereafter, pass a reasoned order on merits and in accordance with law by following the principles enunciated in the case of GKN Driveshafts (India) Ltd., vs. Income Tax Officer & Ors. reported in (2003) 259 ITR 19 (SC). Pursuant to the orders passed in the writ petition, the petitioner submitted further objections contesting the reopening proceedings and the Assessing Officer passed orders on 02.03.2015 furnishing reasons for the reopening of assessment proceedings. The said order is under challenge in the present writ petition.

6. The learned counsel appearing on behalf of the writ petitioner mainly contended that the petitioner had truly and fully furnished all the books, details, informations etc., along with the return of income, which was duly filed and scrutinised by the Assessing Officer. The informations sought for by the Assessing Officer were also provided and the final assessment order was passed on 27.07.2009. When there is no fresh material made available for the Assessing Officer to reopen the assessment, the present proceedings initiated is nothing, but change of opinion and absolutely, there is no tangible material for the purpose of invoking the jurisdiction under Section 147 of the Act.

7. The learned counsel for the petitioner reiterated that the reasons furnished in the impugned order and the proceedings regarding such reasons are completely adjudicated by the Assessing Officer at the time of passing the original assessment order. Even in the counter, the second respondent could not able to establish that they have recovered tangible materials for the purpose of reopening of assessment as required under the provisions of the Act and therefore, reopening of the assessment is based on change of opinion and thus, the impugned order is liable to be set aside.

8. The learned counsel for the petitioner is of an opinion that it is a case where the reopening proceedings are initiated beyond the period of four years and during the fag end of sixth year. Thus, the ingredients contemplated under Proviso to Section 147 are to be complied with scrupulously. When there is no tangible materials available on record and the petitioner has



truly and fully furnished all the details at the time of original assessment, the initiation of reopening the proceedings beyond four years is impermissible and thus, the requirement prescribed under Proviso to Section 147 has not been complied with and on this ground also, the writ petition is to be allowed.

9. In support of the contentions, the learned counsel for the petitioner cited the judgment of this High Court in the case of Asianet Star Communications (P.) Ltd., vs. Assistant Commissioner of Income-tax, Non-Corporate Circle 20(1) reported in (2019) 106 taxmann.com 203 (Madras) and the relevant paragraph 40 is extracted hereunder:-

40. Finally, and in addition to my reasoning as aforesaid for assessment year 2011-12, the placement of the Explanation, after the Proviso to Section 147 is also, in my view, relevant. This indicates the scheme of the section and the interplay of the components thereof. To my mind, the application of the Explanation would be subject to, and post the application of the Proviso itself. Thus, in cases, where the benefit of the Proviso is claimed by the revenue, it would first have to satisfy the condition under the proviso and validate the assumption of jurisdiction beyond four years. Only thereafter can the Revenue seek application of the Explanation to Section 147. In order of sequence, the Proviso comes first and only thereafter, does the Explanation. In the present case, where the Revenue has not satisfied the statutory condition imposed by the Proviso, the door to re-assessment remains conclusively shut. There is no occasion left for the Revenue to look any further, either at the Explanation or otherwise, to justify the proceedings for re-assessment, and the assumption of jurisdiction falls, at the very threshold.

10. Relying on the said judgment, the petitioner has insisted the Proviso to Section 147 and in the present case, the statutory requirements are not fulfilled and thus, the impugned order, disposing of the objections filed by the petitioner, is not in consonance with the fact and it is in violation of the Proviso to Section 147 of the Act.

11. The learned Senior Standing Counsel opposed the contentions raised on behalf of the assessee in its entirety by stating that the very contention that the reopening proceedings is change of opinion is incorrect. The reasonings for reopening furnished in the impugned orders are elaborate and the details



are also in clear terms. Perusal of the impugned order itself would reveal that the case of the assessee is a fit one for reopening of assessment. It is contended that mere submission of informations, books of accounts etc., alone cannot be a ground restraining the Assessing Officer to invoke the powers under Section 147 of the Act. Various other circumstances are contemplated under Section 147 of the Act and therefore, the case of the assessee, that it is a change of opinion, is incorrect and thus, the writ petition is liable to be dismissed.

12.The learned Senior Standing Counsel referred to the order passed by this Court in W.P.No.31294 of 2014 filed by the petitioner, wherein this Court directed the Assessing Officer to consider the objections raised by the petitioner, afford an opportunity of personal hearing and pass orders on merits. The direction was issued in view of the fact that the Assessing Officer, at the first instance, while passing the order, has not elaborated the reasons in clear terms. Thus, the High Court thought fit to direct the Assessing Officer to consider the objections and pass orders by following the procedures and the principles laid down in GKN Driveshafts (India) Ltd. (supra). Subsequently, the Assessing Officer, considered all the aspects on merits and in accordance with law and passed a speaking order, which is impugned in the present writ petition. Thus, the impugned order is relevant for the purpose of finding out the reasons for reopening of assessment.

13.The learned Senior Standing Counsel referred to paragraph 6 of the impugned order wherein, the reasons for reopening are recorded. The Assessing Officer further considered that it is a case of under-assessment and certain facts were not furnished by the petitioner. In paragraph 3 and 4 of the impugned order, the Assessing Officer made the following findings:-

"3.This deferred tax asset and waived interest amounts which were also already debited in the earlier years profit and loss account should have been considered for the calculation of book profit under Section 115JB. Assessee failed to disclose this amount in the tax calculation and subsequently for the taxation hence it is the failure on the part of the assessee to disclose fully and truly all material facts.

4.In the view of the above, as there is a reason to believe that the income chargeable to tax has escaped assessment on account of the failure on the part of the assessee to disclose



fully and truly all material facts within the meaning of Section 147 of the Income Tax Act a Notice u/s. 148 was issued on 21.03.2014.”

14.Relying on the said findings of the Assessing Officer, the learned Senior Standing Counsel reiterated that the reasons were furnished and the assessee failed to disclose certain amount in the tax calculation and subsequently, for the taxation. Thus, it is the failure on the part of the assessee to disclose fully and truly all material facts. As there is a reason to believe that the income chargeable to tax has escaped assessment on account of failure on the part of the assessee to disclose fully and truly all material facts within the meaning of Section 147 of the Act, notice was issued under Section 148 of the Act on 21.03.2014. Therefore, the case is to be considered by following the procedures contemplated and by affording opportunity to the assessee and the second respondent may be permitted to proceed with the reassessment proceedings in accordance with the provisions of the Act.

15.This Court is of the considered opinion that admittedly, the assessment order under Section 143(3) of the Act was passed on 27.07.2009. Reopening of assessment was initiated beyond the period of four years, but within a period of six years. The order furnishing reasons for reopening issued at the first instance by the Assessing Officer was ambiguous and the reasons were not made clear. Thus, the petitioner filed a writ petition in W.P.No.31294 of 2014 and this Court passed an order on 01.12.2014 and the operative portion is extracted hereunder:-

“8.In the light of the above direction, duty is cast upon the Assessing Officer to dispose of the objections raised by the petitioner by passing a speaking order, thereby the Assessing Officer should consider the objections raised by the petitioner, when the petitioner has specifically contended that the assessment is complete in all respects after due consideration and a detailed reply was given by the petitioner on 19.06.2009.

9.Accordingly, this Court is of the view that the Writ Petition is pre-mature and at this stage, the impugned notice cannot be quashed. However, in the light of the decision of the Hon'ble Apex Court made in the case of G.K.N.Driveshafts (India) Ltd., (supra), it is the duty of the Assessing Officer to consider the petitioner's objections and in my view he should judiciously take note of the factual and legal



This waiver of interest had to be offered to tax under Section 41(1). Further, assessee had credited an amount of Rs.14,18,66,299/- towards deferred tax asset."

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17. Perusal of the above facts, as narrated, would establish that the assessee failed to disclose certain amount, which resulted failure on the part of the assessee to disclose fully and truly all materials. The very ground taken by the assessee that it has furnished/disclosed fully and truly all material facts deserves no merit consideration. The second respondent could able to ascertain certain material facts establishing failure on the part of the assessee to disclose the facts fully and truly.

18. Regarding the ground of availability of fresh material for reopening of assessment proceedings, this Court is of the considered opinion that Explanation 2(c) to Section 147 would be relevant. The concept of "has reason to believe" is wider enough to cover numerous circumstances and possibilities for reopening of assessment and such a wider scope is contemplated under the Act with an object to deal with certain cases where the assessee has not produced true and full facts at the time of original assessment. The original assessment orders are passed based on the return of income filed by the assessee. Thus, any discrepancy, new material or inference or otherwise are identified by the Assessing Officer, then he is empowered to initiate reopening proceedings by invoking Section 147 of the Act.

19. In the present case, Explanation 1 and Explanation 2(c) to Section 147 are to be considered. Explanation 1 to Section 147 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". Therefore, mere production of books of account and the details by the assessee are one aspect of the matter and even with reference to such books of accounts and materials, if the Assessing Officer could able to discover some new information or materials, which provided cause for the Assessing Officer to invoke Section 147 of the Act or has reason to believe, then also such reopening proceedings are permissible. Explanation 2(c)(i) states that where an assessment has been made, but income chargeable to tax has been under-assessed, then also reopening of assessment is permissible, in cases where assessment order has been already passed based on the materials available on record. In the event of identifying under-assessment based on the very same materials, then also reopening of assessment is possible.



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Regarding the under-assessment there need not be new materials. Even based on the available materials, if the competent authority could able to identify any under-assessment, then also power under Section 147 shall be invoked by the competent authority.

20.This being the scope of Section 147, this Court is of the considered opinion that the Assessing Officer could able to find out that the materials furnished by the assessee were insufficient and the assessee failed to disclose certain amount in the tax calculation and subsequently, for the taxation. Thus, the second respondent formed an opinion that it is the failure on the part of the assessee to disclose fully and truly all material facts. When such an opinion is formed, a notice under Section 148 was issued and thereafter, the reasons were also furnished by following the principles laid down in GKN Driveshafts (India) Ltd. Therefore, the assessee is bound to participate in the assessment proceedings by defending their case in the manner known to law. In view of the fact that the case on hand is a case where it is established that the assessee failed to disclose certain amount in the tax calculation and subsequently for the taxation, there is a reason to believe that there was a failure on the part of the assessee to disclose fully and truly all material facts. This being the factum, the initiation cannot be construed as change of opinion warranting interference from the hands of this Court. This being the factum established, this Court has no hesitation in arriving a conclusion that the petitioner has not made out any acceptable ground for the purpose of considering the relief as such sought for in the present writ petition.

21.With the above observations, this writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

// True Copy//

Sub Assistant Registrar

abr

To

1. The Commissioner of Income Tax,
Income Tax Department,
No.3, Gandhi Road, Salem-636 007.



2. The Assistant Commissioner of Income Tax
Circle 2, Income Tax Department,
No.3, Gandhi Road, Salem-636 007.

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3. The Deputy Commissioner of Income Tax
Circle (1), Income Tax Department,
No.3, Gandhi Road, Salem-636 007.

+1cc to Mr.A.P.Srinivas, Advocate, SR.No.29101

W.P.No.8050 of 2015

CP(CO)
RLP(03/08/2021)