



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :31.08.2021

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P. No. 30247 of 2016

Janaki Mohan

... Petitioner

..VS..

The Income Tax Officer,
Non Corporation Ward-15(2)
Room No. 205, 2nd Floor, New Block,
No.121, Mahatma Gandhi Road,
Nungambakkam,
Chennai-600 034.

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorari calling for the records in ITO/NCW15(2)/AAGPJ7764C/16-17 dated 12.08.2016 on the file of the respondent relating to assessment year 2009-10.

For Petitioner : Mr.G.Baskar

For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

O R D E R

The order of disposal rejecting the objections filed by the petitioner on the reopening proceedings initiated under Sections 147 / 148 of the Income Tax Act, 1961 is under challenge in the present Writ Petition.

2. The petitioner states that she is a regular assessee in terms of the provisions of the Income Tax Act, 1961 and filed returns of income regularly duly disclosing all incomes within the time frame stipulated under statute. The petitioner states that she was a shareholder in a Company by the name and style of Grand Nirvana Holiday Resorts Private Limited. She filed return



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of income for the assessment year 2009-10. The petitioner duly informed about the capital gains of a sum of Rs.10,79,97,872/- and claimed an exemption of an amount of Rs.6,12,83,975/- being invested in a residential house. The Assessing Officer during the course of original assessment sought for certain clarifications on the claim of the petitioner / assessee under Section 54F of the Act. The petitioner also furnished details and informations regarding the queries raised by the Assessing Officer. Elaborate adjudications are made with reference to the capital gains as well as the claim regarding exemption and finally, the assessment order was passed on 22.12.2011 under Section 143(3) of the Income Tax Act. In view of the fact that the Assessing Officer has granted exemption in respect of one property out of three properties purchased by the petitioner, the petitioner preferred an appeal before the Commissioner of Income Tax (Appeals) who in turn allowed the appeal in entirety in order dated 11.07.2012. Against the order passed by the Commissioner of Income Tax (Appeals), the Assistant Commissioner of Income Tax filed further appeal before the Income Tax Appellate Tribunal in I.T.A.No.1837/Mds/2012. The Income Tax Appellate Tribunal elaborately considered the grounds raised by the Department as well as the defence placed by the assessee and confirmed the order of assessment passed by the original Assessing Authority and reversed the order passed by the Commissioner of Income Tax (Appeals). Against the said order of Income Tax Appellate Tribunal, the petitioner filed T.C.A. No. 71 of 2016 before this Court and an interim order was granted by this Court on 09.03.2016. The Tax Case Appeal is pending. However, it is brought to the notice of this Court that during the pendency of the Tax Case Appeal, the petitioner has opted Samadhanam scheme and settled the issues and therefore, the assessment order dated 22.12.2011 became final.

3. The learned counsel for the petitioner reiterated that all the documents pertaining to the purchase of the properties made by the petitioner / assessee were produced before the Assessing Officer at the first instance more so along with the return of income. Further clarifications sought for by the Assessing Officer were also furnished. The Assessing Officer elaborately discussed the transactions and the purchase of the properties made by the petitioner and made a finding in the assessment order itself. Based on the finding, the Assessing Officer granted exemption under Section 54F of the Act only in



respect of one property and the assessment order now became final. While so, the respondent issued a notice under Section 148 of the Act for reopening of assessment beyond the period of four years but within six years on the ground that the petitioner has not disclosed the material facts fully and truly as contemplated under proviso clause to Section 147 of the Act. The petitioner requested to furnish the reasons which was communicated to the writ petitioner. The learned counsel for the petitioner drew the attention of this Court with reference to the reasons furnished in proceedings dated 06.04.2016 wherein the very same documents pertaining to the purchase of three properties are cited as reasons for reopening and therefore, the reason furnished for reopening is nothing but change of opinion. The petitioner filed her objections in detail stating that the reason itself is not in consonance with the disclosures made by the petitioner before the original Assessing Officer and requested for dropping of the reopening proceedings. Without considering any of the objections merely reproducing the reasons furnished for reopening, the impugned order of disposal has been issued. Thus, the petitioner is constrained to move the present Writ Petition.

4. The learned Senior Standing counsel appearing on behalf of the respondent disputed the said contentions raised on behalf of the petitioner by stating that as per Explanation 1 to Section 147, mere production of documents, book of accounts etc., may not be a ground to seek exoneration from the reopening proceedings. Even if such book of accounts and documents are produced, the authority is empowered to reopen the assessment if they could arrive at a conclusion that income chargeable to tax, escaped assessment due to the failure on the part of the assessee or due to the non-disclosure of material facts truly and fully under the proviso clause to Section 147 of the Act. In the present case, there was non-disclosure during the relevant point of time before the Assessing Officer regarding certain details which provided cause for the respondent to reopen the assessment. Thus, the petitioner is bound to participate in the reassessment proceedings.

5. The learned Senior Standing counsel is of an opinion that the petitioner has erroneously sought for exemption under section 54F of the Income Tax Act and the said informations and materials were not considered by the original Assessing Authority at the time of passing the final assessment order under Section



143(3) of the Act. If at all, the exemption under Section 54F of the Act is required to be withdrawn for violation of the condition under sub-section (2) of Section 54F of the Act, the assessee has to pay an additional tax and the additional tax is also calculated as Rs.46,20,782/-.

6. In view of the fact that these aspects were not considered by the Assessing Officer, the respondent has reopened the assessment.

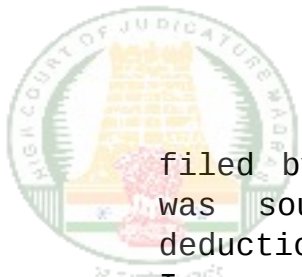
7. In support of the said contentions, the learned Senior Standing counsel relied on the Judgment of the Hon'ble Supreme Court of India in the case of Indi-Aden Salt Manufacturing and Trading Company Private Limited v. Commissioner of Income Tax reported in (1986) 25 Taxman 356 (SC) wherein, the Apex Court made the following observations:

"7. In respect of the material failure, the omission to disclose may be deliberate or inadvertent. That was immaterial. But if there is omission to disclose material facts, then, subject to the other conditions, jurisdiction to reopen is attracted. It is sufficient to refer to the decision of this Court in Calcutta Discount Company Ltd's case (supra) where it had been held that if there are some primary facts from which reasonable belief could be formed that there was some non-disclosure or failure to disclose fully and truly all material facts, the ITO has jurisdiction to reopen the assessment. This position was again reiterated by this Court in Malegaon Electricity Co. (P) Ltd. v. CIT

8. Furthermore, bearing these principles in mind in this particular case whether there has been such non-disclosure of primary facts which has caused escapement of income in the assessment was basically a question of fact."

8. In the case of Girilal and Company v. Income Tax Officer, Mumbai reported in (2016) 75 Taxman 172 (SC), the Hon'ble Supreme Court made an observations as follows:

"4. It is clear from the above that this information was supplied as there was some query about the value of the land. Obviously, while going to this document the Assessing officer



filed by the assessee reveals that deduction under Section 54F was sought for. Long term capital gain was informed and deductions were also sought for under the provisions of the Income Tax Act. It was not in dispute with reference to the capital gain claimed as well as the informations provided seeking exemption under Section 54F of the Act.

13. A reading of the assessment order would clearly reveal that the working for arriving at the deduction under Section 54F was considered by the Assessing Officer in detail in Para Nos.6 and 7 of the assessment order. Based on the informations in Para No.18 of the assessment order, the Assessing Officer categorically made a finding which reads as under:

"18. In view of the above discussions the contentions of the assessee that the entire land is available for benefits of Sec. 54F is not correct. The only portion of land which can be said as complying with the provision of Sec 54F is which is comprised in Survey Nos.98/9, 98/10, 98/11, 98/2-3 wherein which the residential house is situated as claimed by the assessee. This land can be considered as indivisible with the residential house (because of the peculiar geographical terrain of the entire land). This land only can also said as appurtenant to the residential house. Even this land has water bodies present but it would be practically impossible for the seller (Y.J. Alex) to segregate the water bodies and land and sell it to two different buyers. The natural positioning of water bodies of land within these survey numbers is such that the segregation is difficult. Therefore, this chunk of land along with residential house comprising in the Survey No.s. 98/9, 98/10, 98/11, 98/2-3 would only qualify for the benefits of Sec.54F."

14. Not satisfied with the assessment order passed under Section 143(3) of the Act, the petitioner / assessee filed an appeal before the Commissioner of Income Tax (Appeals) who in turn considered the grounds raised by the petitioner / assessee and allowed the appeal in entirety. The Income Tax Department preferred further appeal before the Income Tax Appellate Tribunal and the Income Tax Appellate Tribunal adjudicated the issues with reference to the exemption claim made by the assessee and



confirmed the assessment order passed by the original Assessing Officer. It is pertinent to note that Income Tax Appellate Tribunal independently appointed the Inspector of Income Tax to conduct an inspection and submit a report and the said report was categorically considered by the Income Tax Appellate Tribunal and it is relevant to extract the portion of the findings in this regard from and out of the order passed by the Income Tax Appellate Tribunal, which reads as under:

"14. The assessee relying on the memorandum explaining the provisions of section 54F as reported in 184 ITR (Statue) submits that provision is intended to benefit an assessee that invests in acquisition of residential house. According to the assessee, this parameter is satisfied in this case. Therefore, interpretation given by the Revenue that assessee purchased several pieces of land by way of separate sale deeds and therefore not eligible for deduction under section 54F of the Act on the entire land is hyper technical and contrary to the intention of the provision. No doubt provision is intended to benefit the assessee that invests in acquisition of residential house. However, in this case the intention of the assessee appears to be not to purchase residential house but to develop a resort. This is clearly evident from the enquiry report submitted by the Inspector of Income Tax on 27.05.2013 which read as under:-

"As directed, I have conducted a site inspection on 21.05.2013 at the landed property purchased by Smt. Janaki Mohan, Plot No.490, 4th South Cross Street, Kapaleeswara Nagar, Neelankarai, Chennai (PAN : AAGPJ7764C) from Yogyaveettil family at Muhamma on 04.04.2009 and the report thereupon is submitted as under:-

The property in Survey Nos. 98/2-1, 2-1A, 2-2, 2-3, 98/9, 10, 11, 99/5-1, 5-2, 5-3 and 99-11 admeasuring 555.612 cents as per records of Sub-Registrar Office, Puthanambalam lies about 750 meters from Muhamma Boat Jetty towards north. The east side of the land is Vembanad lake and west side is Pallavathuckal-CMS Road which is parallel to the Muhamma - Thannermukkon Road. This property is lying as a single property fenced with compound wall even



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though it is in several survey numbers.

At the time of my visit, Mr.Amesh, M.K.Project Engineer recently appointed to supervise the land development work was present and also some labourers. Mr.Amesh informed that ground leveling work was started about 10 days back only and about 800 loads of red earth were unloaded which was 'being leveled with JCB. He told me that the owner of the property Smt.Janaki Mohan intends to construct a resort there and for which Chennai based company namely M/s.Arun Expello had been engaged for the construction work.

I could observe two old house properties in the said land. One is used by Mr.Amesh as office the area of the house is about 1000 Sq.ft. The other one having about 300 Sq.ft area is almost in a dilapidated condition.

Mr.Amesh informed that there were three houses about 15 to 20 years old in the land all of which were in dilapidated condition. One of unused building was demolished recently for carrying out ground development leveling work. About 3½ acre land is being under leveling work. Most of the area of the land is marshy with bushes, plants, ponds unyielding coconut trees. The nearby inhabitants informed that the property had been kept idle by the purchaser after it was purchased till one month back.

The property have large commercial or business importance in the area because of emergence of eco-backwater tourism in Alappuzha. Muhamma is lying in western side of the Vembanad lake in Allapuzha District. Many resorts are functioning successfully for years in this area. It is evident that the purchaser spent huge amount for buying this land with an intention to make a huge return from either running a resort or from resale of the land. Earlier before the advent of tourism the cost was only Rs.20,000/- for a cent of land. But as this area become a major tourist attraction in the world, the land price in this area has gone up substantially.

My findings in brief in the light of questionnaire envisaged in the letter of Hon.ITAT Chennai are as under:-



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1. The very intention behind deduction u/s.54F is fully defeated as the assessee neither constructed any building in the land nor existing buildings were useful for residential purpose. Moreover, the intension of the assessee in purchasing the property is to start a resort thereon which is a commercial / business activity. The assessee has been keeping the land idle from the date of purchase till last month.
2. With regard to the investment in property after purchase.
 - a) three side of the property is fenced with temporary compound wall (metal sheet)
 - b) two medium type gate fixed.
 - c) Three metre wide approach road from the opening of the property about 150 mtrs is paved with graded red earth.
 - d) Ground leveling work in about 3.5 acre land which is being carried out.
3. The purchaser never used this property for residential or for business / commercial purpose.
4. After the approval by the Alappuzha Chief town planner, the Grama Panchayat, Muhamma has given permission for construction of villas in the resort on 07.01.2011. This has been amended on 23.01.2013 based on applicants renewal application. Letter dated 25.05.2013 of the Secretary, Muhamma Grama Panchayat enclosing the above permission is attached herewith.
5. The property is still in the possession of Smt.Janaki Mohan as per the records maintained in the SRO, Puthanambalan as on date. Letter received from the SRO, Puchanambalan stating the same is enclosed."

15. The Income Tax Appellate Tribunal passed a final order with the finding that the Assessing Officer is perfectly justified in restricting the deductions only to the portion of the land purchased from Mr.Y.J Alex in Survey Nos. 98/9, 98/10, 98/11 and 98/2-3. Thus, upheld the order of the Assessing Officer and reversed that of the Commissioner of Income Tax (Appeals).

16. The Assessee preferred Tax Case Appeal before the High Court of Madras in T.C.A. No. 71 of 2016 and during the pendency of the Tax Case Appeal, the assessee approached the authorities under the Samadhanam scheme and the disputes were



settled and the assessment order originally passed became final.

17. This being the fact not disputed between the parties, let us consider the reasons furnished for reopening of assessment in proceedings dated 06.04.2016. The reasons furnished are as under:

"All the three houses were not in a human habitual condition as seen from the photos. As per sub section (2) of section 54F, the assessee should not acquire another asset other than the new asset within two years. Here, you had acquired two more houses on the same date. The exemption u/s 54F is required to be withdrawn for violation of condition under sub section(2) of section 54F. This was not considered while completing the assessment u/s 143(3) by the Assessing Officer and consequently by CIT (A) in his order dated 11.07.2012. If this is considered, there would be an additional tax demand of Rs.46,20,782 (excluding interest u/s 234B)."

18. The assessee filed her objections which was disposed of by merely stating that "in the instant case, as the tax effect that escaped income is more than Rs.0.1 Lakh Rupees and the notice under Section 148 is issued on 29.03.2016 which is within time limitation is 06 years, the reopening proceedings is in order in letter and spirit as per the relevant provision of the Income Tax Act and valid in law"

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In the instant case the fact in contention here is the eligibility of claim u/s 54F of the IT Act. Even in the face of the claim of the assessee that there was no failure on her part to disclose fully and truly all material facts regarding the claim u/s. 54F, the specific facts related to the acquiring of total three houses on the same date out of the sale consideration is found being missed scrutiny and hence escaped assessment. As purchasing/acquiring more than one residential house on the same date out of the sale consideration is against the principle and violation of the conditions prescribed under sub section (2) of Sec.54F of the IT Act, the reassessment to scrutinize this crucial criteria whether to allow exemption or withdraw the claim of 54F is justified and permissible by the law. Further for the benefit of the assessee, it is worth to discuss the relevant section 147 of the IT Act which speaks about the Income Escape



Assessment is having its sub section (c) under explanation 2 where it empowers the assessing officer to consider a few cases to be deemed cases where income chargeable to tax has escaped assessment.

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19. The objections in detail filed by the petitioner regarding filing of all the sale documents as well as the adjudications made by the Assessing Officer elaborately were not considered by the respondent while disposing of the objections. Contrarily, the respondent has reiterated the reasonings given for reopening of assessment and passed an order by merely stating that it is not the case of change of opinion. Thus, the reopening assessment is in consonance with Sections 147 / 148 of the Act.

20. The facts established would reveal that the assessee had admittedly furnished all the documents pertaining to the three properties and the Assessing Officer has originally taken note of all such purchasers with reference to the sale documents produced before him and made a categorical finding that the assessee is entitled to claim exemption under Section 54F of the Act only in respect of one property. The findings categorically made in the original assessment order are self speaking that the assessee had produced all those documents and the Assessing Officer also had considered all those documents.

21. The reasons furnished for reopening of assessment in proceedings dated 06.04.2016 reveals that as per sub-section (2) of Section 54F, the assessee should not acquire another asset other than the new asset within two years. Here, the petitioner had acquired two more houses on the same date. The exemption under Section 54F is required to be withdrawn for violation of condition under sub-section (2) of Section 54F. Thus, it is apparently clear that for the purpose of withdrawal of the exemption granted under Section 54F, the assessment is reopened. Such a reopening cannot be construed as based on new tangible material. If at all any lapse committed during the original assessment proceedings or erroneous consideration based on the opinion formed by the Assessing Officer during the relevant point of time, the other possible opinion if at all raised for reopening of assessment is to be construed as change of opinion and cannot be considered as new materials for the purpose of reopening of assessment.



22. However in the event of tracing out new tangible material or informations which were not at all adjudicated during the original assessment may be a good ground for reopening of assessment. As Explanation 1 to Section 147 enumerates that mere book of documents is insufficient to grant exemption from reopening proceedings. However, in the present case, admittedly the assessee had submitted all the documents pertaining to the purchase of the three properties and all those documents were placed before the Assessing Officer and the Assessing Officer considered all those three documents and formed an opinion that, the petitioner / assessee is eligible to grant exemption under Section 54F of the Income Tax Act only in respect of one property.

23. While so, now the reopening is made based on the reasoning that the exemption under Section 54F is required to be withdrawn for violation of condition under sub-section (2) of Section 54F. The Assessing Officer during the relevant point of time, when this issue was considered was very much aware of the fact regarding the implication of sub-section (2) of Section 54F and by considering all those aspects, he granted exemption for only one property alone. This being the factum, the Assessing Officer clearly formed an opinion for the purpose of grant of exemption under Section 54F while passing the original assessment order and now the reasons furnished for reopening of assessment would reveal that they are taking a different opinion on the same set of facts. Thus, the said reasons furnished for reopening the proceedings dated 06.04.2016 amounts to change of opinion beyond any pale of doubt.

24. As far as the Judgment relied on by the respondent in the case of Indi-Aden Salt Manufacturing and Trading Company Private Limited cited supra is concerned, the Hon'ble Supreme Court in unequivocal terms held that in respect of the material failure, the omission to disclose may be deliberate or inadvertent. That was immaterial. But if there is omission to disclose material facts, then, subject to the other conditions, jurisdiction to reopen is attracted. However, in the present case, absolutely, there was no omission on the part of the assessee and all the documents pertaining to the purchase of the three properties were furnished by the assessee and the Assessing Officer also verified the documents and made a finding in the assessment order. Thus, the findings made by the Apex Court of



India in the said Judgment is of no avail to the respondent as the petitioner / assessee had submitted all the material facts before the Assessing Officer.

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25. In respect of the other Judgment in the case of Girilal and Company is concerned, the Hon'ble Supreme Court in clear terms held that the assessee in the case before the Hon'ble Supreme Court had not correctly disclosed the actual assets of the plot and therefore, the assessee was not entitled for deduction. However, even perusal of the reasoning furnished in the present case, there is no such allegation against the petitioner / assessee. In the present case, the sale document pertaining to all the three properties were placed before the Assessing Officer by the assets. Even the return of income filed by the assessee would reveal that the details regarding the capital gains are clearly mentions that it is not disputed by the Assessing Officer and its correctness is also not questioned by the authorities. This being the factum established, this Court of an opinion that the Writ Petition on hand is a case of change of opinion wherein an interference is called for. Admittedly, the reopening proceedings are initiated beyond the period of four years and thus, the conditions stipulated in proviso clause to Section 147 is to be complied with. The respondent has not established that the petitioner had not furnished all material facts fully and truly for the assessment. Further, the materials produced for the assessment for claiming exemption are not disputed by the respondent.

26. In view of the fact that non-disclosure on the part of the assessee has not been established in this case, and thus the case of the petitioner deserves merit consideration. Accordingly, the impugned order passed by the respondent in proceedings No.ITO/NCW15(2)/AAGPJ7764C/16-17 dated 12.08.2016 is quashed and the Writ Petition stands allowed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

vji



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+1cc to Mr.G.Baskar, Advocate, S.R.No.44029

+1cc to Mr.A.P.Srinivas, Senior Standing Counsel, S.R.No.43549

W.P. No. 30247 of 2016

LN(CO)
SB(23/09/2021)