

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23-04-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.8171 of 2013 & 30659 of 2014
and
M.P.No.1 of 2014

W.P.No.8171 of 2013

M/s.Mardia Sons Holding Private Ltd.,
A Private Limited Company,
Incorporated under the Provisions of the
Indian Companies Act, 1956,
Represented by its Director,
Mr.Bharat Kumar Mardia,
No.5 Damodar Street,
1st Floor, Kellys,
Chennai-600 010. ... Petitioner

vs.

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

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

.. Respondents

PRAYER : 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 on the file of the first respondent and quash the impugned notice issued by the second respondent under Section 148 of the Act in PAN No.AAACM6235G dated 23.02.2012 and consequentially quash the Assessment Order for A.Y. 2007-2008 in dated 01.03.2013 issued by the first respondent.

W.P.No.30659 of 2014

M/s.Mardia Sons Holding Private Ltd.,
A Private Limited Company,
Incorporated under the Provisions of the
Indian Companies Act, 1956,
Represented by its Director,
Mr.Bharat Kumar Mardia,
No.5 Damodar Street,
1st Floor, Kellys,
Chennai-600 010.

.. Petitioner

vs.

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

... Respondent

PRAYER : 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 on the file of the
respondent in PAN AAACM6253G dated 24.10.2014 relating to the
Assessment Year 2007-08, quash the same.

For Petitioner : Mr.Veerabathiran Prasanth for
Mr.R.Sivaraman
[in both W.Ps]

For Respondents : Ms.Hema Muralikrishnan,
Senior Standing Counsel
[For Income Tax]
[in both W.Ps]

COMMON ORDER

The writ petition in W.P.No.8171 of 2013 is filed,
challenging the notice issued by the second respondent under
Section 148 of the Income Tax Act, 1961 (hereinafter referred to
as the 'Act', in short) dated 22.03.2012 and the consequential
assessment order for the assessment year 2007-2008 in order
dated 01.03.2013.

2. The petitioner is a domestic Private Limited Company under the assessment of income tax in the file of the respondents. For the assessment year 2007-2008, the petitioner filed its return of income on 22.10.2007, claiming depreciation under Section 32 of the Act, for Rs.2,20,97,892/- at the rate of 60% on computers and its accessories, which had been given on lease that year. The case was selected for scrutiny and assessment was completed under Section 143(3) of the Act on 29.12.2009, allowing the entire claim of depreciation. Under these circumstances, the impugned notice dated 23.02.2012 was issued under Section 148 of the Act for reopening of assessment. Thus, the petitioner is constrained to move the present writ petition.

3. The learned counsel, appearing on behalf of the petitioner, mainly contended that the reasons for reopening of the assessment is absurd and not in consonance with the provisions of the Income Tax Act, 1961. There is no new material available on record to establish for the purpose of reopening of assessment and in fact, the reasons assigned in the impugned orders were already adjudicated by the Assessing Officer and a finding was also made.

4. Thus, initiation of proceedings under Section 147 of the Act, is nothing but change of opinion and cannot be construed as reason to believe. In this regard, the learned counsel for the petitioner solicited the attention of this Court with reference to the assessment order passed under Section 143 (3) of the Income Tax Act on 29.12.2009 with reference to assessment order for the assessment year 2007-2008.

5. The reasons cited and the income escaped as alleged were already brought to the notice of the Assessing Officer at the time of original assessment and therefore, there is no change of circumstances nor any new material available on record for the authorities to invoke Section 147 of the Act.

6. The learned counsel for the petitioner, citing the reasons for reopening of assessment year 2007-2008, furnished by the respondent in proceedings dated 09.05.2012, contended that the petitioner raised specific objections for reopening of the assessment.

7. The petitioner, in his objections, has stated that "we would like to submit that the reopening of assessment proceedings under Section 148 of the Act is null and void and without jurisdiction and further, we would like to bring to your notice that during the course of assessment proceedings, the Assessing Officer has specifically called for the details in this regard vide notice under Section 142(1) of the Income Tax

Act, 1961 on 17.09.2009 vide Serial Nos.1, 11 and 14 as reproduced."

8. Relying on the objections, the learned counsel for the petitioner is of the opinion that the impugned order is nothing but change of opinion and there is no reason to believe, which is mandatory under the provisions of the Act.

9. The learned counsel for the petitioner relied on the judgment of the Supreme Court India in the case of Industrial Credit and Development Syndicate Limited vs. Commissioner of Income Tax, Mysore and Another [(2013) 350 ITR 527 (SC)], it has been held in paragraph-13, which reads as under:-

"13. The Revenue attacked both legs of this portion of the section by contending:

(i) that the assessee is not the owner of the vehicles in question, and

(ii) that the assessee did not use these trucks in the course of its business.

It was argued that depreciation can be claimed by an assessee only in a case where the assessee is both, the owner and user of the asset."

10. However, the reasons for reopening furnished by the respondents in proceedings dated 09.05.2012 reads as under:-

"During the year assessee has entered into a tripartite lease agreement with M/s.NLC Ltd (lessee) and M/s.CCS Infotech Ltd (vendor) for the purchase of computer system. As per the lease agreement, the assessee has offered to pay acquisition cost of purchase of the equipment. However, the purchase order has been placed by the lessee directly to the vendor. Also the agreement states that M/s.NLC Ltd will avail income tax depreciation. However, assessee has claimed depreciation in respect of computers for a sum of Rs.2,20,97,982/-. As per the lease agreement the assessee is mere financing agent whereby the assessee have only provided funds for the acquisition of the asset. Hence, the depreciation on the computers cannot be allowed in the hands of the assessee."

11. The assessee, vide reply dated 09.11.2012, has stated that the reopen of assessment proceedings under Section 148 is null and void and without jurisdiction and further, it is contended that it amounts to change of opinion and therefore, the writ petition is to be allowed. However, the authorities found that the depreciation on the computers cannot be allowed in the hands of the assessee and therefore, the said aspect is to be considered only by reopening of the assessment.

12. The facts regarding the lease agreement would have been placed before the Assessing Officer during the original assessment. However, the other factors regarding depreciation on computers and related factors were not adjudicated during the original assessment and thus, there is a reason to believe for reopening of assessment. However, the fact remains that assessment order has already been passed in order dated 24.10.2014 and the petitioner filed another Writ Petition in W.P.No.30659 of 2014, challenging the assessment order.

13. Under these circumstances, this Court is of the considered opinion that the reasons given provided a cause for reopening of the assessment and such reasons are sufficient to satisfy the requirement of reason to believe for reopening of assessment under Section 147 of the Income Tax Act and thus, there is no infirmity. Accordingly, Writ Petition in W.P.No.8171 of 2013 is liable to be dismissed.

14. As far as the Writ Petition in W.P.No.30659 of 2014 is concerned, the assessment order passed for the Assessment Year 2007-08, in order dated 24.10.2014 is under challenge in this writ petition. The first writ petition in W.P.No.8171 of 2013 was filed, challenging the initiation of proceedings under Section 147 of the Act and the notice issued under Section 148 of the Act. Meanwhile, the respondent passed the assessment order for the Assessment Year 2007-08 in proceedings dated 24.10.2014 and therefore, the petitioner is constrained to file the second writ petition in W.P.No.30659 of 2014. In this writ petition, the petitioner mainly raised the ground of limitation. It is contended that the interim stay granted in W.P.No.8171 of 2013 expired automatically, in view of the fact that the High Court has not extended the interim stay granted. 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 liable to be set aside on the ground of limitation. Relying on the fact that the interim stay granted by this Court expired, the period of limitation is to be reckoned from the date of expiry of the stay and therefore, the assessment order was issued beyond the period

of limitation and thus, the writ petition is to be allowed. The time limit prescribed under Proviso to Section 153(2) to pass an order of reassessment within a period of 60 days expired and thus, the reassessment order passed under Section 143(3) read with Section 147 of the Income Tax Act in proceedings dated 24.10.2014 is non-est in law and liable to be quashed.

15. With reference to the reckoning period of limitation in cases where the stay granted and expired automatically, in view of the fact that it was not extended, this Court has decided the principles in WP Nos.3005 of 2013 and 28434 of 2014 dated 23.04.2021 and the relevant paragraphs are extracted hereunder:-

"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.

13.

14.

15.

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.

17.

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 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 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."

16. In view of the findings in the order passed in WP Nos.3005 of 2013 and 28434 of 2014 dated 23.04.2021, the case of the petitioner deserves no merit consideration as the petitioner has to avail the appellate remedy against the assessment order passed by the Competent Authority and the petitioner is at liberty to do so.

17. Accordingly, the writ petitions in W.P.No.8171 of 2013 and W.P.No.30659 of 2014 are dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

Svn/Kak

To

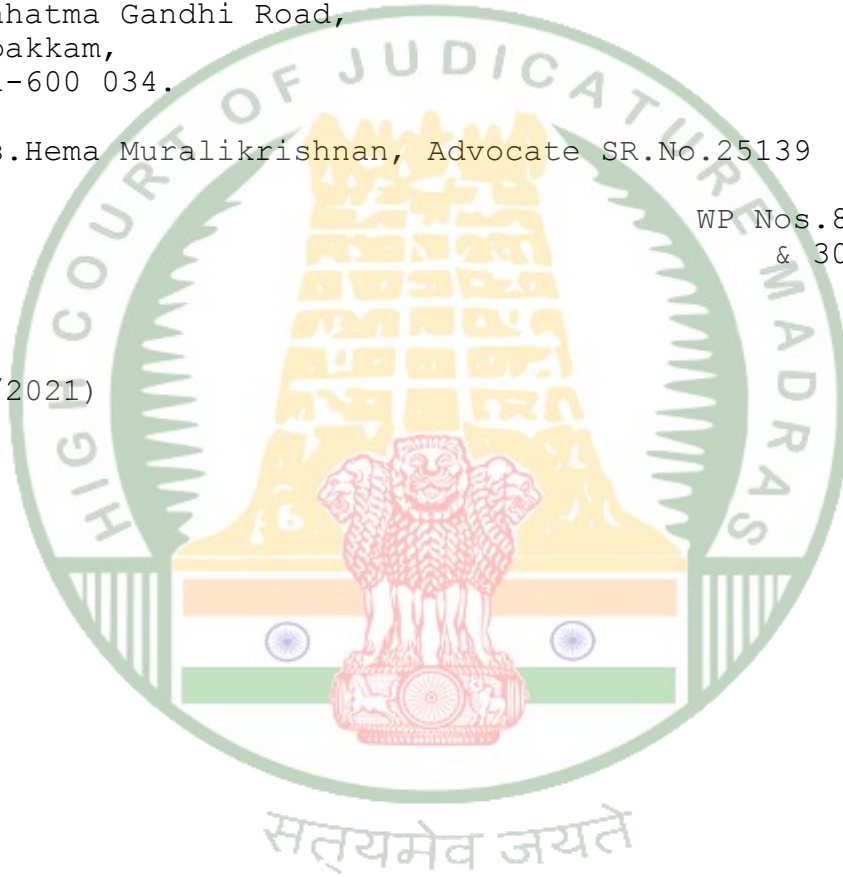
1.The Deputy Commissioner of Income Tax
Company Circle IV (1),
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai-600 034.

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

+1cc to Ms.Hema Muralikrishnan, Advocate SR.No.25139

WP Nos.8171 of 2013
& 30659 of 2014

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



WEB COPY