In the High Court of Judicature at Madras

Dated : 02.9.2021

Coram

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

Writ Appeal No.2174 of 2021 & CMP.No.13747 of 2021

M/s.Thambi Modern Spinning Mills
Ltd., rep.by its Managing Director ...Appellant

Vs

1.The Commissioner of Income Tax,
Income Tax Department, No.3
Gandhi Road, Salem-7.

2.The Assistant Commissioner of
Income Tax, Circle-2, Income Tax
Department, No.3, Gandhi Road,
Salem-7.

3.The Deputy Commissioner of
Income Tax, Circle (1), Income Tax
Department, No.3, Gandhi Road,
Salem-7. ...Respondents

APPEAL under Clause 15 of the Letters Patent against the order dated 23.6.2021 made in W.P.No.8050 of 2015.

Prayer in WP.No.8050/2015: Petition filed under Article 226 of the Constitution of India praying to issue writ of certiorarified mandamus to call for the records of the second respondent to quash the impugned order No.148/Circle-2, SLM/2014-15 dated 02.03.2015 issued in terms of Section 148 of the Income Tax Act, 1961 on the assumption of Jurisdiction U/s.147 of the said Income Tax Act, 1961 for framing Re-assessment in relation to the Assessment year 2007-2008 in PAN:AAACT7676G of the 3rd respondent and further direct the second respondent to drop the proceedings initiated under 147 of the Act for the said Assessment year 2007-08.

For Appellant: Mr.A.S.Sriraman
For Respondents: Mr.A.P.Srinivas, SSC

Judgment was delivered by T.S.SIVAGNANAM,J

We have elaborately heard Mr.A.S.Sriraman, learned counsel appearing for the appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel accepting notice for the respondent.

2. This appeal filed by the writ petitioner – assessee is directed against the order dated 23.6.2021 in W.P.No.8050 of 2015.

3. The said writ petition was filed by the appellant – assessee challenging he order passed by the second respondent dated 02.3.2015, by which, the objections filed by the assessee for the reopening of assessment for the year 2007-08 were rejected and the assumption of jurisdiction by the second respondent was sustained.

4. Before the learned Single Judge, the assessee contended that the reassessment proceedings initiated vide order dated 02.3.2015 after expiry of four years from the end of the assessment year 2007-08 would attract the Proviso under Section 147 of the Income Tax Act, 1961 (for short, the Act) and in the absence of any failure on the part of the assessee in disclosing fully and truly all material facts, the reassessment proceedings were without authority of law. It was further contended that one of the reasons for reopening, as mentioned in the counter affidavit filed in the said writ petition by the second respondent, was that the mere production before the Assessing Officer the books of accounts or other evidence, from which, material evidence could, with due diligence, have been discovered by the Assessing Officer would not necessarily amount to disclosure mentioned in the First Proviso.

5. The appellant – assessee also contended that the issue of taxability of the benefit derived from one time settlement (OTS) was discussed and accepted in the original assessment order dated 27.7.2009. Therefore, the Explanation to Section 147 of the Act had been wrongly invoked by the second respondent and thereby the reassessment order dated 02.3.2015 was liable to be quashed. The assessee further contended that the reopening of assessment on the same ground amounted to change of opinion. It was also the case of the assessee that the reopening of the assessment for taxing the benefit derived from the OTS was completely against the decision of this Court in the case of Iskraemeco Rent Limited Vs. CIT [reported in (2011) 331 ITR 317] and the law laid down in that decision was affirmed by the Hon'ble Supreme Court in the decision in the case of Commissioner Vs. Mahindra & Mahindra Ltd. [reported in (2018) 404 ITR 1].

6. By relying upon the above decisions, the assessee contended that the reopening of assessment was bad in law. It was also contended that the reopening of assessment was beyond four years and that therefore, unless there was a fresh tangible material, the reassessment proceedings could not have been initiated. It was further contended that neither in the reasons for reopening nor in the counter, the Assessing Officer brought out any fresh tangible material for sustaining the reassessment proceedings.

7. It is seen that the appellant filed notes on submission, both on facts as well as pointing out the legal position.

8. In the counter filed by the second respondent in the said writ petition, in respect of the contentions, which were raised by the appellant - assessee and more particularly with regard to the benefit derived from the OTS and as to how it was discussed in the original assessment, there was no denial by the second respondent and the averment in paragraph 9 only touched upon the said issue, which, in fact, was a verbatim extract of the reasons for reopening. The reasons for reopening were extracted by the Assessing Officer in the order dated 02.3.2015, which was impugned in the said writ petition.

9. A perusal of the reasons clearly show that there was no reference to fresh tangible material, which came to the notice of the Assessing Officer to justify reopening. With the above pleadings by the parties and the legal contentions raised by the assessee and the Department, the said writ petition was heard.

10. We find from the order impugned before us that after noting the submissions made on either side, the learned Single Judge proceeded to take note of the scheme under Section 147 of the Act as to how the power has been conferred on the Assessing Officer to reopen the proceedings. Thereafter, the learned Single Judge noted that the Assessing Officer formed an opinion and based on that opinion, the notice under Section 148 of the Act was issued and the procedure laid down by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO [reported in (2003) 259 ITR 19] was followed and therefore, the assessee was bound to participate in the assessment (reassessment) proceedings by defending their case in a manner known to law. Thus, we also find that the legal issue, which was raised by the assessee questioning the assumption of jurisdiction, has not been considered and decided by the learned Single Judge.

11. We have perused the original assessment order dated 27.7.2009 under Section 143(3) of the Act. Before passing such an order, the Assessing Officer had discussed the case with the

assessee and sought for further particulars, which were furnished by the assessee along with their letter dated 19.6.2009.

12. In annexure III, the relevant documents concerning the subject issue had been furnished by the assessee namely with regard to the OTS of loan liability, the assessee submitted that the company had availed several term loans from financial institutions and banks for the purchase of machinery and acquired capital asset, that those loans were not in the nature of trading liability, but were in the nature of capital liability and that the waiver of loan liability was not the waiver of any trading liability and the waiver of capital liability would not become income under Section 41(1) of the Act on the ground of remission or cessation thereof.

13. The assessee placed reliance on the decision of the Bombay High Court in the case of Mahindra & Mahindra Ltd. Vs. CIT [reported in (2003) 261 ITR 501], which held the field at the relevant time. The assessee further contended that the waiver amount of term loan availed by the assessee did not partake the character of assessable income either under Section 28(iv) or under Section 41(1) of the Act. Further, by once again referring to the decision of the Bombay High Court in the case of Mahindra & Mahindra Ltd., it was submitted that the loan had been availed by the assessee towards augmenting their capital and that any amount waived out of the said liability should be only treated as capital receipt not liable for taxation. The assessee also placed reliance on the decision of this Court in the case of CIT Vs. P.Ganesa Chettiar [reported in (1979) 133 ITR 103] and submitted that a debt forgiven or waived cannot constitute an income.

14. The assessee also contended that the term loan from banks was taken long time before and they paid interest for certain period, that there was a separate loan agreement whenever we got the term loan and that the loans availed were used for purchase of machinery and hence, Section 28(iv) of the Act was not applicable. The assessee further contended that they had not claimed any deduction in the assessment (profit and loss account) by taking term loan, that it was not a trading liability and that waiver of the loan could not be taxed under Section 41(1) of the Act. Thus, the assessee submitted that the amounts referable to loans received for purchase of capital assets would not constitute a trading liability and accordingly, Section 41(1) was not attracted.

15. The Assessing Officer, while completing the original assessment, took note of the submissions and in the assessment order dated 27.7.2009 under Section 143(3) of the Act, there was

a discussion in respect of the OTS and the loans, etc. With regard to the hire purchase interest, the Assessing Officer noted that the same was not disallowed in the earlier years under Section 43(B) of the Act and as such, when it was waived, it became income of the assessee since the same was allowed in the earlier years as trading liability. Accordingly, a sum of Rs.40,75,340/- was assessed to tax under Section 41(1) of the Act.

16. Thus, it is clear that the issue, which appears to be the reason for reopening, was, in fact, discussed by the Assessing Officer in the original assessment and it was completed. If such is the factual position, unless and until the Assessing Officer has fresh tangible material brought on record while recording the reasons for reopening, the reopening of assessment, if permitted, would amount to review of the earlier decision, which is impermissible in law. Thus, we are satisfied that the assumption of jurisdiction by the second respondent to reopen the assessment is not sustainable.

17. For all the above reasons, the writ appeal is allowed, the impugned order passed in W.P.No.8050 of 2015 is set aside, W.P.No. 8050 of 2015 is allowed and the order dated 02.3.2015 passed by the second respondent is quashed. No costs. Consequently, the connected CMP is closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

RS

To

1.The Commissioner of Income Tax, Income Tax Department, No.3 Gandhi Road, Salem-7.

2.The Assistant Commissioner of Income Tax, Circle-2, Income Tax Department, No.3, Gandhi Road, Salem-7.

3.The Deputy Commissioner of Income Tax, Circle (1), Income Tax Department, No.3, Gandhi Road, Salem-7.

+1cc to Mr.S.Sridhar, Advocate, S.R.No.44206
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.44516

WA.No.2174 of 2021&
CMP.No.13747 of 2021

NK(CO)
CB(01/11/2021)