IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2021

CORAM :

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

W.A.No.1494 of 2021
and
C.M.P.No.9551 of 2021

M/s.DRS Industries Private Limited,
Flat No.1D, Gowtham Maple,
Hindustan Avenue,
Udayampalayam Road,
Chennai - 641 028
Represented by its Director
D.Shivakumar ...Appellant

Vs.

1. The Deputy Commissioner of Income Tax,
Central Circle-I,
Main Building,
63, Race Course Road,
Coimbatore - 641 018.

2. Assistant Commissioner of Income Tax,
Central Circle-I,
Main Building,
63, Race Course Road,
Coimbatore - 641 018. ... Respondents

Prayer : Writ Appeal filed under Clause 15 of the Letters Patent to set aside the order dated 16.04.2021 made in W.P.No.33896 of 2018.

Prayer in W.P.No.33896 of 2018: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the second respondent and quash the impugned notice under Section 148 of the Act in PAN:AABCD0553B dated 31.07.2017 and the consequential impugned order of the first respondent dated 07.11.2018 for the Assessment Year 2011-2012.

For Appellant : Mr.R.Sandeep Bagmar
For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

J U D G M E N T
(Judgment was delivered by T.S. SIVAGNANAM, J.)

This Writ Appeal has been filed by the writ petitioner challenging the correctness of the order passed in W.P.No.33896 of 2018, dated 16.04.2021.

2.In this judgment, we shall refer to the appellant as "assessee" and the respondent as "Revenue".

3.The assessee filed the writ petition to quash the notice issued by the respondent/Revenue, dated 31.07.2017, under Section 148 of the Income Tax Act, 1961 ("the Act" for brevity) and the consequential order passed by the Revenue, dated 07.11.2018, disposing of the objections raised by the assessee by passing a speaking order.

4.We have elaborately heard Mr.R.Sandeep Bagmar, learned counsel for the appellant/assessee and Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent/Revenue.

5.The learned Writ Court was primarily of the view that the assessee should raise all issues by availing the alternate remedy provided under the Act and the Writ Court should be slow in interfering with the order passed by the authorities under the provisions of the Act. Taking note of the submissions made by the learned counsel for the assessee and the submissions made by the learned Senior Standing Counsel for the Revenue, we are of the considered view that, since jurisdictional issues have been raised and the assessee being entitled to question the correctness of the order dated 07.11.2018 disposing of the assessee's objections, against which, no remedy has been provided under the Act, the writ petition can be entertained and the correctness of the order of reopening can be decided in a writ petition.

6.The appellant/assessee is before us raising five contentions. Firstly, that the conditions stipulated in the first proviso to Section 147 of the Act have not been fulfilled. Secondly, it is contended that there is no allegation made against the appellant/assessee that they failed to fully and truly disclose all material information at first instance during the assessment proceedings. Thirdly, it is contended that, on account of the assessment having been completed under Section 143(3) of the Act by order dated 30.03.2015, which order was reversed by the Commissioner of Income Tax (Appeals)-18, Coimbatore ("CIT(A)" for brevity) by order dated 01.06.2016 and affirmed by the Tribunal by order dated 03.02.2017, the reopening proceedings is clearly barred under the third proviso. The next contention is that the reopening is a clear case of change of opinion, and finally, that the Assessing Officer has not brought out any new tangible material to justify the reopening.

7.Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent/Revenue, sought to sustain the reopening proceedings by referring to the reasons for reopening. It is submitted that, at the first instance before the Assessing Officer, the issue was whether there was a slump sale. The said issue traveled up to the Tribunal and was decided against the Revenue. However, on a reading of the reasons for reopening, it is seen that the Department had reopened the proceedings on the ground that the assessee has debited an amount of Rs.82,49,045/- under the head “Administrative Expenses” towards “share of profit” payable to M/s.Miracle Cars India Pvt. Ltd., pursuant to a Memo of Understanding dated 30.06.2010 entered into between the assessee and M/s.Miracle Cars India Pvt. Ltd., and as per the assessee's own version, as confirmed by the CIT(A), the agreement did not fructify due to non receipt of approval from SKODA, and therefore, the assessee should have offered the amount of Rs.82,49,045/- claimed under the head “Administrative Expenses” for taxation. Therefore, it is submitted that this issue was never a subject matter of the assessment proceedings, which was completed by order dated 30.03.2015, nor the subject matter of appeal before the CIT(A) or for that matter before the Tribunal.

8.Section 147, which falls under Chapter-XIV of the Act, deals with “Income escaping assessment”. In terms of the said provision, if the Assessing Officer has reasons to believe that any income chargeable to tax has escaped assessment, he may, subject to provisions of Sections 148 to 153 of the Act, assess or reassess such income and also any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under Section 147 for the Assessment Year concerned. The power under Section 147 has been clearly circumscribed and a cumulative reading of the provisos to Section 147 as well as the explanation will show that the power is conditional upon the fact that the Assessing Officer has some reasons to believe that income has escaped assessment. The Hon'ble Supreme Court, in the case of Income Tax Officer, Ward No.16(2) v. M/s.TechSpan India Private Limited and another reported in (2018) 404 ITR 10 (SC) held that the words “reasons to believe” in Section 147 have to be interpreted schematically, as liberal interpretation would have the consequence of conferring arbitrary powers on the Assessing Officer who may even initiate re-assessment proceedings merely on his change of opinion on the basis of some facts and circumstances which have already been considered by him during the original assessment proceedings. Thus, it was held that, this cannot be the intention of the legislature and doing so, would have the effect of giving the Assessing Officer the power of review.

9.On going through the facts before us, we find that, what the Assessing Officer has done by virtue of issuance of notice under Section 148 of the Act is to review the earlier order of assessment. The subject matter which was writ large in the assessment proceedings is the agreement between the assessee and M/s.Miracle Cars India Pvt. Ltd., dated 30.06.2010. In the said agreement, the assessee was described as the "seller" and M/s.Miracle Cars India Pvt. Ltd., the "buyer". The assessee offered transfer of dealership to the buyer subject to the consent of SKODA Auto India Private Limited and to sell the spares, tools, machinery, goodwill, etc., for a specific value. It may not be necessary for us to refer to various terms and conditions of the agreement, except to observe that the said agreement was subject to the approval of SKODA Auto India Private Limited. Therefore, unless and until the said company which granted the dealership agrees, transfer cannot take place. It is not in dispute that the approval did not go through and consequently, the transfer did not take place. When the assessment was taken up for consideration by the Assessing Officer for the Assessment Year under consideration, AY 2011-12, it is the interpretation of the agreement and the questions incidental and consequential thereto, which was the subject matter of consideration. This could be seen from the show cause notice issued to the assessee, dated 14.03.2014. The assessee submitted his reply specifically pointing out about the agreement as to how the deal did not fructify all other matters related thereto. The Assessing Officer completed the assessment by holding that the transfer had taken place as per Section 50-B of the Act and also that the assessee agreed that the share of profit is to be paid to M/s.Miracle Cars India Pvt. Ltd., from which, it is proved that the transfer had taken place, without the transfer, the assessee is not liable to share its profit with M/s.Miracle Cars India Private Limited, but by sharing the profit with M/s.Miracle Cars India Private Limited, it is very clear that the transfer had taken place.

10.Aggrieved by the same, the assessee preferred an appeal before the CIT(A). The appeal was allowed by order dated 01.06.2016, holding that no transfer had taken place and the addition on account of slump sale was found to be incorrect and accordingly, the addition was deleted. The Revenue carried the matter on appeal to the Tribunal, which, by order dated 03.02.2017, dismissed the appeal, then the matter attained finality. To be noted, for the Assessment Year AY 2012-13, the Revenue similarly took the matter up to the Tribunal and the assessee succeeded and the issue has attained finality.

11.In these circumstances, question would be whether the reasons assigned by the Assessing Officer in his communication, dated 26.09.2017, for reopening the assessment, can be taken to be valid. On a plain reading of the reasons as communicated in the letter, dated 26.09.2017, it is evidently clear that the Assessing Officer did not have any new tangible material for reopening the proceedings, as the reason is prefaced by the sentence "In the return of income filed for the A.Y.2011-12, the assessee has debited a certain amount". Courts have always held that the Assessing Officer is always an independent authority who has to exercise his powers within the four corners of law and it is not for the higher authorities or for the assessee to tell as to in what manner the assessment has to be completed. The duty of the assessee is to fully and truly disclose all the material particulars. There is no allegation made by the Assessing Officer that the assessee had failed to fully and truly disclose all relevant materials for completing the assessment. Therefore, we are of the view that the reopening was a clear case of change of opinion. Furthermore, we find from the reasons dated 26.09.2017 that there is no whisper of any tangible material, and all information has been culled out from the returns filed by the assessee and the agreement, dated 30.06.2010, which was very much available when the original assessment was completed vide order dated 31.03.2014.

12.We find that the Revenue had filed a Miscellaneous Petition in M.P.No.265 of 2017 in I.T.A.No.2727/Mds/2016, in which, they had stated that the assessee had produced new material by way of producing the agreement dated 30.06.2010, which was not available when the assessment was completed on 31.03.2014. This appears to be factually incorrect, as the Assessing Officer, while completing the assessment, has specifically noted the agreement which was produced and placed before the Assessing Officer. Be that as it may, the said Miscellaneous Petition has been dismissed by the Tribunal. As has always been observed, notice under Section 147 is not to be casually invoked to suit the convenience of the Department or to correct any alleged errors which would have been committed by the Assessing Officer. In the instant case, we find that, not only the ingredients required to be fulfilled in the first proviso to Section 147 have not been fulfilled, there is no allegation made against the assessee for not having made full or true disclosure of all material particulars and the reopening of the assessment would also be barred in terms of the third proviso to Section 147. As observed earlier, it is a clear case of change of opinion, and that apart, the Assessing Officer has not brought on record any new tangible material to reopen the assessment, which has been done beyond the period of four years. For all the above reasons, we hold that the reopening proceedings is without jurisdiction and bad in law.

13.At the time when the Writ Appeal was entertained, the Division Bench by order dated 30.06.2021, had passed an order of status quo, by which, the assessee was required to participate in the proceedings and the authorities were directed not to pass final orders till the disposal of the Writ Appeal. Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondent/Revenue submitted that the Assessing Officer was not aware about the interim order which has been passed and therefore, he has passed the Assessment Order and has even uploaded in the Departmental Portal. It appears that the assessee is not aware of it. The learned counsel for the appellant/assessee submitted on instructions that the assessee is yet to receive the said Assessment Order. Be that as it may, since we have held that reopening proceedings are bad in law, consequently, if the Assessment Order had been passed by the Assessing Officer, the same is to be set aside.

14.In the result, this Writ Appeal is allowed and the order passed in the Writ Petition is set aside, and consequently, the Writ Petition is allowed. The reopening proceedings are quashed. Consequently, the Assessment Order, if any passed by the 2nd respondent/Assessing Officer, is also quashed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mkn

To

1. The Tax Deputy Commissioner of Income Tax,
   Central Circle-I,
   Main Building,
   63, Race Course Road,
   Coimbatore - 641 018.

2. The Assistant Commissioner of Income Tax,
   Central Circle-I,
   Main Building,
   63, Race Course Road,
   Coimbatore - 641 018.

+1 CC to Mr.Dwarakesh Prabakaran, Advocate, Sr.No. 39019.
+1 CC to Mr.Srinivas, Advocate, Sr.No. 39518.

W.A.No.1494 of 2021

MG(CO)
LS(03/09/2021)