

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2021
PRONOUNCED ON : 02.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.8077 of 2015
and M.P.No.2 of 2015

M/s.CavinKare Pvt.Ltd,
Registered under the provisions of
Indian Companies Act, 1956.
Represented by its Chairman and Managing Director,
Mr.C.Ranganathan
"Cavin Ville", 12, Cenotaph Road,
Chennai - 600 018. ... Petitioner

vs

- 1.The Deputy Commissioner of Income Tax,
Company Circle 1(3),
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.
- 2.The Assistant Commissioner of Income Tax,
Company Circle 1(3),
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034. ... Respondents

Prayer: Writ petition filed under Article 226 of the
Constitution of India praying to issue a writ of Certiorari, to
call for the records of the 1st respondent in PAN No.AAACB3754B
and quash the impugned notice under Section 148 of the Act dated
29.03.2014 and the consequent proceedings issued by the Second
Respondent in Co.Cir.I(2)/147/2014-15 dated 05.12.2014.

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

O R D E R

The petitioner has challenged the impugned notice dated
29.03.2014 issued under Section 148 of the Income Tax Act
seeking to re-open the Assessment for the year 2007-2008 and the
consequential communication/speaking order dated 05.12.2014 over
ruling the objection of the petitioner against the reopening of
the assessment for the aforesaid Assessment year 2007-2008.

2.Regular scrutiny Assessment was completed under Section 143(3) of the Income Tax Act an assessment order was passed on 31.12.2009. Thereafter, at the fag end of the limitation, the impugned notice dated 29.03.2014 was issued to the petitioner under Section 148 of the Income Tax Act, 1961. The reasons given for reopening of the assessment was communicated to the petitioner vide letter dated 06.08.2014 reads as under:-

'During the A.Y.2007-2008, the assessee has paid a sum of Rs.1,40,00,000/- to Shri C.K.Ranganathan apart from directors remuneration of Rs.99,21,973/-. The same requires to be disallowed u.s 36(i) (ii).

Since there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, there is a reason to believe that the income has escaped assessment.'

3.It is the case of the petitioner that reopening of the assessment was based on the change of opinion for the year 2011-2012, and there was no ground for reopening of the assessment under Section 148 of the Income Tax Act for the purpose of Section 147 of the Income Tax Act, as the petitioner had not suppressed any information required for completing the assessment.

4.It is submitted that a similar proceedings was also initiated based on a similar reasoning for the Assessment year 2008-2009. The Commissioner of Income Tax(Appeals) by an order dated 15.12.2017 in I.T.A.No.65/17-18 had dropped the demand with the following observations:-

'During the appellate proceedings, the appellant raised a significant ground that in the absence of any fresh material in the possession of the AO and that too after the expiry of four years, the issuance of notice under Section 148 for reopening the already completed assessment is ao initio void. In order to fortify this ground, the appellant relied on the decision of the Hon'ble Apex Court in the case of CIT Vs. Kelvinator of India Ltd (2010) 320 ITR 561.

It is a fact that the assessment was reopened beyond the period of 4 years. Further as pointed out by the AR, there were no fresh materials which would justify the invocation of the provisions of Section 147. It is also true that the AO has not brought on record any

failure on the part of the appellant to disclose fully and truly all material facts necessary for its assessment.''

5.The learned counsel for the petitioner submits that similar reasonings has to be adopted for the present case as well as for the Assessment year 2007-2008. He further submits that for the Assessment year 2011-12, an appeal before the Commissioner of Income Tax (Appeals) was pending on the basis of change of opinion for the reopening of the Assessment under Notification dated 29.03.2014 under Section 148 of the Income Tax Act. It is fairly submitted that even though, the petitioner had earlier filed a separate writ petition, the petitioner could not obtained a stay from this High Court.

6.On merits, the learned counsel for the petitioner further submits that the Minutes of the Meeting of the petitioner held on 01.08.2006 decided that the Chairman cum Managing Director of the petitioner company will be paid a remuneration consisting of a salary, commission and perquisites which reads as under:

'a.Salary:Rs.5,00,000/- per month (rupees five lakhs only)

b.Commission:0.3% of the net turnover of the company, {if the turn over is upto Rs.400,00,00,000/- (Rupees four hundred crores only,} payable on a quarterly basis and a fixed commission of Rs.20,00,000/- (Rupees twenty lacs only) if the turnover exceeds Rs.400,00,00,000/- (Rupees four hundred crores only)

c.Perquisites:The following perquisites shall be allowed in addition to the salary.''

7.He further submits that this was also reflected in the Schedule forming part of the Financial Statement for the year 31.03.2007 wherein clearly the commission of Rs.1,40,00,000/- has been declared has detailed below:

Schedules Forming Part of the Financial Statements for the year ended 31st March 2007.

(b) (i) Remuneration to Chairman and Managing Director and a Whole-time Director (key management Personnel)

Particulars	For the year ended 31 March 2007	For the year ended 31 March 2006
Salaries and other Allowances	12,527	8,462

Particulars	For the year ended 31 March 2007	For the year ended 31 March 2006
Contribution to Provident and other Funds	867	720
Amount of Perquisites	1,564	1,705
Commission	14,000	3,883
Total	28,958	14,770

8.The learned counsel for the petitioner further submits that the returns filed for the Assessment year 2007-2008 on 31.12.2019 along with the annexures also gave the particulars of the commission paid to the Chariman cum Managing Director of the petitioner.

9.It is further submitted that while passing the Assessment order under Section 143(3) of the Income Tax Act, the Assessing Officer had disallowed the several expenses and some of the other items which were missed out were also sought to be rectified under Section 154 of the Income Tax Act by exercising its jurisdiction under the aforesaid provision vide order dated 09.3.2010.

10.The learned counsel for the petitioner also refers to form No.3CA namely an Audit Report filed under section 44AB of the Act, wherein the particulars of the salary namely the remuneration, contribution to provident funds, perquisites and the commission paid to the Chairman cum Managing Director were disclosed.

11.He therefore submits that there is no case made out for invoking extended period of limitation under proviso to section 147 of the income tax act. On merits, the learned counsel for the petitioner placed the reliance on the decisions of the Delhi High Court in Commissioner of Income Tax Vs. Converttech Equipments (P) Ltd [2013]36 taxmann.com (Delhi) wherein held as follows:

7.This Court is of the opinion that in view of the fact that no fresh circumstances have come to notice to take a different view, no substantial question of law arises on the point of the disallowance under Section 36(1)(ii). The decisions of the Income

Tax authorities involved concurrent findings on pure questions of fact. Moreover, a Division Bench of this Court in *AMD Metplast (P) Ltd v. Dy.CIT* [2012] 341 ITR 563/20 taxmann.com 647 (Delhi), after referring to the judgment of the Bombay High Court in *Loyal Motors Services Co.Ltd Vs. CIT* [1946] 14 ITR 647 opined that the commission, if found to be paid for services rendered by the director as per the terms of the appointment, cannot be said to be distribution of dividend or profits in the guise of commission. It was noticed that while commission was paid as a form of remuneration for actual services rendered, dividend is a return of investment and is paid to all its shareholders equally. It was thus held that if the commission is paid for actual services rendered, section 36(1)(ii) will not apply. This decision was followed by this Court in *CIT Vs. Career Launcher India Ltd* [2012] 207 Taxman 28/20 taxmann.com 637 (Delhi). These decisions apply to the present case. The substantial question of law in ITA No.669/2012 is answered in favour of the assessee.

12. That apart, reliance was placed on the decision of the Hon'ble Supreme Court and other High Courts and specific reference was made to the decision of the Hon'ble Supreme Court in *Assistant Commissioner of Income Tax vs. ICICI Securities Primary Dealership Ltd* [2012] 24 taxmann.com 310 (SC). The learned counsel for the petitioner also relied on the other following decisions:-

1. *Fenner (India) P.Ltd Vs. DCIT* (1999) 107 Taxman 53 (Mad),
2. *Indian Bank Vs. SCIT* (2015) 63 taxmann.com 145 (Madras),
3. *Tractors & Farm Equipment ltd Vs. ACIT* (2019) 102 taxmann.com 130 (Madras) and
4. *PVP Ventures Ltd Vs. ACIT* (2016) 65 taxmann.com 221 (Madras).

13. An other decision of this Court in T.C.A.No.873 of 2013 dated 02.03.2021 in *The Commissioner of Income Tax Vs. M/s.True Value Homes (India) Pvt Ltd* was also referred wherein it has been held as follows:

- 2.2 The item of dispute was disallowance under Section 36(1)(ii) and disallowance of

deduction under Section 801B(10). During the year, major shareholding in respect of the assessee was held by N.Ravichandran, to an extent of 95% and acted as Chairman and Managing Director and the remuneration was paid at Rs.7,47,59,772/-. The breakup of the same was Director's remuneration amounting to Rs.2,40,00,000/- and the commission amounting to Rs.4,83,59,772/- and perquisite and benefit amounting to Rs.24 lakhs was paid.

14. Defending the impugned order, the learned counsel for the respondent submits that this High Court has settled the scope to Section 147 of the Income Tax Act, 1961 and the amendments and therefore submits the respondents herein was justified in reopening for the Assessment.

15. He submits that explanation 1 to section 147, makes it clear mere production of documents and books of accounts or other evidence from which material after due negligence facts can be discovered by the Assessing Officer does not amount to disclose within the meaning of Section 147 of the Income Tax Act.

16. He therefore submits that, even though, the petitioner had filed an audit report under Section 44AB of the income tax act and the annual report and other documents along with the returns on 20.03.2009, it could not be said that there was a true and full disclosure at the time of filing of the returns.

17. It is therefore submitted that the present writ petition is liable to be dismissed. He therefore submits that it is open for the petitioner to produce the order passed by the Commissioner of Income Tax (Appeals) passed on 15.12.2013 for the Assessment year 2008-2009 and have the matter decided by the respondent. However, it cannot be said that the reopening of the Assessment was without jurisdiction in view of the amended provisions of the Income Tax Act.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent. Facts are not in dispute. The petitioner has made adequate disclosures and based on the same assessment was completed for the assessment year 2007-2008 by the assessing officer.

19. For the assessment year 2008-2009, the assessment was sought to be reopened on similar grounds under a similar notice Section 148 of the Income Tax Act, 1961. The Commissioner of Income Tax (Appeals) vide order dated 15.12.2017 has dropped the proceeding.

20.Reopening of the completed assessment based on change of opinion has been frowned upon by the Apex Court by its several decisions. The decision cited by the petitioner are squarely applicable facts and circumstances of the case. Even if the matter is remitted back to the respondents to pass a speaking order, no useful purpose would be served as the respondents appear to have accepted the views of the Commissioner of Income Tax (Appeals) vide order dated 15.12.2017 for the assessment years 2008-2009 under similar circumstances.

21.The respondents have also not produced any documents to show that the said order of the Commissioner of Income Tax (Appeals) has been appealed against before the Income Tax Appellate Tribunal and an Appeal is pending as on dated. Therefore, even on merits it is not permissible to the respondents to proceed with the impugned proceeding contrary to the said order.

22.Further, as an assessing officer, the respondent cannot take a different view for the assessment year 2007-2008 from the view is taken for the assessment year 2008-2009 by the Commissioner of Income Tax (Appeals) in the light of the decision of the Hon'ble Supreme Court, Union of India Vs Kamalakshi Finance Corporation Limited 1991 (55) ELT 333.

23.Under these circumstances, this Court is inclined to allow this writ petition. Accordingly, this writ petition is allowed. No cost. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CS VII)

True Copy

Sub-Assistant Registrar

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To

1. The Deputy Commissioner of Income Tax,
Company Circle 1(3), सत्यमेव जयते
121, Mahatma Gandhi Road,
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W.P.No.8077 of 2015 and
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CP(CO)
SP(13/07/2021)