IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.8.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

WRIT APPEAL NO.2059 OF 2021
&
CMP.NOS.13052 & 13053 OF 2021

M/s.Financial Software and
Systems Private Limited,
Chennai-20 ...Appellant

Vs

The Deputy/Assistant Commissioner
of Income Tax, Company Circle 2(1),
7th Floor, New Block, 121, Mahatma
Gandhi Road, Chennai-34. ...Respondent

APPEAL under Clause 15 of the Letters Patent against the order dated 30.6.2021 made in W.P.No.9409 of 2016.

Prayer in W.P.No.9409 of 2016:-

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 respondent and quash the impugned proceedings in AAACF2351F/2010-2011 dated 26.02.2016 along with notice issued by the respondent under section 148 of the Act dated 20.03.2015.

For Appellant : Mr.N.V.Balaji
For Respondent: Mr.Prabhu Mukunth Arunkumar, SC

Judgment was delivered by T.S.SIVAGNANAM,J

We have elaborately heard Mr.N.V.Balaji, learned counsel appearing for the appellant and Mr.Prabhu Mukunth Arunkumar, learned Standing Counsel accepting notice to the respondent.

2. This appeal is directed against the order dated 30.6.2021 made in W.P.No.9409 of 2016.

3. The said writ petition was filed by the appellant challenging the notice issued by the respondent - Assessing Officer under Section 148 of the Income Tax Act, 1961 (for brevity, the Act) reopening the assessment for the year 2010-11.

4. At the time when the said writ petition was entertained in the year 2016, an order of interim stay was granted.

5. The said writ petition was dismissed by the impugned order on 30.6.2021 on the sole ground that the reasons stated in the order passed by the Assessing Officer disposing of the objections, filed by the assessee, by order dated 26.2.2016, could be scrutinized for its correctness only in the reassessment proceedings and could not be the subject matter of challenge in a writ proceeding. Aggrieved by such an order, the appellant is before us by way of this appeal.

6. The Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO [reported in (2003) 259 ITR 19], held that reasons for reopening, if sought for by the assessee, have to be furnished and the assessee is entitled to an opportunity to file their objections to the reasons assigned by the Assessing Officer for reopening the assessment, be it within four years or beyond four years and such objections should be disposed of by a speaking order.

7. The Act does not provide for any remedy against the order disposing of the objections by the Assessing Officer and therefore, writ petitions filed under Article 226 of The Constitution of India are held to be maintainable. Hence, the learned Single Judge would be entitled to consider as to whether the reopening was justified and as to whether the parameters, which were required to be fulfilled, while invoking the provisions of Section 147/148 of the Act, stood attracted.

8. This aspect has been brought out very lucidly in several decisions and the earliest of such decisions is that of the Constitution Bench of the Hon'ble Supreme Court in the case of Calcutta Discount Company Ltd. Vs. ITO [reported in (1961) 41 ITR 191]. The sum and substance of the decision of the Constitution Bench is that the Assessing Officer is only entitled to reopen the assessment, but he cannot review an assessment in the sense that there cannot be a rethinking or different opinion on the same material, which was the subject matter of the original assessment proceedings.

9. So far as maintainability of the writ petition is concerned, the Hon'ble Supreme Court in the case of M/s.Whirlpool Corporation Vs. Registrar of Trademarks [reported

in 1998 (8) SCC 1] held that writ petitions are maintainable and that mere existence of an alternate remedy will not, always, be a bar for entertaining writ petitions especially when the orders impugned are questioned on the ground of violation of the principles of natural justice, when there is total lack of jurisdiction and when there is manifestly arbitrariness and illegality in the orders passed by the Authority.

10. Thus, bearing these principles in mind, if we examine the case on hand, the writ petition is maintainable as against the order disposing of the objections and the Court can scrutinize as to whether the reopening was a change of opinion and was there any attempt to review the original order of assessment. However, we agree with the learned Single Judge that there cannot be an adjudication into the merits or roving enquiry into the merits of the assessment to come to a conclusion as to whether the reopening was justified or not. Prima facie, the Assessing Officer should be able to establish that the reopening of assessment was not on account of change of opinion, be it within four years or beyond four years.

11. In the instant case, the Assessing Officer issued the notice dated 20.3.2015 for reopening. The assessee sought for reasons for reopening by a representation dated 06.4.2015. The reasons for reopening were communicated to the assessee by the Assessing Officer vide communication dated 20.8.2015. The reasons are as follows :

> "In this case, during the period pertaining to the assessment year 2010-11, compulsory convertible preference shares were issued for Rs.117.50 crores and advisory fees in this regard was paid to M/s.Veda Corporate Advisors P. Ltd., in connection with this issue. This expenditure is of the nature referred to in Section 35D and hence, is required to be amortized as per Section 35D."

12. The assessee submitted their objections for reopening firstly questioning the jurisdiction to initiate the reassessment proceedings since the details with regard to issue of shares were provided in their submissions before the Assessing Officer at the first instance on 09.11.2012 and the details of expenses relating to issue of shares were provided in their submissions dated 05.12.2012.

13. The assessee placed reliance on several decisions and referred to the decision of the Full Bench of the High Court of Delhi in the case of CIT Vs. Kelvinator of India Ltd.[reported

in (2002) 256 ITR 1] wherein it was held that when a regular order of assessment was passed under Section 143(3) of the Act, a presumption could be raised that such an order had been passed on application of mind and if it was to be held that an order, which had been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to the Authority exercising quasi judicial function to take benefit of his own wrong.

14. The assessee contended that Section 147 of the Act did not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. On the merits of the matter, the assessee submitted as to what was the nature of disclosure made at the time of original assessment, which was completed under Section 143(3) of the Act by order dated 30.3.2013.

15. In terms of the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., the Assessing Officer is bound to dispose of the objections by passing a speaking order, which is purported to be the order dated 26.2.2016 - the subject matter of challenge in the said writ petition.

16. On going through the said order dated 26.2.2016, we find that there is a reference to the First Proviso to Section 147 of the Act, which would not arise in the case of the assessee, as neither in the reasons for reopening, the same has been pointed out nor it was the case of the assessee in their objections. Thus, we find that the observation in the order dated 26.2.2016 in paragraph 2.1 is an outcome of non application of mind. The other paragraphs namely paragraphs 3, 3.1, 3.2, 3.3 and 4 are all extracts from various decisions of the Hon'ble Supreme Court and this Court. The so-called discussion is in paragraph 5, which does not deal with the objections given by the assessee questioning the jurisdiction of the Authority to reopen the proceedings.

17. It is demonstrated before us that when the assessment was initially taken up and the notice under Section 142(1) of the Act dated 10.7.2012 was issued, the Assessing Officer put out a questionnaire containing as many as 20 questions and it is submitted that question Nos.13 and 15 would be germane for the issue on hand, which dealt with a detailed note on the conversion of preference shares into equity shares and the details under several heads of expenses along with details of deduction. It is further submitted by the learned counsel for the appellant that the details were filed before the Assessing Officer and a brief note on the issuance of shares was also

submitted along with relevant details. Further, the assessee claimed the benefit of Section 37 of the Act. It is also submitted that there was only one issue pertaining to preference shares in the case of the assessee for the relevant financial year and there was no other issue of preference shares and that the Assessing Officer was fully apprised of the facts and figures including the agreement. Furthermore, since the details of expenses, which were paid to M/s.Veda Corporate Advisors P. Ltd., were called for, the same were also furnished to the Assessing Officer.

18. If such is the position, in the absence of any allegation that there was any fresh material to come to a conclusion that income escaped assessment, the Assessing Officer cannot now take a stand that the claim made by the assessee under Section 37 of the Act, which was acceded to by the Assessing Officer, was incorrect and the expenditure is in the nature referred to in Section 35D of the Act. If this is the observation and reason for reopening, it would be a clear case of change of opinion. What the Assessing Officer purported to do is to review his earlier decision.

19. The learned Standing Counsel appearing for the respondent - Department submits that the compulsory convertible preference share issued was never discussed by the Assessing Officer nor with regard to the issue as to whether it has to be amortized as per Section 35D of the Act.

20. As held by the Hon'ble Supreme Court, it is not for the assessee to tell as to how the Assessing Officer has to complete the assessment. The duty of the assessee is to make a full and true disclosure of all materials. If the assessee is put on notice calling for additional materials, the assessee is duty bound to fully and truly disclose all materials and thereafter, it is for the Assessing Officer to take a call on the materials.

21. We are satisfied that whatever be the concern, it was to be traced in the assessment under Section 143(3) of the Act, the details in the understanding of the Assessing Officer were called for and the details were placed by the assessee and thereafter, the assessment has been completed. Therefore, we find that the reopening was wholly without jurisdiction. As pointed out earlier, the Assessing Officer, while disposing of the objections vide order dated 26.2.2016, has not touched upon the issue relating to jurisdiction.

22. It is the submission of the learned Standing Counsel appearing for the respondent that if the Court has to come to such a conclusion, then the matter may be remanded to the Assessing Officer to pass a speaking order on the objections

filed by the assessee.

23. We are not convinced to accept the said contention for more than one reason. Firstly, we hold that the reopening is a clear case of change of opinion. Secondly, we cannot give a new lease of life to the Assessing Officer and remand the matter for a fresh consideration as it has been held that the power to reopen is a very powerful tool and the same is required to be exercised in accordance with law and not otherwise. Therefore, we are inclined to quash the proceedings of reopening.

24. Accordingly, the writ appeal is allowed, the impugned order is set aside, the writ petition is allowed and the proceedings impugned in the writ petition namely the notice dated 20.3.2015 as well as the order dated 26.2.2016 are quashed. No costs. Consequently, the connected CMPs are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

RS

To

The Deputy/Assistant Commissioner of Income Tax,
Company Circle 2(1), 7th Floor,
New Block, 121, Mahatma Gandhi Road,
Chennai-34.

+1cc to M/S.N.V.Balaji, Advocate, S.R.No.42388
+1cc to M/S.Hema Murali Krishnan, Advocate, S.R.No.41976

WA.No.2059 of 2021 &
CMP.Nos.13052 & 13053
of 2021

RLD(CO)
PM/21/09/2021