

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.04.2021
CORAM

THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.Nos.3005 of 2013 & 28434 of 2014
and M.P.No.1 of 2014

M/s.Madras Race Club,
Rep., by its Additional Secretary,
Mrs.S.Aruna,P.O.Box No.2639,
Race Course Road,
Guindy, Chennai-600 032. .. Petitioner in both W.Ps.

-vs-

The Deputy Commissioner of Income-tax,
Company Circle IV(1),
Room No.430, 4th Floor, Main Building,
'Aayakar Bhavan',
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034. ... Respondent in both W.Ps.

Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records in PAN: AAACM7640R dated 11.01.2013 and 24.10.2014 relating to Assessment Year 2007-08 on the file of the respondent and quash the same.

For Petitioner : Mr.G.Baskar
(In both W.Ps.)

For Respondent : Ms.Hema Muralikrishnan,
(In both W.Ps.) Senior Standing Counsel

COMMON ORDER

W.P.No.3005 of 2013 is preferred challenging the proceedings dated 11.01.2013 issued by the Deputy Commissioner of Income Tax, Company Circle IV(1), Chennai regarding proposal to complete the assessment and calling for objections on initiation of proceedings under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as "the IT Act"). Notice under Section 148 of the IT Act was issued on 20.04.2011. On receipt of the notice under Section 148 of the IT Act, issued for reopening of the assessment for the assessment year 2007-08, the petitioner sent reply to the notice requesting for the reasons for reopening. When the writ petition was taken up for

hearing on 06.02.2013, it was admitted and an order of interim stay of all further proceedings was granted by this Court.

2.The learned counsel appearing on behalf of the petitioner made a submission that the petitioner-Club is incorporated in terms of Section 25 of the Indian Companies Act, 1956 and having its registered office at Chennai.

3.With reference to the disputes raised for reopening of assessment, it is contended that the very initiation per se untenable in view of the fact that the reasonings given were already considered by the Assessing Officer during the original assessment and the appellate authority, viz., the Commissioner of Income Tax (Appeals)-VI, Chennai (for brevity "the Commissioner") also confirmed such findings made by the Assessing Officer in respect of the said assessment year 2007-08. Thus, there is no reason to believe for reopening of assessment, but the impugned reasons amount to change of opinion. Thus, the very initiation of proceedings is not in consonance with the requirements contemplated under Section 147 of the IT Act and the same is liable to be set aside.

4.In support of the contention, the learned counsel for the petitioner solicited the attention of this Court with reference to the computation of profits for the year ended 31.03.2007 (AY 2007-08 dated 29.10.2007) wherein, expenses on mutuality basis, income on mutuality basis and the Guindy Lodge & Club House receipts all such particulars were made available and the said particulars were considered by the Assessing Officer at the time of passing the assessment order dated 29.12.2009 under Section 143(3) of the IT Act. The said assessment order reveals that during the assessment year 2007-08, it is stated that the Club had received Rs.1,55,65,851/- as interest income from their Fixed Deposit.

5.The learned counsel for the petitioner relying on the said findings, made a submission that the very same amount has been taken as a ground for reopening of assessment and thus, the reopening is untenable. This apart, there was a consideration in respect of the said amount in the order of assessment more specifically in paragraph 1.7 where the Assessing Officer made a finding that the interest income of Rs.1,55,65,851/- is treated as income from other sources and taxed accordingly. Para 2.1 of the assessment order was also relied upon, which reads as hereunder:-

"2.1. In the computation, the assessee company had adjusted the income and expenses pertaining to Guindy lodge and club house. However, on verifying the P&L, it was found that the expenses in P&L in the computation differs. From the details filed it was found that the

expenses claimed in the Guindy Lodge comes to Rs.4,20,25,342/- as against the amount of Rs.3,94,36,300/- and Rs.28,73,507/- as against Rs.25,56,190/- with respect of Club House. Hence the difference is also added back to the expenses respectively. When this was pointed out the AR has not submitted any reply. Since the assessee company had filed inaccurate particulars thereby concealing income penalty u/s 271(1)(c) are separately initiated."

6. Based on this, the learned counsel for the petitioner in order to assail the initiation of proceedings for reopening of assessment under Section 147 of the IT Act has stated that two grounds were raised and both the two grounds were already adjudicated by the Assessing Officer and categorical findings were made by the Assessing Officer in his order and therefore, the said two grounds raised in proceedings under Section 147 of the IT Act dated 30.05.2011, are untenable. The two grounds, viz., the income and expenditure account and the Schedule VIII to the balance sheet shows that the assessee was in receipt of interest income of Rs.1,55,65,851/- and the profit and account shows the lease rent of Rs.3.90 crores, which does not seem to have the character of racing income or mutuality income, had been adjudicated and a clear finding was provided. Thus, the same cannot be considered as a new material or otherwise for the purpose of initiation of proceedings under Section 147 of the IT Act. The assessee submitted their submissions to the Assistant Commissioner of Income Tax on 08.06.2011. In the said letter also, the assessee has elaborated the factual matrix and the details regarding the assessment order already passed.

7. The assessment order was taken by way of an appeal before the Commissioner and the appellate order was passed on 28.03.2012 wherein, the said objections stated as reasons in the impugned proceedings were adjudicated and the Commissioner made the following findings at para 8.1, which read as hereunder:-

"8.1. The AR filed written submission on 28.11.2011 and objected to the disallowance on the ground that:

"The Assessing Officer has come to the conclusion based on and relying the following case laws, that even in case of mutual agency the interest income has to be treated as income from other sources and to be assessed to tax, as the interest income is not earned out of mutual agency.

a) Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT (227 ITR 172)

b) CIT vs. Bokoro Steel Ltd. (236 ITR 315)

Your appellant would like to rely on the

interest received by the club from the fixed deposits with banks is not taxable on the principles of mutuality as held by the Supreme Court in the case of CIT vs. Cawnpore Club Ltd. (Civil Appeal Nos.4777-8 of 1999 (unreported decision) which is followed in the decision of ITAT Hyderabad. A bench in case of Fateh Maidan Club vs. Assistant Commissioner of Income Tax reported in 81 TTJ 831.

In respect of the above matter your appellant would like to say that various High Courts have given judgment for and against the issue. In fact the Delhi Gymkhana Club vs. DCIT in ITA No.3585/Del/21006 has held it in favour of the assessee. The Supreme Court decision quoted by the Assessing Officer is not relevant to the facts of the appellant case. Hence, as the matter has not reached a finality your appellant prays to consider the interest income under business income as returned. In any event since Supreme Court has held to Bankipur Club that interest income for the part of mutuality income it cannot be assessed as income from other sources.

Alternatively, the appellant prays that the interest income if it is assessable, it has to be assessed as business income and included in the total income, the carried forward business loss u/s 72 has to be allowed against such business income.""

8.Relying on the said portion of the order passed by the Commissioner, the learned counsel for the petitioner contended that even the reasons stated as of now are untenable and therefore, the impugned order is liable to be set aside. The impugned proceedings are nothing, but change of opinion, as the reasons stated were already elaborately adjudicated both by the Assessing Officer in his assessment order and by the Commissioner, who has affirmed the assessment order.

9.With reference to the other reasons stated in the impugned proceedings dated 11.01.2013, the learned counsel for the petitioner reiterated that the grounds are raised at the first instance and what is not stated in the impugned proceedings at the initial stage under Section 148, cannot be taken. The said grounds are relatable to the Lease Deed entered into by the assessee with DLF Properties Private Limited. It is contended that the reasons furnished in the proceedings should stand for its own and it cannot be substituted by another reason. Thus, any other further reason provided in the impugned proceedings dated 11.01.2013 are untenable and not in consonance

with the provisions of the IT Act.

10. In support of the claim, the learned counsel for the petitioner is of an opinion that the very reason constituting ground for initiation of 147 proceedings is untenable and it is only a change of opinion and thus, liable to be set aside and the writ petition is to be allowed.

11. The learned Senior Standing Counsel appearing on behalf of the respondent objected the contentions raised on behalf of the petitioner strenuously by stating that the case on hand is a case to be adjudicated by the Assessing Officer. The reason to believe is established and the details and other grounds raised by the petitioner are to be adjudicated by the Assessing Officer, as the scope of the writ petition cannot be expanded so as to adjudicate those disputed facts on merits with reference to the documents and evidences.

12. The learned Senior Standing Counsel solicited the attention of this Court with reference to the objections given by the assessee on 08.06.2011. Based on the said objections, the competent authority issued the impugned order wherein, paragraph 2 elaborates that the Lease Deed entered into by the assessee with DLF Properties Private Limited was identified during the course of proceedings. As far as the first reason is concerned, the assessee has to place all the documents before the Assessing Officer for the purpose of adjudication and the factual findings and other relevant factors considered by the Commissioner on merits, are to be considered by the Assessing Officer and not by this Court in a writ proceedings.

13. As far as the other reasons stated with reference to the Lease Deed with DLF Properties Private Limited are concerned, the learned Senior Standing Counsel relied on Explanation 3 to Section 147, which enumerates "for the purpose of assessment or reassessment under the Section 147, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment and such issue comes to his notice subsequently in the course of the proceedings under Section 147, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-Section (2) of Section 148. Relying on the said Explanation, the learned Senior Standing Counsel reiterated that during the course of proceedings, if any new materials are identified or traced out, then the said ground also may be included for the purpose of further adjudication and when the provision of law empowers the authority to consider those new grounds also, it is for the assessee to submit their explanation/objection and contest the matter before the authority concerned and not before the High Court in a writ proceedings.

14. This Court is of the considered opinion that the scope of writ proceedings cannot be expanded so as to adjudicate the disputed facts between the parties. The High Court is empowered to scrutinise the process through which a decision is taken by the competent authority in consonance with the provisions of the law and certainly not the decision itself. Thus, the disputed materials which all are placed in a writ proceedings are to be adjudicated by the competent authority in view of the fact that it is only the proceedings initiated for reopening of assessment and the process is in progress and the very initiation itself is under question in a writ petition and under these circumstances, an opportunity is to be provided to either of the parties to place their records, documents and evidences for effective completion of the proceedings. In the event of any finding on merits, the same would affect or cause prejudice to either of the parties and the High Court may not do so. Contrarily, the disputed documents and evidences with reference to the grounds raised are to be adjudicated in detail both by the petitioner and the respondent during the course of proceedings and not before the High Court.

15. As far as the contention raised by the petitioner is concerned, that a new ground cannot be added, Explanation 3 to Section 147 is unambiguous and the provision contemplates in respect of any issue which has escaped assessment and such issue comes to his notice subsequently in the course of the proceedings under Section 147, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-Section (2) of Section 148. Thus, the authorities competent are empowered to adjudicate those new issues identified during the course of proceedings and there is no impediment as such and therefore, the grounds raised in this regard by the petitioner stand rejected.

16. As far as the ground raised regarding change of opinion is concerned, this Court is of the considered opinion that the petitioner is bound to establish the reasons stated for reopening of assessment. Certain intricacies raised by the Department with reference to certain transactions are to be adjudicated in the manner known to law and the High Court cannot go into the details of such transactions so as to make a finding, which would cause prejudice to either of the parties. Such accounting transactions are to be scrutinised by the experts and such an exercise cannot be done by the High Court more specifically in a writ proceedings wherein, the very initiation of proceedings for reopening of assessment is under challenge. Even the benefit of doubt in this regard should be held in favour of the Revenue and not in favour of the assessee. Even in case where the petitioners are raising certain doubts regarding the reason to believe and if the Department arrives certain reasons in respect of factual aspects and the

informations provided or the income disclosed then the High Court must in all fairness allow the Department to conduct an adjudication by affording opportunity to the assessee, so as to conclude the proceedings, and in this regard, it is to be reiterated that the benefit of doubt in certain factual aspects must be held in favour of the Revenue and not in favour of the assessee. This being the principles to be adopted, this Court has no hesitation in arriving a conclusion that there is reason to believe for reopening of assessment and the reasons furnished by the Department can not be construed as change of opinion.

17. Accordingly, W.P.No.3005 of 2013 fails and stands dismissed.

18. As far as W.P.No.28434 of 2014 is concerned, the learned counsel for the petitioner mainly raised the ground of limitation. It is contended that the interim stay granted in W.P.No.3005 of 2013 expired automatically on 08.06.2014. Relying on Explanation 1 to Section 153, the learned counsel for the petitioner contended that the assessment order was passed beyond the period of limitation as contemplated under Section 153 of Explanation 1 to the Act and therefore, the same is to be set aside on the ground of limitation. It is contended that the interim stay granted by the High Court on 06.02.2013 was extended till 08.06.2014. On 08.06.2014, the stay granted by the High Court was not extended and expired. Thereafter, on 04.07.2014, W.P.No.3005 of 2013 was dismissed. Thus, the time limit prescribed under proviso to Section 153(2) to pass an order of reassessment expired (60 days from 08.06.2014 as per Explanation 1 to Section 153(2)). Thus, the reassessment order passed under Section 143(3) read with Section 147 in proceedings dated 24.10.2014 is non est in law and liable to be quashed.

19. The learned counsel appearing on behalf of the writ petitioner mainly contended that the issue has been considered by the Allahabad High Court in the case of Commissioner of Income Tax, Agra vs. Chandra Bhan Bansal reported in (2014) 46 taxmann.com 108 (All) wherein, a finding was made that in such circumstances where the interim order was not extended, then the period of limitation expired and the order of reassessment is to be set aside. Para 10 of the judgment, which is relevant, stands extracted hereunder:-

"10. The above statutory scheme clearly indicates that for computing the period of limitation the period during which the assessment proceedings is stayed shall be excluded. In excluding the above period, the concept of communication of the order of the Court cannot be imported. The exclusion of the period has been provided because of stay or injunction by any Court during which the

assessment proceedings are stayed. The intention is clear that when the limitation for assessment has started it can be stayed only by an order or injunction of any Court and as soon as the order or injunction of the Court is vacated, the period of limitation shall re-start since after the vacation of the order of the Court, there is no embargo on the authorities to proceed with the assessment. The submission of Shri Shambhu Chopra learned counsel appearing for the Revenue that the limitation will start again only when the order is communicated to the Department thus cannot be accepted. The other reason for not accepting the above submission is also equally potent. Explanation 1 (v) and (vi) to Section 153 of the Act, 1961 are also part of the same statutory scheme. In Explanation 1 (v) and (vi) to Section 153 of the Act, 1961 the statutory scheme provides for computing the period of limitation from the date when the order under sub-section (1) of Section 245D and 245Q is received by the Commissioner. Thus, the legislature has provided for excluding the period from the date of communication of the order where they so intended. The use of concept of communication of receiving the order in the same provision which is absent in Explanation 1 (ii) concerned clearly indicates that for the purposes of Explanation 1 (ii), the communication of the order of the Court vacating the stay order or injunction is not contemplated."

20. In yet another case in CIT vs. Drs. X-Ray & Pathology Institute (P.) Ltd. reported in (2013) 385 ITR 27 (All), the Allahabad High Court held as follows:-

"In the present case, the stay was vacated by the High Court on August 26, 2009. The Assessing Officer took the date of vacation of the interim order to be the date, when it was received by him on November 9, 2009, and passed the assessment order on June 22, 2010, which was clearly beyond two years as limitation would restart from August 26, 2009, and ended on April 15, 2010.

Apart from the fact that the Assessing Officer had sufficient time the Tribunal has held that there is no procedure in the High Court to communicate the order to the party to make it effective. The provisions of the income tax Act for filing of the appeal from the date

of service of the order will not be attracted to calculate the period of limitation to complete the assessment.

In the present case, we are not concerned with limitation for any particular act to be performed, but the arrest of the limitation by an interim order passed by the High Court. As soon as the order was vacated, the limitation will restart and will exhaust itself on the period of limitation provided under the Act."

21. The learned counsel for the petitioner also relied upon the decision of the Delhi High Court in the case of Saheb Ram Om Prakash Marketing Pvt Ltd., vs Commissioner Of Income Tax & Ors., reported in 398 ITR 292. The relevant paragraphs are hereunder:-

"12. In the counter-affidavit the stand taken by the Revenue is that the order of this Court dated 9th November 2016 dismissing the Assessee's writ petition W.P. (C) No. 1738 of 2013 was received in the office of Principal CIT-8 only on 2nd December 2016. Thereafter notice was issued to the Assessee on 6th December 2016 under Section 142(1) of the Act. Within 60 days of the date of the receipt of the order of the High Court, the impugned assessment order under Section 147 read with Section 143 (3) of the Act was passed on 30th January 2017. It is accordingly submitted that the assessment order was not issued beyond the period stipulated under Section 153 (2) of the Act read with the proviso to Explanation 1 thereof.

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16. On the other hand, Mr. Rahul Kaushik, learned Senior Standing Counsel appearing for the Revenue, relied on the decision of the Calcutta High Court in India Ferro Alloy Industry Pvt. Ltd. v. Commissioner of Income-Tax [1993] 202 ITR 671 (Cal) and of the Madras High Court in Thanthi Trust v. Income Tax Officer [1989] 177 ITR 307 (Mad) and urged that the period of limitation of one year in terms of Section 153 (2) of the Act should be reckoned only after the vacation of the stay by this Court, in which case the impugned order of assessment would be within time. He submitted alternatively that, in terms of the first proviso to Explanation 1 to Section 153 of the Act, the period of limitation got extended by 60

days from 2nd December, 2016, i.e. the date of receipt by the Revenue of the certified copy of the order of this Court.

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18. In any event, clause (ii) to Explanation 1 only excludes from the computation of limitation "the period during which the assessment proceeding is stayed by an order or an injunction of any court." It does not exclude the period between the date of the order of vacation of stay by the Court and the date of receipt of such order by the Department. Therefore, in the present case, the Revenue cannot take advantage of the fact that it received a copy of the order dated 9th November 2016 of this Court only on 2nd December 2016."

22. Relying on the said decisions, the learned counsel for the petitioner reiterated that in the present case, it is an admitted fact that the order of reassessment was passed after the period of expiry and thus, it is untenable and liable to be set aside, in view of the limitation clause contemplated under Section 153(2).

23. The admitted facts are that the writ petition in W.P.No.3005 of 2013 was filed by the petitioner on 14.02.2013 challenging the proceedings dated 11.01.2013 issued under Section 148 of the IT Act with reference to the assessment year 2007-08. The High Court admitted the writ petition and granted interim stay of all further proceedings for the assessment year 2007-08 on 06.02.2013. Normal limitation under Section 153(2) to pass reassessment order ended on 31.03.2013. Difference between the above two dates is only 53 days. In this context, it is contended that interim stay granted on 06.02.2013 extended till 08.04.2014 thereafter, the interim stay was not extended and expired on 08.06.2014 and W.P.No.3005 of 2013 was dismissed on 04.07.2014.

24. The learned counsel for the petitioner is of an opinion that once the stay expired automatically, then the limitation should be reckoned from the date of expiry of the stay and not from the date of communication of the final order passed in a writ petition as contended by the respondent. The respondent relied on the final order passed in the writ petition on 04.07.2014. Thus, the very interpretation regarding the period of limitation as explained by the respondent in their order is untenable.

25. This Court is of the considered opinion that a pragmatic approach is required in such circumstances and the situations prevailing in the High Courts are to be considered. High Court

cannot close its eyes in respect of the happenings and the situation prevailing in the matter of dealing with litigations and on hyper-technical grounds, the liability or the opportunity cannot be dispensed with. Even in such circumstances, the law of limitation is to be interpreted in a constructive manner so as to ensure that the purpose and object of the provisions are dealt with in accordance with the objects and reasons of the Act.

26. Undoubtedly, as rightly pointed out, if the date of expiry of the interim stay is taken into consideration, the petitioner may be correct, as the period of limitation contemplated expired. However, the fact remains that the interim order granted initially on 06.02.2013, which was extended up to 08.06.2014 was neither extended nor vacated by the High Court subsequently. Admittedly, the High Court has not passed any orders either vacating the stay or extending the stay. Thus, no order has been passed on the date of expiry. In practice, the cases are not listed on the date of expiry of interim order in all circumstances by the Registry of High Court, for which the litigants should not be made to suffer. In most of the writ petitions, even after the expiry of interim orders, the cases are not listed for various reasons. It is a practical difficulty being faced by the High Courts across the country, as large number of litigations are pending. When the cases are not listed on a particular day more specifically on the day of expiry of an interim order, then the parties cannot be penalised or blamed for non-listing of the matter for hearing, nor parties should be made to suffer for the practical difficulties being faced by Courts. In this context, it is to be construed that in the absence of any order passed by the High Court either vacating the interim order or extending the order, it is to be construed that the same position as on 08.04.2014 shall continue for all purposes and the assessee cannot take undue advantages of the situation for the purpose of seeking exoneration from the clutches of the proceedings more specifically, under the IT Act. Such hyper-technical grounds raised cannot be a reason for granting exoneration. The department admittedly had not received any orders from the High Court. The only contention is that the counsels were aware of such orders. Even in such circumstances in the absence of any order communicated, it may not be possible for the Income Tax Department to act in a particular manner. In the event of no order, the Department has to wait for the orders to be received and cannot presume or assume certain implications and take a decision. Thus, the Income Tax Department has rightly acted upon based on the final order passed in the writ petition and the automatic expiry theory as contemplated by the petitioner cannot be taken into consideration for the purpose of reckoning the period of limitation with reference to the provisions of the IT Act. This apart, W.P.No.3005 of 2013 was dismissed on merits. Thus, no further adjudication on merits is required in

respect of the present writ petition, as the present writ petition has been filed challenging the proceedings dated 24.10.2014, which is the reassessment order passed by the competent authority.

27. Accordingly, W.P.No.28434 of 2014 stands dismissed. The petitioner is at liberty to file a statutory appeal and raise all the grounds raised in this writ petition before the appellate authority for the purpose of redressing their grievances in the manner known to law. In the event of filing any such statutory appeal, the appellate authority is bound to consider the same on merits and in accordance with law by affording opportunity to the petitioner.

28. With the above observations, both the writ petitions in W.P.Nos.3005 of 2013 and 28434 of 2014 stand dismissed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

abr

To

The Deputy Commissioner of Income-tax,
Company Circle IV(1),
Room No.430, 4th Floor, Main Building,
'Aayakar Bhavan',
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

+2cc to Ms.Hema Muralikrishnan, Advocate SR.No.25140, 25137

+2cc to Mr.G.Baskar, Advocate SR.No.25246, 25249

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28434 of 2014

VBM(CO)
GMY(08/07/2021)