IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.08.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

W.A.NO.2206 OF 2021
AND
C.M.P.NOS.13960 & 13975 OF 2021

M/s.Sutherland Global Services Private Limited,
Rep., by the Authorized Signatory,
Mr.LakshminarayananRamasamy,
Gateway Office Parks,
2nd Floor Building,
No.B2, No.16, GST Road,
Perungalathur, Chennai,
Tamil Nadu, India - 600 063. ... Appellant/Petitioner

-Vs-

1. The Commissioner of Income Tax, Chennai-VI,
Income Tax Department,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034.

2. The Deputy/Assistant Commissioner of Income Tax,
Company Circle IV(4),
Income Tax Department,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034.

3. The Income-Tax Officer (OSD-III),
Range-VI, Income Tax Department,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034. ... Respondents/Respondents

PRAYER:-

Appeal under Clause 15 of Letters Patent against the order dated 29.04.2021 passed in W.P.No.31352 of 2014 and set aside the same.

Prayer in W.P.No.31352 of 2014:-

Writ Petition filed under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, to call for the records of the second respondent in PAN:AAECS8093A to quash the impugned Notice dated 26.03.2014 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 for the Assessment Year 2007-2008 and further direct the second and third respondents to drop the proceedings intiated under 147 of the Act for the said Assessment Year 2007-2008.

For Appellant : Mr.N.V.Balaji

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal, by the appellant-assessee, is directed against the order dated 29.04.2021, made in W.P.No.31352 of 2014, by which the appellant-assessee challenged the reopening of an assessment in terms of Section 148 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for the assessment year 2007-08.

2. It may not be necessary for this Court to refer to the factual matrix, as the dispute raised by the assessee and sought to be defended by the Revenue in the writ petition lies in a very narrow campus.

3. The assessee filed its return of income for the assessment year under consideration AY 2007-08 on 26.10.2007. Notice was issued under Section 143(2) of the Act on 18.07.2008 followed by an intimation under Section 143(1) of the Act dated 23.09.2008. Thereafter, proceedings were dealt with by the Transfer Pricing Officer VI, Chennai, and ultimately, the assessment was completed under Section 143(3) on 15.12.2010. The Assessing Officer, by notice dated 26.03.2014, under Section 148 of the Act, proposed to reopen the assessment and directed the assessee to file its return of income. The assessee though initially filed a letter stating that the return originally filed may be taken as return in pursuance to the notice under Section 148, subsequently filed e-return on 16.06.2014. Thereafter, the assessee sought for furnishing reasons for

reopening, which were furnished by the Assessing Officer by communication dated 11.04.2014. The assessee filed its objections stating that the reasons stated are not reasons for reopening, but what the authority appears to do is to review its earlier decision more particularly when, no fresh tangible material has been pointed out by the Assessing Officer in the reasons to reopen especially when, the reopening is done at the fag end of the sixth year. Apart from that, the assessee specifically pointed out that the very same issue was subject matter of decision for the assessment years 2011-12 and 2012-13 wherein the Income Tax Officer, International Taxation-II(2), Chennai vide order dated 30.03.2013, treated the Business development commission as subject to tax deduction at source in India and the assessee challenged the said order by filing an appeal before the Commissioner of Income Tax (Appeals)-VII, Chennai (for brevity "the CIT(A)"), who by order dated 03.02.2014, partly allowed the assessee's appeal. The assessee pointed out that the said order passed by the CIT(A) dated 03.02.2014 had become final, as the Revenue did not prefer any appeal. Apart from that, the assessee also pointed out that there is a circular issued by the Board in Circular No.786, dated 07.02.2000, which was valid and effective for the assessment year 2008-09 wherein, it was advised that no tax is deductible under Section 195 for commission paid on exports, to a non-resident, who operates from outside India and payment is remitted abroad. Further, it was pointed out that the Income Tax Officer, International Taxation-II(2) dealt with the same issue for the assessment year 2008-09 and accepted the stand taken by the assessee. However, the business development commission is not subjected to taxes in India. Therefore, the assessee contended that when the TDS Officer himself has held that the business development commission is not subject to tax in India, a reassessment on the same ground would amount to reviewing the earlier order of assessment.

4. The assessee placed reliance on the decision of this Court in M.V.S.Kathirvelu Nadar vs. Commr. of Agrl. I.T. [(1968) 68 ITR 786 (Mad.)] wherein, it was held that if one wing of the Government takes a particular view on a certain transaction, it does not appear proper that the same wing, while dealing with another branch of its business, should contradict itself and come to a different conclusion, which causes discomfiture to the assessee. The assessee also raised other grounds to state that the reopening of the assessment was not valid in law. The objections given by the assessee were disposed of by communication dated 07.10.2014. It appears that when the writ petition was heard, the assessee apart from placing reliance on the orders passed by the CIT(A), International Taxation Officer, relied on the decision in the assessee's own case for the assessment year 2008-09 in T.C.A.No.32 of 2019, dated 23.09.2020

on the very same issue. Though such was the subject made before the learned Writ Court, the learned Writ Court came to the conclusion that considering the spirit of Section 147 of the Act, the Court cannot adjudicate into the factual matrix and accordingly, the writ petition was dismissed directing the appellant to face the assessment proceedings. The reopening of an assessment, that too, beyond four years, in the case of the assessee at the fag end of the 6th year, is a very serious issue. Therefore, the statute provides for a remedy and there can be no reopening of an assessment, unless the requisite factors as laid down in Sections 147/148 of the Act are complied with. A strict compliance of the statutory provision is always called upon in a reopening proceedings, as it is settled legal position, a reopening is not a review of the earlier decision. In the instant case, since the reopening is beyond the period of four years, there should be tangible materials available with the Assessing Officer to do so.

5. We have noted the reasons for reopening and for better appreciation, we quote the same hereunder:-

> "Under section 195, any person responsible for paying to a non-resident, any sum chargeable to tax in India, which arises through business connection in India, under section 9(i)(a) of IT Act, should deduct tax. Thus, as per the provision of section 9(i) of IT Act, necessary tax has to be deducted on the Business development commission paid. The Business development commission is in the nature of Technical service fees paid to the parent entity. As no TDS has been made on the Business Development Commission, the same needs to be disallowed as per section 40(a)(ia). Hence, I have reasons to believe that income has escaped assessment within the meaning of section 147 of the Income Tax Act."

6. As mentioned above, the assessee has given an elaborate objection to the reopening dated 29.04.2014 both on merits as well as how the assessee's case on the very same issue was dealt with by the Department for the earlier/subsequent assessment years. To say the least, the objection was not even taken note of by the Assessing Officer while disposing of the objections, vide communication dated 07.10.2014. All that the Assessing Officer says is as follows:-

> "As per the provision of section 9(1) of Income tax Act, necessary tax has not deducted on the business development commission paid to

> non-resident. The business development commission is in the nature of technical services fees paid to the parent entity. The non-deduction of tax in the above payment, raised the liability to tax, which is escaped to assessment."

From the above, it is clear that the Assessing Officer did not deal with the objections given by the appellant.

7. The learned Writ Court did not go into the contention as to whether the case of the assessee that reopening amounts to change of opinion is correct or not.

8. In our considered view, this is the moot issue, which requires to be gone into, when a challenge is made to a reopening proceedings under Article 226 of the Constitution of India. This is more so because, the assessee has no remedy under the Act.

9. The Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. vs. ITO [(2003) 259 ITR 19 (SC)], had directed that the assessee is entitled to communicate to the reasons based on which reopening is made. On reasons being furnished, the assessee has been granted liberty to object to the reopening and there is a direction to the Assessing Officer to dispose of the objections by passing a speaking order. In the absence of a remedy provided under the statute, as against such speaking order, the assessee is entitled to approach this Court under Article 226 of the Constitution of India. Therefore, the learned Writ Court was required to examine as to whether the reopening was within the four corners of law.

10. In our considered view, this exercise has not been done by the learned Writ Court. Therefore, the order passed in the writ petition calls for interference.

11. Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the Revenue submitted that factual issues were involved and if in the opinion of this Court, the order disposing of the objections vide communication dated 07.10.2014 is non-speaking or has not dealt with all the objections, then the matter can be remanded back to the Assessing Officer. We are not convinced with the said submission for more than one reason. Firstly, the assessee cannot be vexed on the same issue repeatedly. The Department has taken a stand pursuant to the orders passed by the CIT(A) dated 03.02.2014, which order has become final. Thereafter, the TDS Officer has also granted relief.

12. The learned Senior Standing Counsel would vehemently contend that the learned Writ Court rightly made an observation that factual issues have to be gone into which cannot be agitated in a writ petition. We partially agree with the submission of the learned Senior Standing Counsel, but cannot apply the same to the facts and circumstances of the case on hand and we set out the reasons in support of such conclusion.

13. We are informed by the learned counsel for the assessee that for the subsequent years, there has been no issues on the said point. Furthermore, from the reasons for reopening, we find that all material has been culled out from the return of income filed by the assessee at the first instance viz., on 26.10.2007, which will go to show that there is no fresh tangible material much less, the Assessing Officer also does not refer to any such material in the reasons for reopening dated 11.04.2014. Thus, we are of the definite view that the reopening is unsustainable in law.

14. Thus, for all the above reasons, the writ appeal is allowed and the reopening proceedings are quashed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

abr

To

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   Income Tax Department,
   121, Mahatma Gandhi Road,
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NR(CO)
PBS/27/09/2021