

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2021

CORAM

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

W.P.Nos.38185 & 38186 of 2016

and

W.M.P.Nos.32726 to 32729 of 2016

and

W.M.P.Nos.23280 to 23283 of 2017

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

..Petitioner in both W.Ps

vs

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

..Respondent in both W.Ps

Common Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the entire records of the 1st respondent contained in its impugned order bearing Proceedings No.AABCT6759R/2009-10 & Proceedings No.AABCT6759R/2010-11, dated 13.10.2016, 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's income for the assessment year 2009-10 & 2010-11 Under Section 147 of the Income Tax Act, 1961.

For Petitioner : Mr.R.V.Easwar
Senior Counsel
Assisted by M/s.Rubal Bansal and
Mr.Suhrith Parthasarathy

For Respondents : Mr.A.P.Srinivas
Senior Standing counsel
[For Income Tax]

C O M M O N O R D E R

The writs on hand are filed, challenging the proceedings dated 13.10.2016, passed by the Assistant Commissioner of Income Tax, Central Circle, Salem, disposing of the objections raised by the petitioner/assessee against the initiation of action under Section 147 of the Income Tax Act, 1956, with reference to the Assessment Years 2009-10 & 2010-11.

2. The petitioner is a Company, registered under Companies Act, 1956 and it is engaged in business of iron ore mining services, transportation and handling of iron ore and limestone, quarrying of blue metals boulders and sale of blue metals.

3. In respect of W.P.No.38185 of 2016, the petitioner states that, they filed its return of income for the Assessment Year 2009-10 on 29.09.2009, declaring a total income of Rs.136,50,44,330/-. The petitioner's return was processed under Section 143(1) on 31.03.2011 and the petitioner was issued an intimation of the same. The case of the petitioner was selected for scrutiny and a notice was issued under Section 143 (2) of the Income Tax Act dated 19.08.2010 was issued. Thereafter, the assessment order was passed under Section 143(3) of the Act on 14.09.2011. An addition to the tune of Rs.18,94,117/- was made to the petitioner's income, in view of a disallowance under Section 14A of the Act. Accordingly, a notice of demand of a sum of Rs.6,43,810/- dated 14.09.2011 was also issued to the petitioner. Under these circumstances, the respondent issued a notice under Section 148 of the Act dated 25.09.2014, seeking reopening of the petitioner's income tax assessment for the assessment year 2009-10. The reasons for reopening of the assessment as sought for by the petitioner and it was furnished.

4. In respect of W.P.No.38186 of 2016, the petitioner states that, they filed its return of income for the Assessment Year 2010-11 on 29.09.2010, declaring a total income of Rs.174,37,64,170/-. The petitioner's return was processed and the petitioner was issued an intimation of the same. The case of the petitioner was selected for scrutiny and a notice was issued under Section 143 (2) of the Income Tax Act dated 29.08.2011 was issued. Thereafter, the assessment order was passed under Section 143(3) of the Act on 18.12.2012. An addition to the tune of Rs.85,08,293/- was made to the petitioner's income. Accordingly, a notice of demand of a sum of Rs.42,61,760/- dated 18.12.2012 was also issued to the petitioner. Under these circumstances, the respondent issued a notice under Section 148 of the Act dated 26.09.2014, seeking reopening of the petitioner's income tax assessment for the assessment year 2010-11. The reasons for reopening of the assessment as sought for by the petitioner and it was furnished.

5. On 13.04.2016, the petitioner wrote a letter to the respondent, seeking reasons on the basis of which the petitioner's income tax assessment had been reopened by way of the above notice dated 28.03.2016 under Section 148 of the Income Tax Act. The petitioner intimated the respondent that it had already filed its return for the said assessment year electronically, and it had now re-filed the same electronically in response to the respondent's notice on 11.04.2016 under Section 143(2) of the Act. On 06.05.2016, the Joint Commissioner of Income Tax furnished the purported reasons on the basis of which the notice under Section 148 had been issued.

6. The petitioner has stated about MB Shah Commission report in the matter of illegal mining in the State of Odisha. It is contended that the allegation of M/s.Indrani Patnaik had illegally removed 3,04,568.175 Mts of Iron Ore with the help of the petitioner is only a surmise and not based on any objective reasons. There is no link whatsoever brought between the alleged illegal dispatch by the Mine owner. It is contended that the petitioner company, being a raising contractor, does not have power to dispatch the stock, which belongs to the mine owner. The assessee company, in fact, does not maintain the Books of Accounts pertaining to the production and dispatch of Iron Ore. Thus, the very basis for reopening of assessment is untenable and contrary to law.

7. The learned Senior counsel appearing on behalf of the writ petitioner mainly contended that the Income Tax Tribunal has quashed the entire proceedings on 16.01.2012 itself, more specifically, before issuance of notice under Section 148 of the Income Tax Act.

8. The learned Senior counsel contended that the order of the Tribunal was taken by way of a writ petition by the State of Odisha in W.P.No.10219 of 2012, and the High Court of Odisha, dismissed the writ petition on 08.08.2016, confirming the order passed by the Tribunal. Thus, the entire issues are non-est in law and therefore, there cannot be any reason to believe for the purpose of reopening of assessment as far as the Assessment Years 2009-10 & 2010-11 are concerned.

9. The learned Senior counsel relying on the order of the Tribunal, which was confirmed by the High Court in the writ petition, states that there is no escapement of income as such, in view of the orders passed by the Tribunal, which was confirmed by the High Court in order dated 08.08.2016. It is contended that reopening of assessment was initiated after the order passed by the Tribunal and therefore, the respondent has not even considered the findings made by the Tribunal in its

order. Thus, the impugned orders are liable to be set aside.

10. The respondent filed a common counter affidavit, contending that the proceedings initiated for the Assessment Years 2009-10 and 2010-11 was dropped vide letter dated 15.03.2016 as the issues contained in the reasons recorded by the Assessing officer was satisfactorily explained by the assessee.

11. However, the Department came to be in possession of certain new issues emanating from the Hon'ble Justice MB Shah Commission Report on illegal mining in the State of Odisha. Examination of the said report revealed that based on the Vigilance Enquiry Report of the State Government, the Hon'ble Justice MB Shah Commission noted that there was shortage of stock of 3,04,568.175 MT valued at Rs.182,74,09,050/- and gave a finding that the lessee, (M/s.Indrani Patnaik), with the help of the raising contractor M/s.Triveni Earth Movers Private Limited, the assessee, has clandestinely disposed off the material without any records, for which, no Royalty and Sales tax has been paid. The above referred Vigilance Inspection was conducted on 24.09.2009 and the period for which the production & dispatches analyzed and shortage of stock arrived was from May 2008 to September 2009 relevant to Assessment Years 2009-10 & 2010-11. As per the work order dated 24.02.2008 given by M/s.Indrani Patnaik, the raising Contractor, M/s.Thriveni Earth Movers Private Limited was entitled for 35.8% of the net sale value as it's share of income on the above value of ore despatched, which comes to Rs.65.2 Crores for the above period under report.

12. In the above background, it is contended that whether assessment of any other income would be sustainable when no addition is possible on the issue on which the Assessing Officer has reason to believe income chargeable to tax has escaped assessment. In order to support the said contention, the Hon'ble Bombay High Court, in the case of CIT Vs. Jet Airways Limited (331 ITR 236) held that the words "and also" used in Section 147 is conjunctive and cumulative and indicate that reassessment must be with respect to the income for which the Assessing Officer has formed an opinion "and also" in respect of any other income, which comes to his notice subsequently. In view of the Amended proviso under Section 147, the Assessing Officer has wider power to reopen the assessment, if he has reason to believe to do so. The objections raised by the assessee were considered by the Assessing Officer. Thus, the writ petition is liable to be dismissed.

13. The learned Senior standing counsel for the respondent contended that on tracing out new materials based on the MB Shah

Commission report, the Assessing Officer has reason to believe that there is an escape of income and thus, instituted action under Section 147 of the Act. There was a failure on the part of the petitioner to disclose fully and truly all material facts as envisaged in Section 147 of the Income Tax Act, the assessment validly reopened. A fresh tangible materials are identified by the respondent are provided a cause for them to initiate proceedings for reopening of assessment. Thus, in the present case, enough reasons are substantiated by the respondents for the purpose of reopening of assessment and thus, the writ petition is liable to be dismissed.

14. The learned Senior Standing counsel with reference to the orders of the Tribunal, which was confirmed by the High Court, contended that when the Assessing Officer received fresh materials and has reason to believe, there is an escape of income from assessment, then he is empowered to independently go through the details and the materials available on record and further, in the present case, those details and materials adjudicated before the Tribunal and in a writ petition are not connected. However, even if the petitioner claims that it is connected, it is for the petitioner to place all the materials before the Assessing Officer for the purpose of adjudication. Contrarily, the Assessing Officer cannot form an unilateral opinion in respect of the issues adjudicated before the Tribunal and in a writ petition. As far as the reasons for reopening communicated to the petitioner are concerned, the details regarding the new materials identified as well as the discrepancies were categorically stated. However, the learned Senior counsel appearing on behalf of the petitioner contended that all such informations were adjudicated by the Tribunal and the order of the Tribunal was confirmed by the High Court. Thus, there is no cause for reason to believe that there was an escapement of income, so as to reopen the assessment.

15. In this regard, let us now consider the order passed by the High Court of Odisha in W.P.(C).No.10219 of 2012. The writ petition was filed by the State of Odisha against the Government of India. What is challenged in the writ petition was that the order dated 16.01.2012 passed by the Revisional authority under Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957, whereby the order/ notice dated 25.11.2010 passed under Section 21 (5) of the Act 1957 and under Rule 27(5) of the Mineral Concession Rules, 1960 has been quashed, whereby direction for payment of a certain amount for alleged breach of conditions of the mining lease, had been directed by the State Government. Admittedly, the writ petitioner / assessee is not a party to the writ proceedings. The writ proceedings were conducted with reference to the issues in an independent manner and the materials now relied on by the

Department for reopening of the assessment has not been adjudicated by the High Court. High Court has considered the order passed by the Revisional authority under Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957 and the rules and passed an order, dismissing the writ petition filed by the State of Odisha. Perusal of the entire order reveals that, the reasons for dismissing the writ petition cannot be directly connected with the facts and circumstances now relied upon by the Respondent Department for the purpose of reopening of assessment under Section 147 of the Income Tax Act.

16. Even in case, where certain observations made in the order passed by the High Court of Odisha in a writ petition is in favour of the petitioner or in support of the contentions of the petitioner, it is left open to the petitioner to place all such facts, circumstances, orders and findings before the Assessing officer, while undertaking the process of assessment and the same would not constitute a ground for quashing of the initiation of reopening proceedings under Section 147 of the Act. Therefore, the contention of the learned Senior counsel in this regard needs to be rejected and the writ petitioner is at liberty to place all those orders and materials before the Assessing Officer for the purpose of assessment and this Court cannot adjudicate those facts and circumstances decided by the Tribunal and the High Court in a writ petition, as the writ petitioner company itself is not a party to the proceedings nor the issues for reopening raised now form part and parcel of the order passed by the High Court in the writ petition.

17. The reasons for reopening of assessment intimated to the writ petitioner reveals that from revised 26AS details, the assessee company has received contract receipts of Rs.5,78,10,06,904/-, on which, tax at source has been deducted to the tune of Rs.12,54,24,815/-. The assessee company claimed the TDS of Rs.12,41,50,256/-. However, the assessee company credited P & L account as contract receipts and sales for Rs.521,79,70,864/- only. Thus, the assessee has not offered receipts of Rs.56,30,36,040/- for taxation, resulting in escapement of income due to failure on the part of the assessee company to correctly account its income. Thus, the Assessing officer has reason to believe that income of Rs.57,97,88,686/- has escaped assessment within the meaning of Section 147 of the Income Tax Act due to the failure on the part of the assessee company to disclose fully and truly all material facts necessary for its assessment.

18. In the case of Jayaram Paper Mills Limited, Vs. Commissioner of Income Tax, reported in [2010] 191 Taxman 38 (Madras), the High Court of Madras held as follows:

"6. It is now well settled that the term "escaped assessment" includes both non-assessment and under assessment. (see Tax Officer-cum-Regional Transport Officer vs. Durg Transport Company (Pvt) Ltd --1975 (4) SCC 43 and CIT vs. Sun Engineering Works (P) Ltd- 1992(4) SCC 363). In a long line of decisions, the Supreme Court has held that this court, under Article 226 of the Constitution, has power to set aside a notice under section 147 of the Income Tax Act, 1961, if the conditions precedent for the exercise of the jurisdiction do not exist."

19. Therefore, in the presence of materials on record, if the power under Section 147 is invoked by the competent authority, then the authorities competent must be allowed to proceed with the reopening proceedings by following the procedures as contemplated. High Court cannot adjudicate the disputed facts and materials to form an opinion in a writ proceedings. The High Court, under Article 226 of the Constitution of India, is empowered to scrutinize the process, through which, the decision is taken and the reasons and in consonance with the statutory requirements, but not the decision by itself. Thus, the scope of Article 226 of the Constitution of India cannot be expanded for the adjudication of the disputed facts and circumstances with reference to the documents, evidences produced by the respective parties and such an adjudication must be allowed to be done by the competent authorities under the provisions of the Statutes by following the procedures as contemplated and by affording opportunity to the assessee.

20. As in these writ petitions, the respondent could able to establish that sufficient materials are available for the purpose of reopening of assessment for the Assessment Years 2009-10 and 2010-11 and thus, the respondent must be allowed to proceed with the reopening of assessment by following the procedures as contemplated and the writ petitioner is bound to co-operate by defending their case by availing the opportunities to be provided under the Statute.

21. Accordingly, both the writ petitions fail and stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS III)
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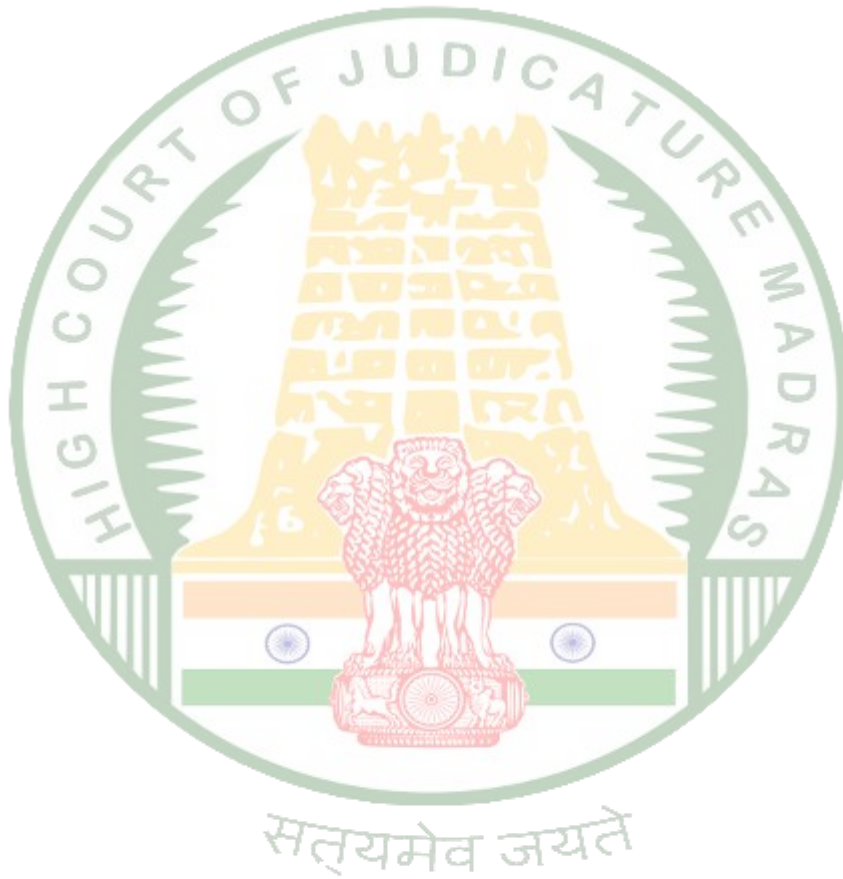
Sub Assistant Registrar

Kak

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

W.P.Nos.38185 & 38186 of 2016

LN(CO)
A.SK (12.07.2021)



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