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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2021

CORAM

The Honourable Mr. Justice T.S.SIVAGNANAM  
and

The Honourable Mr. Justice SATHI KUMAR SUKUMARA KURUP

|                                    |                                      |
|------------------------------------|--------------------------------------|
| Judgment Reserved On<br>17.08.2021 | Judgment Pronounced On<br>01.09.2021 |
|------------------------------------|--------------------------------------|

W.A.Nos.1911, 1922 and 1987 of 2021  
and C.M.P.Nos.12403, 12537, 12469, 12472,  
12811 and 12817 of 2021

W.A.No.1911 of 2021

M/s.Thirveni Earthmovers Pvt. Ltd.,  
#22/110, Greenways Raod, Fairlands,  
Salem - 636 016.  
Represented by its Executive Director  
and Authorised Signatory  
Sri.B.Karthikeyan

...Appellant/Petitioner

-vs-

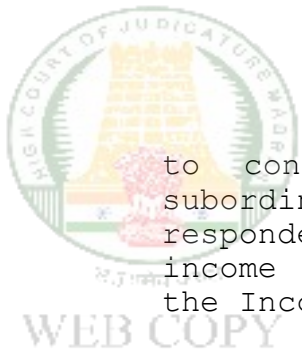
1. The Assistant Commissioner of  
Income Tax, Central Circle,  
#3, Gandhi Road, Salem - 636 007.
2. The Deputy Commissioner of  
Income Tax, Central Circle,  
#3, Gandhi Road, Salem - 636 007.
3. The Deputy Commissioner of  
Income Tax, Circle I,  
#3, Gandhi Road, Salem - 636 007.

...Respondents

Appeal under Clause 15 of Letters Patent against the order  
dated 26.04.2021 made in W.P.No.10846 of 2016.

Prayer in W.P.No.10846 of 2016

Writ Petition filed under Article 226 of the Constitution of  
India to Call for the entire records of the 1st respondent  
contained in its impugned order bearing proceedings No.  
AABCT6759R/2008-09 dated 23.02.2016, and to quash the same and



to consequently forbear the respondents or any of their subordinates, agents or any other person claiming under the respondents, from in any manner re-assessing the petitioner income for the assessment year 2008-2009 under section 147 of the Income Tax Act, 1961

W.A.Nos.1922 and 1987 of 2021

M/s.Thirveni Earthmovers Pvt. Ltd.,  
#22/110, Greenways Raod, Fairlands,  
Salem - 636 016.  
Represented by its Executive Director  
and Authorised Signatory  
Sri.B.Karthikeyan

...Appellant/Petitioner

-vs-

The Assistant Commissioner of  
Income Tax, Central Circle,  
#3, Gandhi Road, Salem - 636 007.

...Respondent/Respondent

Appeals under Clause 15 of Letters Patent against the common order dated 26.04.2021 made in W.P.Nos.38185 and 38186 of 2016 respectively.

Prayer in W.P.Nos.38185 of 2016

Writ Petition filed under Article 226 of the Constitution of India to Call for the entire records of the respondent contained in its impugned order bearing Proceedings No. AABCT6759R/2009-10 dated 13.10.2016, and to quash the same and to consequently forbear the respondent or any of its superiors, subordinates, agents or any other person claiming under or above the respondent, from in any manner re-assessing the petitioner income for the assessment year 2009-10 under section 147 for the Income Tax Act, 1961

Prayer in W.P.Nos.38186 of 2016

Writ Petition filed under Article 226 of the Constitution of India to Call for the entire records of the respondent contained in its impugned order bearing Proceedings No. AABCT6759R/2010-11 dated 13.10.2016, and to quash the same and to consequently forbear the respondent or any of its superiors, subordinates, agents or any other person claiming under or above the respondent, from in any manner re-assessing the petitioner income for the assessment year 2010-11 under section 147 for the Income Tax Act, 1961



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For Appellant : Mr.R.V.Easwar,  
(In all Appeals) Senior Counsel  
for Mr.Suhrith Parthasarathy

For Respondents : Mr.A.P.Srinivas  
(In all Appeals) Senior Standing Counsel

#### COMMON JUDGMENT

T.S.Sivagnanam, J.

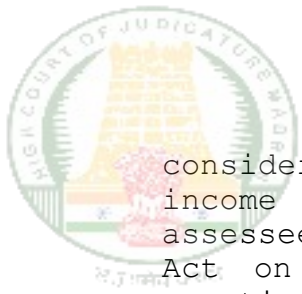
The writ petitioner in W.P.Nos.10846/2016, 38185/2016 and 38186/2016 is the appellant before us.

2.The prayer sought for in W.P.No.10846 of 2016 is for issuance of writ of Certiorarified Mandamus to quash the order passed by the first respondent dated 23.02.2016, by which the objections raised by the appellant, objecting to the reopening of the assessment under Section 147 of the Income Tax Act, 1961 ['the Act' for brevity] was disposed of and for a consequential direction to forbear the respondent from in any manner re-assessing the appellant's income for the assessment year 2008-09 under Section 147 of the Act.

3.Writ Appeal Nos.1922/2021 and 1987/2021 are directed against the common order dated 26.04.2021 in W.P.Nos.38185/2016 and 38186/2016. The common prayer in both the writ petitions is to quash the order passed by the first respondent dated 13.10.2016 by which the objections raised by the appellant against the reopening of the assessment under Section 147 of the Act for the assessment year 2009-2010 and 2010-2011 were disposed of by the respondent. The writ petitions have been dismissed by two separate orders both dated 26.04.2021.

4.Since the petitioner in all the three writ petitions is one and the same, namely, M/s.Thiriveni Earthmovers Private Limited, the facts as stated in W.P.No.10846/2016 are taken for consideration. In this judgment, the appellant shall be referred to as the assessee and the respondent as the revenue.

5.The assessee is a Company registered under the Companies Act, engaged in the business of iron ore mining services, transportation and handling of iron ore and limestone, quarrying of blue metal boulders and sale of blue metals. The assessee filed its return of income for the assessment year under



consideration AY 2008-2009 on 30.09.2008 declaring a total income of Rs.117,55,95,560/-, the return was processed and the assessee was issued an intimation under Section 143(1) of the Act on 23.09.2009. Subsequently the case was selected for scrutiny and notice under Section 143(2) of the Act dated 23.09.2009 was issued. The income tax was computed at higher rate resulting in a total tax demand of Rs.38,82,78,150/- after credit for tax deducted at source given for Rs.8,51,06,508/- as against the TDS of Rs.9,04,19,747/- claimed by the assessee. The assessee filed an application under Section 154 of the Act on 05.04.2010 to rectify the assessment. The rectification order was passed on 28.12.2010 and a revised demand for Rs.38,05,14,782/- was issued. Subsequently, assessment was completed under Section 143(3) of the Act by order dated 31.12.2010. In the said order of assessment, TDS credit was given to the tune of Rs.8,51,06,508/- as against the TDS credit claimed by the assessee to the tune of Rs.9,04,19,747/-. Therefore, the assessee filed an application under Section 154 of the Act on 20.07.2011 on the ground that once TDS amount of Rs.55,65,195/- had not been given credit for was taken into account, the levy of interest under Section 234B of the Act would be reduced and there would be no further income tax payable by the assessee.

6.While the application under Section 154 of the Act was pending, the Assessing Officer, the third respondent issued notice dated 20.02.2015 under Section 148 of the Act to reopen the assessment for the assessment year 2008-2009 on the ground that income had escaped assessment. The said notice was issued after four years after the end of the relevant assessment year, namely, 2008-2009. The assessee by letter dated 21.04.2015 requested the third respondent to furnish the reasons for reopening. On 12.10.2015, the second respondent to whose file the case was transferred furnished the reasons for reopening. The second respondent stated that it had been seen from the Form 26As downloaded that the petitioner was in receipt of Rs.419,47,44,777/- as opposed to the total amount credited to the P&L account of Rs.387,30,50,376/- and that therefore the Deputy Commissioner of Income Tax had a reason to believe that income of Rs.41,59,51,722/- had escaped assessment within the meaning of Section 147 of the Act, that the assessee had claimed less TDS credit in respect of other deductors corresponding to the TDS of Rs.36,46,935/- claimed by the assessee in its rectification application dated 20.07.2011 and the assessee has suppressed income of Rs.2,82,22,870/- on the basis that the assessee had not claimed TDS credit of Rs.6,39,531/- corresponding to the aforesaid income in the return of income.



7.The assessee would contend that the second respondent failed to show any evidence of any failure on the part of the assessee to fully and truly disclose all materials. The assessee filed their objections to the reopening on 22.11.2015, among other things, submitting that the reopening was completely untenable as complete information was available with the Assessing Officer even at the time of scrutiny under Section 143 (3) of the Act and the reopening was contrary to law. The assessee contended that they had made full and true disclosure during the scrutiny assessment, the re-assessment cannot be initiated after four years from the end of the relevant assessment year as per the first Proviso to Section 147 of the Act. It is further contended that there is no tangible material to come to the conclusion that the income has escaped assessment, reopening is based on mere change of opening, reopening is based on assumptions and surmises, on merits the notice under Section 148 is illegal and the notice under Section 148 was issued with an intention of initiating a roving and fishing enquiry. The assessee pointed out that the allegation that they had not disclosed the entire contractual receipts as shown in Form 26AS is incorrect as the said Form is essentially a consolidated statement, i.e. with the Income Tax Department and comprises of details of tax paid and deposited in the Department including any TDS deposited on behalf of the assessee. The said objections were rejected and an order to the said effect was passed on 23.02.2016 which was impugned in the writ petition.

8.The facts in the other two writ petitions which order is subject matter of W.A.Nos.1922 and 1987 of 2021 are more or less similar except that they are for the assessment years 2009-2010 and 2010-2011 and in those writ petitions, the challenge was to the rejection of the objections filed by the assessee for reopening of the assessment.

9.Since the appellant is before us questioning the reopening of the assessment on legal grounds, it may not be necessary to have a threadbare analysis of the facts and figures and to the extent required, we shall refer to the facts and figures as we proceed to decide the cases on merits.

10.The learned Single Bench opined that if there are additional materials available which satisfies the requirements of Section 147 of the Act, then it is sufficient for the Assessing Officer to have reason to believe for the purposes of reopening of assessment. It was further observed that from Form 26AS, it is seen that the assessee was in receipt of income of



Rs.419,47,44,777/-, whereas the total amount credited to the Profit and Loss account is Rs.387,30,50,376/- and in view of the large discrepancy and mismatch, the Assessing Officer had reason to believe that income of Rs.41,59,51,722/- has escaped assessment within the meaning of Section 147 of the Act due to the failure on the part of the assessee to disclose all and true material facts necessary for the assessment. Further, the Court observed that the rectification application dated 20.07.2011 submitted by the assessee was considered by the Assessing Officer and the information was verified and it was found that there was huge mismatch in the receipts appearing in Form 26AS vis-a-vis receipts credited in P&L account. Therefore, the Assessing Officer had reason to believe that the income of the assessee has escaped assessment and decided to reopen the assessment. Further, the learned Writ Court took note of the fact that the Assessing Officer relied on Justice MB Shah Commission report which was constituted by the Governments of India to enquire into the cases of illegal mining in the State of Odisha. The Court pointed out that the assessee was a raising Contractor employed by one KJS Ahulwalia, who was a lessee whose name finds place in the Commission's report. Noting the materials available on record, the Court opined that there are sufficient reasons to believe that there is escapement of income and the sufficiency of reasons cannot be gone into by the Court in a writ proceedings under Article 226 of the Constitution of India and those are all matters to be adjudicated before the competent authority and therefore, on the grounds raised in the writ petition, there is no reason to interfere with the re-assessment proceedings.

11. In so far as W.P.Nos.38185/2016 and 38186/2016, the assessee contended that the allegation that one M/s.Indrani Patnaik has illegally removed 3,04,568.175 Mts of iron ore with the assistance of the assessee is only a surmise and not based on any objective reasons, there is no embargo whatsoever between the alleged dispatch by the mine owner and the assessee being a raising contractor does not have power to dispatch the stock which belongs to the mine owner and they do not maintain the books of accounts pertaining to the production and dispatch of iron ore. The assessee contended that the Mines Tribunal had granted the relief to the mine owner and the entire proceedings were quashed on 16.01.2012 and prior to issuance of notice under Section 148 of the Act. The said order was put to challenge by the State of Odisha in W.P.No.10219 of 2012 before the High Court of Odisha which was dismissed on 08.08.2016. Therefore, the assessee contended that the entire issue which is subject matter of reopening is non-est in law and there cannot be any reason to believe that income has escaped assessment for the assessment years under consideration, namely, 2009-2010 and 2010-2011.



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12.The revenue resisted the prayer sought for in the writ petition stating that the Department came to be in possession of new issues emanating from Justice MB Shah Commission report on illegal mining in the State of Odisha and on examination of the report, it reveal that based upon vigilance enquiry by the State Government, the Commission noted that there was huge shortage of stock valued at Rs.182,74,09,050/- and it gave a finding that the lessee M/s.Indirani Patnaik with the help of the assessee, the raising contractor had clandestinely disposed of the material without any records for which royalty and sales tax was not paid. It was further contended by the revenue that the vigilance inspection was conducted on 24.09.2009 and the period for which production and dispatches analysed and shortage of stock arrived was from May 2008 to September 2009 relevant to the assessment years 2009-2010 and 2010-2011. Further, as per the work order dated 24.02.2008 given by M/s.Indrani Patnaik to the assessee, they were entitled for 35.8% of the net value as its share of income on the value of the ore dispatched which comes to Rs.65.2 Crores for the period covered under the report. Thus, it was contended that on receipt of new material based on the Commission's report, the Assessing Officer had reason to believe that there was escapement of income and thus initiated proceedings under Section 147 of the Act.

13.Further, it was contended that there was failure on the part of the assessee to disclose fully and truly all materials as envisaged in Section 147 of the Act and the assessment was validly reopened. There are fresh tangible material and there are enough reasons which have been set out for reopening the assessment as contained in the orders which were impugned in the writ petitions. With regard to the writ petition filed by the State of Odisha challenging the order of the Mines Tribunal, the Court pointed out that what was challenged in the writ petition is an order dated 16.01.2012 passed by the revisional authority under Section 30 of the Mines and Minerals [Development and Regulation] Act, 1957 and admittedly the assessee was not a party to the proceedings and the writ proceedings were conducted with reference to the issues in an independent manner and the materials relied on by the revenue for reopening the assessment has not been adjudicated by the High Court in the said writ petition. Further, the Court pointed out that even if there were certain observations made in the order passed by the High Court of Odisha which would enure in favour of the assessee, the assess has to place all facts and circumstances before the Assessing Officer and participate in the re-assessment proceedings. The discrepancy with regard to the TDS was also pointed out and the Court came to the conclusion that when materials are available on record, the Assessing Officer should allowed to proceed with the reopening proceedings and



accordingly held that there are no grounds to interfere with the reopening of the assessment.

14. Mr. R. V. Easwar, learned senior counsel assisted by Mr. Suhrit Parthasarathy, learned counsel for the appellant submitted that the reopening proceedings do not satisfy the two conditions under Section 147 of the Act, namely, (a) that the Assessing Officer had reason to believe that income has escaped assessment and (b) such escapement was due to the omission or failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment for the relevant year. The facts with regard to the scrutiny assessment which we have had set out in the preceding paragraphs were elaborated upon by the learned senior counsel. It is further submitted that Section 147 of the Act is triggered only if the Assessing Officer had "reason to believe" that income chargeable to tax had escaped assessment and in the absence of the same, the entire re-assessment proceedings will be void. Referring to the Constitution Bench judgment of the Hon'ble Supreme Court in the case of Muthiah vs. CIT [1956 29 ITR 390], it is submitted that the expression 'reason to believe' is distinguishable from the expression 'reason to suspect' and precisely the Assessing Officer has done so and therefore, the reopening is illegal.

15. With regard to the TDS, it was submitted that the reopening is sought to be done on the basis of Form 26AS and the report of the Justice MB Shah Commission. The Form 26AS was available with the Assessing Officer during the original assessment proceedings and it was based on the same, the Assessing Officer granted TDS credit to a certain extent as against the TDS credit claimed by the assessee. Therefore, when the Assessing Officer has acted on the basis of Form 26AS available during the assessment proceedings, the same Form 26AS cannot form the basis for reopening under Section 147 of the Act. In so far as Justice MB Shah Commission's report is concerned, the assessee is neither a party nor referred to in the said report and nothing has been independently brought out to link the assessee to the alleged excess production by KJS Ahulwalia. It is submitted that though the assessee has given a detailed explanation, the same was brushed aside by the Assessing Officer while rejecting the objections to the reopening proceedings. Placing reliance on the decision of the High Court of Bombay in Sesa Sterlite Limited and others vs. Assistant Commissioner of Income Tax and others [(2019) 417 ITR 334 (Bom)], it is submitted that the opinion expressed by Justice MB Shah Commission report cannot qualify as information so as to sustain the belief on the part of the Assessing Officer



of income having escaped assessment. Therefore, the reopening of the assessment was bad in law.

16. Reliance was placed on the decision of the High Court of Delhi in Commissioner of Income Tax vs. Kelvinator India Ltd.. [256 ITR 1] which was confirmed by the Hon'ble Supreme Court. Further, it is submitted that the assessee's books were available with the Assessing Officer at the time of scrutiny assessment and any failure on the part of the Assessing Officer to make due enquiries during the scrutiny does not mean there is a failure on the part of the assessee to make full and true disclosure. To support such proposition, reliance was placed on the decision of the Hon'ble Supreme Court in Gemini Leather Stores vs. ITO [(1975) 100 ITR 1(SC)]. Reliance was also placed on the decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of Calcutta Discounts Company Ltd. vs. ITO [(1961) 41 ITR 191 (SC)]. Similar are the arguments in the other two writ appeals.

17. The learned senior counsel submitted that when the writ petition was pending before the learned Single Bench, the Court noted that the assessee had filed application under Section 154 of the Act as early as on 20.07.2011 and that the disposal of the rectification application will have material ramification in the case in the light of the objections on merits raised by the assessee and direction was issued to the assessee to appear before the Assessing Officer and the Assessing Officer was directed to dispose of the rectification application after hearing the assessee prior to the next date of hearing of the writ petition by order dated 21.10.2019. Subsequently when the case was heard on 19.11.2019, the revenue produced an order under Section 154 of the Act dated 18.01.2013 which in the opinion of the Court did not taken into account the objections raised as it is a computer generated order. Therefore, the Court clarified that the rectification application dated 20.07.2011 be heard and a speaking order be passed by the Assessing Officer in the light of the objections raised on the merits by the assessee in the objections dated 23.11.2015 and the assessee was directed to appear before the Assessing Officer.

18. Subsequently, an order was passed and when the writ petitions were heard on 22.01.2020, the Court noted that two orders have been passed by the Assessing Officer dated 06.12.2019 and 16.01.2020 and it appears that the orders passed by the Court on 21.10.2019 as clarified on 19.11.2019 had not been complied with by the Assessing Officer whereas the revenue



took a stand that the directions have been complied with. The Court therefore observed that since there is some area of doubt as to whether the order has been complied with or not, it gave liberty to obtain suitable clarification from the very same Hon'ble Court which passed the order dated 21.10.2019 and 19.11.2019 and the matter was adjourned. Subsequently another order was passed by the Assessing Officer on 11.02.2020. The interim directions issued in the writ petitions were referred to by the learned senior counsel with a view to impress upon the Court that when the rectification application was pending, there is no occasion for the Assessing Officer to reopen the assessment, more particularly, for the reasons which have been stated to be the basis for the reopening of the assessment. In fact this submission is without prejudice to the other contentions of the assessee that the entire reopening of the assessment was bad in law.

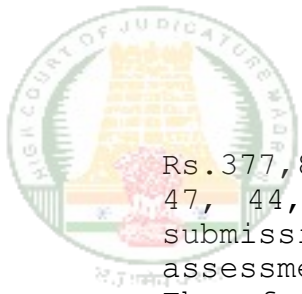
19.The learned senior counsel referred to the return of income filed by the assessee for the assessment year 2008-2009 in particular Column No.15 which relates to taxes paid and has drawn our attention to paragraph (b) of Column No.15 which deals with TDS and referred to Schedule TDS 2 which provides for the entire details which were appended to the return of income filed by the assessee. These aspects were referred to, to substantiate the contention that all materials were fully and truly disclosed by the assessee at the time of filing the return and the scrutiny assessment was done on the same material, reopening could not have been made. The learned senior counsel referred to the rectification application dated 05.04.2010 and the order rectifying assessment dated 28.12.2010 and thereafter the second rectification application dated 20.07.2011 which was not disposed of and which was noted by the learned Single Bench when the writ petition was pending and interim directions were issued on 21.10.2019. Next, the learned senior counsel has extensively referred to the reasons for reopening as communicated by the assessee vide communication dated 12.10.2015. It is submitted that a reading of the reasons for reopening will clearly show that it is based upon the details in Form 26AS which was available with the Assessing Officer at the time of scrutiny assessment and the same could not have been the reason for reopening. With the above submission, the learned senior counsel sought for setting aside the reopening of the assessment for all the three assessment years.

20.Mr.A.P.Srinivas, learned senior standing counsel submitted that mere production of books of accounts by the assessee cannot tantamount to full and true disclosure as per the explanation to Proviso to Section 147 of the Act. With



regard to the TDS credit, the same is given only as per the credit available in the Online Tax Accounting System [OLTAS] which reflects the correct TDS available to the assessee at the given point of time. It is submitted that the provisions of Section 147 of the Act prior to the amendment and post-amendment are different and the conditions that were present earlier are no longer required to be fulfilled post amendment of the said provision. Further, Explanation 1 to third Proviso is abundantly clear to indicate that mere production before the Assessing Officer, the Accounts books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure. Further, it is submitted that the assessee has spelt out as to what opinion was formed by the Assessing Officer initially and how the reasons furnished shown change of opinion. The records show that no opinion was formed by the Assessing Officer during the original assessment proceedings on the issues which have been mentioned in the reasons recorded in the reopening of assessment. In other words, it is submitted no opinion had been formed by the Assessing Officer during the course of original assessment on the issues under consideration. It is further submitted that the information in Form 26AS which is a statement of TDS deducted and deposited by itself was not used as a reason for reopening of the assessment. Rather the information was matched with the details provided by the assessee in his return of income and accompanying statements/documents and on observing that certain receipts of income were not accounted by the assessee, the Assessing Officer formed the belief that income chargeable to tax had escaped assessment and therefore, has reopened the assessment by issuing notice under Section 148 of the Act. Further, it is submitted that this observation was made from the rectification application filed by the assessee on 20.07.2011 claiming additional credit for tax deduction, albeit corresponding income receipts had not appeared in the P&L account filed by the assessee along with the return of income.

21. Elaborating on the issue regarding the TDS, it is submitted that there is a huge difference between the data reflected in Form 26AS and the assessee's statement. Form 26AS is constantly updated from time to time and the figures may increase or decrease based on the TDS statement filed by the deductors. It is further submitted that though the amount of TDS credited in the assessee's account may vary according to the e-TDS statement filed by the deductor, the amount of gross receipts received/receivable by the assessee during the financial year is available with the assessee as it follows Mercantile System of Accounting. It is submitted that the assessee has credited in his P&L Account an income of



Rs.377,87,93,055/- only out of the total receipts of Rs.419,47,44,777/- and there is a huge difference in the assessee's submission before the Assessing Officer during the course of assessment and the figures which were reflected in Form 26AS. Therefore, it is submitted that the assessee did not submit the correct figures before the Assessing Officer and the facts came to the knowledge when the assessee filed the rectification application and Form 26AS was downloaded by the Assessing Officer. Thus, it is clear that there is failure on the part of the assessee to disclose fully and truly all materials before the Assessing Officer and the reopening of the assessment is valid.

22.The learned counsel had referred to the relevant details appearing in Form 26AS which has been extracted in ground (f) of the counter affidavit to point out that there is a huge mismatch in receipts appearing in Form 26AS vis-a-vis the receipts credited in the P&L Account. Countering the submissions of the learned senior counsel that Form 26AS was very much available before the Assessing Officer and based on which TDS credit was given during the course of assessment, it is submitted that the issue for reopening of the assessment is not the TDS credit but the gross receipts received by the assessee and the assessee had not disclosed all the receipts/receivables in his financial statements which they are bound to do, more so because they are following Mercantile System of Accounting, wherein all receipts/receivables are recorded in the financial year itself. Therefore, there should not be any deviation in reporting of the gross receipts as this figure is very much available with the assessee and if the assessee had disclosed fully and truly all material facts before the Assessing Officer, there would not be any deviation between its financial statement and Form 26AS. Further, it is submitted that as per Justice MB Shah Commission report, a tabulated statement has been given which lists out 146 lessees who were involved in illegal and excess production of iron ore during the period 2000-2001 to 2009-2010 and KJS Ahulwalia and other persons are lessees who employed the assessee as raising contractor. The assessee is doing extraction work for the lessee, the contract charges correspond to the value of the excess production was believed to have been suppressed and hence, the Assessing Officer has rightly reopened the assessment. The information in Form 26AS about the receipts of income found out from the rectification application filed subsequent to the assessment proceedings led to the discovery of non-disclosure of receipts in the P&L Account which is a tangible material and hence, exercise of power under Section 147 of the Act is valid. On the above grounds, the learned senior standing counsel sought to sustain the order passed by the learned Writ Court.



23. We have elaborately heard the learned senior counsel appearing for the appellant and the learned senior standing counsel appearing for the respondents.

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24. We have set out the relevant facts to demonstrate as to how the proceedings have reached the present stage where the objections raised by the assessee to the reopening of assessment have been rejected. The sum and substance of the contentions raised by the assessee is that the TDS issue could not have been the basis for reopening the assessment as Form 26AS was very much available at the time of scrutiny assessment and based upon the said Form, TDS credit was granted to the assessee and based on the very same material, the Assessing Officer is not justified in reopening the proceedings. Secondly it is contended that there is no fresh tangible material available with the Assessing Officer to reopen the assessment and all that the Assessing Officer falls back on is the Form 26AS which cannot be done. Therefore, the submission is that the re-assessment proposed is based on change of opinion and it is not based upon the facts but merely on assumptions and presumptions. So far as the effect of Justice MB Shah Commission report is concerned, the assessee would state that they are not party to the said proceedings and in any event, the revisional authority has granted full relief to the lessees and such order passed has been affirmed as the writ petition filed by the State of Odisha has been dismissed by the High Court of Odisha.

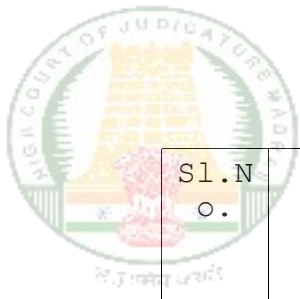
25. After carefully going through the material facts, we find that the case as projected by the assessee does not merit acceptance. We support this conclusion with the following reasons. Admittedly, the TDS issue cropped up only after the assessee filed a rectification application under Section 154 of the Act after the assessment was completed. Therefore, it needs to be examined as to whether the details as contained in Form 26AS as filed by the assessee along with the return of income was the sole reason for reopening the assessment. When we look into the facts we find that after the rectification application was filed, the details in Form 26AS was downloaded by the Assessing Officer and while examining the same, they found that there was mismatch of TDS and also the receipts which form the income of the assessee. This undoubtedly is a tangible material to form an opinion that the income has escaped assessment. It is seen that from Form 26AS, the Assessing Officer was able to ascertain that the assessee was in receipt of Rs.419,47,44777 whereas total amount credited in P&L account is Rs.387,30,50,376. The break-up details were noted and it was pointed out that the income mentioned from sale of boulders, transportation receipts, trailer hire receipts and profit on



sale of assets would not form part of receipts appearing in Form 26AS as tax deduction at source is not required on such receipts. Further the assessee has credited in the P&L account an income of Rs.377,87,93,055/- only out of the total receipts of Rs.419,47,44,777/- as appearing in Form 26AS. Thus the Assessing Officer while recording reasons for reopening stated that the assessee has suppressed income of Rs.41,59,51,722/- by not crediting entire receipts as appearing in Form 26AS. Further, the Assessing Officer recorded that even if the entire receipts of Rs.387,30,50,376/- credited in the P&L Account has suffered TDS which is much lesser than the amount appearing in Form 26AS which is Rs.419,47,44,777/-. The assessee filed rectification application dated 20.07.2011 wherein they stated that they have received contract payment of Rs.12,70,89,680/- from Tata Steel Ltd. and claimed corresponding TDS of Rs.28,79,852/-. The Assessing Officer pointed out that as per Form 26AS the assessee is in receipt of contract charges of Rs.1,66,78,156/- only and corresponding TDS of Rs.3,77,927/-.

26.The Assessing Officer has tabulated the parties from whom they are stated to have received contract charges, whose names do not find place in Form 26AS. Such tabulated statement is as follows:

| Sl.N<br>o. | Deductor                     | As per assessee's<br>submission vide<br>rectification<br>application dated<br>20.07.2011 |                  | As per 26AS        |                  |
|------------|------------------------------|------------------------------------------------------------------------------------------|------------------|--------------------|------------------|
|            |                              | Amount<br>Credited                                                                       | Amount of<br>TDS | Amount<br>Credited | Amount<br>of TDS |
| 1.         | Tata Steel Limited           | 127089680                                                                                | 2879852          | 16678156           | 377927           |
| 2.         | Topworth Steel<br>Private    | 18047097                                                                                 | 408948           | Nil                |                  |
| 3.         | Rajesh Jaiswal &<br>Co.      | 4472001                                                                                  | 101336           | Nil                |                  |
| 4.         | Rashmi Cement<br>Limited     | 16852646                                                                                 | 381391           | Nil                |                  |
| 5.         | Shree Virangana<br>Steels    | 5818292                                                                                  | 131843           | Nil                |                  |
| 6.         | Sunflag Iron &<br>Steel Ltd. | 5102596                                                                                  | 105113           | Nil                |                  |
| 7.         | Tata Sponge Iron<br>Ltd.     | 722341                                                                                   | 16369            | Nil                |                  |



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| Sl.N<br>o. | Deductor | As per assessee's<br>submission vide<br>rectification<br>application dated<br>20.07.2011 |                  | As per 26AS        |                  |
|------------|----------|------------------------------------------------------------------------------------------|------------------|--------------------|------------------|
|            |          | Amount<br>Credited                                                                       | Amount of<br>TDS | Amount<br>Credited | Amount<br>of TDS |
| Total      |          | 17,81,04,653                                                                             | 40,24,852        |                    |                  |

27. On receiving such details, the Assessing Officer pointed out that there is a huge mismatch in receipts appearing in Form 26AS vis-a-vis receipts credited in P&L account. The receipts and TDS from the above mentioned parties were not appearing in Form 26AS whereas it was claimed by the assessee in the rectification application dated 20.07.2011. The Assessing Officer has recorded that the assessee has claimed less TDS in respect of some other deductors and thereby suppressed corresponding receipts to that extent and during the assessment proceedings, the assessee did not produce the accurate particulars of income and TDS claimed and it is only after the rectification application was filed the issue cropped up. Further the Assessing Officer has noted from the rectification application that the assessee has claimed TDS of Rs.6,39,531/- which was neither claimed in the return under Section 143(1) nor during the assessment proceedings. The details were tabulated in the following manner:

| Deductors Name                                       | Deductors<br>TAN | Nature of<br>Payment | Amount<br>Credited/Paid | Tax Deducted |
|------------------------------------------------------|------------------|----------------------|-------------------------|--------------|
| RAJENDRAN<br>VADUGAPATTI<br>CHENDIL-S<br>S Logistics | CMBRO4973D       | Contract<br>Payment  | 11541112                | 261522       |
| Tata Steel Ltd.                                      | RCHTO0148B       | Contract<br>Payment  | 16681758                | 378009       |
| Total                                                |                  |                      | Rs.2,82,22,870          | Rs.6,39,531  |

28. Thus, the Assessing Officer recorded that the assessee never disclosed and claimed the above TDS during the assessment proceedings though he had opportunity to do so and therefore, deliberately concealed the particulars during assessment proceedings. Therefore, we are fully satisfied that the issue which is now subject matter of the reopening was never discussed during the original assessment proceedings and no opinion was formed by the Assessing Officer during the original assessment



proceedings on this issue. In fact, the issue cropped up only after the assessee filed the rectification application. Therefore, the contention of the assessee that the reopening is a case of change of opinion and based on surmises and conjectures has to be outrightly rejected.

29. Next we consider as to what would be the effect of the report of Justice MB Shah Commission. The assessee seeks to wriggle out from the rigor of the said report by contending that they are only a raising contractor, they are not party to the proceedings which were subject matter of reference to the Commission. Admittedly, the lessee who had awarded the raising contract to the assessee was a party to the subject matter which was referred to the Enquiry Commission. The matter concerned illegal mining in the State of Odisha and there were 146 lessees who were involved in the illegal mining and excess production of iron ore during 2000-2001 to 2009-2010. Though the assessee might not have been party to the subject which was probed by the Commission, the admitted fact is that they were a raising contractor for the lessee whose mining activities were subject matter of scrutiny by the enquiry commission. The revisional authority under the Mines and Minerals [Development and Regulation] Act, 1957 appears to have passed an order in favour of the lessees and the State of Odisha was unsuccessful in the challenge to the said order of the revisional authority as the writ petition filed by the State was dismissed.

30. The writ petition filed by the State of Odisha was dismissed on the technical ground. In any event, it is too early for this Court to rule on the effect on the judgment of State of Odisha qua the assessee and undoubtedly this is a matter which is required to be adjudicated on facts. The specific stand of the revenue is that the assessee who was a raising contractor engaged for extraction of iron ore by the lessee, the contract charges corresponding to the value of the excess production has been believed to have been suppressed. This aspect has to be gone into in the re-assessment proceedings. Therefore, we are of the clear view that the assessee has not made full and true disclosure of all material facts during the original assessment, the reopening of the assessment was not based on the change of opinion but the facts which emanated after the rectification application was filed by the assessee and it is incorrect on the part of the assessee to state that the reopening of the original assessment was on assumptions and presumptions. The reliance placed on the interim directions which were issued during the pendency of the writ petitions is of little avail as the the main writ petitions have been dismissed which is subject matter of challenge before



us in these appeals. Therefore, the assessee cannot be heard to say that they can advance their case based on certain interim directions issued in the writ petitions when the cases were pending before the learned Single Bench. Thus, for all the above reasons, we hold that the reopening proceedings have been validly done and the assessee should co-operate in the re-assessment to be done by the Assessing Officer.

31. In the result, we find no ground to interfere with the reopening of the assessment in all these cases. Accordingly, the writ appeals fail and are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

cse

To

1. The Assistant Commissioner of  
Income Tax, Central Circle,  
#3, Gandhi Road, Salem - 636 007.
2. The Deputy Commissioner of  
Income Tax, Central Circle,  
#3, Gandhi Road, Salem - 636 007.
3. The Deputy Commissioner of  
Income Tax, Circle I,  
#3, Gandhi Road, Salem - 636 007.

+3ccs to M/s.Arun Karthik Mohan, Advocate, Sr.43814,43815,43816  
+1 cc to Mr.A.P.Srinivas, Advocate Sr.No.43883

W.A.Nos.1911, 1922 and 1987 of 2021

NR[co]  
NSK 21/09/2021