IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :30.06.2021

CORAM

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

W.P.No.37563 of 2016
and
W.M.P.No.32189 of 2016

M/s.Vestas Technology R&D Chennai Private Limited,
Represented by its Director – Finance,
Mr.Govindaraj Kolappan
Block A, 8th Floor, Tecci Park,
No.173, Rajiv Gandhi Salai (OMR)
Sholinganallur, Chennai – 600 119. ...Petitioner

Vs.

1.Assistant Commissioner of Income Tax,
Company Circle 3(2)
4th Floor, Wanaparthy Block,
121, Mahatma Gandhi Road,
Chennai – 600 034.

2.Principal Commissioner of Income Tax-3,
4th Floor, Main Building,
121, Mahatma Gandhi Road,
Chennai – 600 034. ... Respondents

PRAYER : Writ Petition filed Under Article 226 of the Constitution of India to issue of Writ of Certiorari, calling for the records on the file of the first respondent and quash the impugned order in AACV8490Q/458-V/2009-10 dated 08.09.2016 along with notice issued by the first respondent under Section 148 of the Act in Pan No.AACV4768P dated 25.01.2016.

For Petitioner : Mr.N.V.Balaji

For Respondents : Mrs.Hema Muralikrishna
Standing Standing Counsel
for Income Tax

O R D E R

The Notice issued under Section 148 of the Income Tax Act dated 25.01.2016 and the order dated 08.09.2016 disposing of the objections filed by the writ petitioner are under challenge in the present writ petition

2. The petitioner is a Private Limited Company, incorporated under the Companies Act, 1956 and is a wholly owned subsidiary of Vestas Wind Systems A/S, a company incorporated in Denmark.

3. The petitioner filed return of income on 29.09.2009, for the Assessment Year 2009 - 10, claiming deduction under Section 10 A of the Act. The Assessing Officer issued notice under Section 143 (2) of the Income Tax Act on 21.09.2010 followed by notice under Section 142 (1) of the Act calling for information. The petitioner submitted all the informations and materials which were scrutinized and considered by the Assessing Officer and original assessment order was passed by the Assessing Officer on 17.04.2013 under Section 143 (3) of the Income Tax Act.

4. While so, surprisingly notice under Section 148 of the Income Tax Act was issued on 25.01.2016. The petitioner vide letter dated 25.02.2016 sought for the reasons for reopening of assessment. The respondents furnished the reasons for reopening of assessment in proceedings dated 29.04.2016. Thereafter on 15.06.2016, the petitioner submitted its objections in detail and the said objections were disposed of by the respondent, vide letter dated 08.09.2016.

5. The learned counsel for the petitioner strenuously contended that there is no reason to believe for reopening of assessment, in view of the fact that the judgment relied on by the Assessing Officer for reopening of assessment is the Tribunal's judgment and the issues as raised in the reasons are decided by the Bombay High Court, in the case of CIT vs. Gem Plus Jewellery India Limited, reported in 2011 330 ITR 175, which reads as follows:

> "On this position, in the present case it cannot be disputed that the net consequence of the dis allowance of the employer's contribution is that the business profits have to that extent been enhanced. There was, as we have already noted, an add back by the Assessing Officer to the income. All profits of the unit of the assessee have been derived from manufacturing activity. The dis allowance of the provident fund / ESIC payments has been made because of the statutory provisions section 43 B in the case of the employee's contribution and section 36 (v) read with section 2 (24) (x) in the case of the employee's contribution which has been deemed to be the income of the assessee. The plain consequence of the dis

allowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the revenue that in computing the deduction under section 10 A the addition made on account of the dis allowance of the provident fund / ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the dis allowance made by the Assessing Officer must follow. The second question shall accordingly, stand answered against the revenue and in favour of the assessee."

6. When the similar issue relating to dis-allowance were decided by the Bombay High Court, there is no reason to rely on the judgment of the Tribunal by invoking Section 147 of the Income Tax Act and thus, the very basis for reopening of assessment is unsustainable and liable to be set aside.

7. The learned counsel for the petitioner further contended that the objections in detail with reference to the materials regarding dis-allowance were dealt with by the Assessing Officer, while passing an original order of assessment. Thus, the objections were not considered nor any findings are given in the impugned order. For all these reasons, the impugned order is liable to be set aside.

8. The learned Senior Standing Counsel appearing for the respondents disputed the said contentions by stating that where principles with reference to the facts are applicable, in relation to the judgment referred by either of the parties, are looked into by the Assessing Officer, while proceeding with the reassessment, this Court cannot go into such disputed facts regarding the materials scrutinized and the informations or details now available with the Assessing Officer for reopening of Assessment. All such details are to be gone into while undertaking the process of reassessment and now it is in the stage of disposing of the objections and therefore, the petitioner has to cooperate for reassessment.

9. This Court is of the considered opinion that the disputed facts and circumstances based on the documents and evidences cannot be adjudicated in a writ proceedings under Article 226 of the Constitution of India. The facts relevant and the principles laid down in a particular judgment are to be considered while adjudication and this Court cannot enter into venture of adjudication of those disputed facts. However, the fact remains that the reasons are communicated and the reasons would show that the expenditures are expressly disallowed under the deeming fiction created by the penal Section of IT Act, on

account of infringement of law. By adding back the same item, the eligible profits got increased by these disallowances, resulting in excess claim. It is well settled principle that the deeming fictions created under any provisions of the IT Act, cannot be imported to a beneficial provision of the Act as held in the case of DCIT vs. Rameshbhai C Prajapati 2013 140 ITO 488 (AHD). Therefore, the above dis allowance is required to be added back to the taxable income.

10. With reference to the above said reasons, various facts, circumstances and intricacies in the documents are to be scrutinized by the Competent Authority and such an exercise cannot be done by the High Court.

11. The disposal of the objections in the impugned order reveals that mere production of account books or other evidence from which material evidence could with due diligence have been discovered by the AO does not necessarily amount to a disclosure within the meaning of the first proviso to Section 147 - “necessary” - 79 ITR 582 (SC). It is to further to be stated here that “It is possible with due diligence the Assessing Officer would have ascertained this fact at the time of original assessment also, but in view of the explanation (1) it does not mean that there was no default on the part of the assessee”. The assessee can not try to take shelter under the exception provided by the above proviso to Sec.147 that where an assessment order u/s 143 (3) has been completed, no action after the expiry of four years from the end of the assessment year can be taken.

12. With the above observations, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Pns

To

1.The Assistant Commissioner of Income Tax,
Company Circle 3(2)
4th Floor, Wanaparthy Block,
121, Mahatma Gandhi Road,
Chennai – 600 034.

2.The Principal Commissioner of Income Tax-3,
4th Floor, Main Building,
121, Mahatma Gandhi Road,
Chennai - 600 034.

+1cc to Ms.Hema Muralikrishnan, Standign Counsel, S.R.No.30123
+1cc to Mr.N.V.Balaji, Advocate, S.R.No.20172

W.P.No.37563 of 2016
and
W.M.P.No.32189 of 2016

UM(CO)
SB(03/08/2021)