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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.09.2021

CORAM

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

W.A. No. 2456 of 2021
and
C.M.P. No. 15776 of 2021

M/s. Subrahmanyan Constructions
Company Pvt. Ltd.,
Mr. R. Sankar,
No.20, Sir C.V. Raman,
Alwarpet,
Chennai – 600 018. ...Appellant/Petitioner

Vs.

The Assistant Commissioner of
Income Tax,
Corporate Circle 6(2)-Chennai,
121, Mahatma Gandhi Road,
Chennai – 600 034. ... Respondent/Respondent

Appeal filed under Clause 15 of Letters Patent, praying to allow the above Writ Appeal by setting aside the order dated 26.04.2021 passed in W.P.No. 34632 of 2018 on the file of this Court and allow the Writ Petition.

Prayer in W.P.No.34632 of 2018 : Petition filed under Article 226 of the Constitution of India praying for issuance of writ of certiorari to call for the records on the file of the respondent in PAN.AAFCS3911A in issuing the impugned Notice in ITBA/ AST/ S/ 148/ 2017-18/ 1009544069(2) dated 29.03.2018 under Section 148 of the Income Tax Act 1961 and the consequential proceedings in Corp. Circle-6(2)/ Reasons/ 2018-19 dated 18.12.2018 and quash the same as illegal arbitrary and without jurisdiction.

For Appellant : Mr. Raghav Menon
for Mr. R.Sivaraman

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

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J U D G M E N T

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

This appeal, filed by the writ petitioner/assessee, is directed against the order dated 26.04.2021, in W.P. No.34632 of 2018 challenging the reopening of assessment for the assessment year 2011-12 on several grounds and that the reopening is a case of change of opinion.

2. The Learned Single Bench had dismissed the writ petition by the impugned order and the appellant being aggrieved is before us by way of this appeal.

3. We have heard Mr. Raghav Menon, Learned counsel representing Mr. R.Sivaraman, Learned counsel for the appellant and Mr. A.P. Srinivas, Learned Senior Standing Counsel, who accepts notice on behalf of the respondent.

4. The first aspect to be seen, in a case where there is a challenge to a reopening of an assessment, is to ascertain as to whether there was an allegation that the assessee failed to fully and truly disclose all material facts and particulars at the first instance, when the assessment was completed. This is more so only in the case where the reopening is done beyond the period of four years as in the instant case. The assessee has filed the return of income on 27.09.2011 for the assessment year 2011-12 and thereafter, the case was selected for scrutiny and the scrutiny assessment was completed by order dated 31.03.2014. Thereafter, the Assessing Officer by letter dated 17.01.2018, sought for certain clarification. It is not clear under which provisions of law certain clarification was called for by the Assessing Officer after he has completed the scrutiny assessment under Section 143(3) by order dated 31.03.2014.

5. Be that as it may, the assessee through their Authorised Representative submitted a reply dated 12.02.2018, thereafter, nothing happened, and notice under Section 148 dated 29.03.2018 was issued to the assessee. The assessee sought for the reasons for reopening, which were furnished vide communication dated 14.12.2018. Essentially the issue was regarding the retention and it was alleged that the assessee had offered the retention money for the completed projects, which was shown in the sundry debtors list. However, while reckoning the value of Work In Progress (WIP) of the on-going projects, the assessee had deducted the retention money from the WIP and when the assessee had followed mercantile system as mentioned in the letter dated 25.02.2014, the assessee should have offered the retention money or else

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the assessee should have claimed the expenses related to the retention money. But, the assessee had claimed the expenses in relation to retention money in the on-going projects expenditure. Along with the said reasons, the Assessing Officer also made an analysis as to how he proposes to proceed. The assessee submitted their objections dated 17.12.2018 for the assessment year 2011-12.

6. Apart from stating that the reopening is bad in law, it was contended that the retention money is not in the nature of income till such time the contractual obligations are performed or fully performed to the satisfaction of the customer by the assessee and therefore, the retention money cannot be regarded as 'income' even for the purpose of book profits under Section 115-JB of the Act, though credited in the profit and loss account and have to be excluded for arriving at book profits under Section 115-JB of the Act. The assessee also relied on various decisions in support of their claim.

7. Further, even earlier, the assessee while replying to the clarification sought for by their reply dated 12.02.2018, has specifically stated as follows :-

> "The assessee had incomplete projects worth Rs.2,92,00,91,516/-, out of which the total expected Retention money at the end of the project is Rs.11,14,43,711/-. These projects were completed on percentage completion method and a sum of Rs.5,87,61,167/- was deducted by the customer as Retention money. This money will be paid by the customer only after the project is completed and defect curing period is completed. In other words, the amount will become due to assessee only after the completion of warranty period. This amount of Retention money has been accrued at the completion of project, in the subsequent years. This money is held as Retention money to ensure that the assessee completes the job and if there are any defects.
>
> The right to receive the Retention money, accrues only after the defect liability period is over which generally 1 year after the execution of the work contract. Until the period is not completed, there is no right to receive the money. When there is no right to receive the money, the income does not accrue or arise to the assessee. Supreme Court has also recognized this principle and charges the Retention money to tax at the time of receipt only. If this has to be offered at the time of running job, it is not possible, since the quantum of how much amount will be known only

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after the defect liability period. The assessee has been consistently following the same method of accounting from the last 25 years. Hence, no change in the method of accounting is warranted as running job.

The Retention money has already been offered to tax in the subsequent period. Hence, charging this to tax will not be in compliance with the Accounting Standard and Income-tax Act. The same income cannot be charged to tax, twice.”

8. As mentioned above, after the above clarifications, the Assessing Officer did nothing further and the assessee was served with a notice under Section 148 on 29.03.2018. The objections dated 17.12.2018 filed by the assessee were disposed of by speaking order dated 18.12.2018 reiterating the earlier stand and also stating that the Assessing Officer was in possession of material in the form of audited balance sheet, computation of total income and the Assessing Officer had verified the information available on record, analyzed the provisions of the Act and thereafter, arrived at the conclusion that the assessee has made incorrect claim and reduced income.

9. Further, it was observed that in the assessment year or during the course of assessment proceedings [scrutiny assessment under Section 143(3)], the Assessing Officer has not formed any opinion on the issue of retention money and not considered the WIP and there is no change of opinion. The assessee challenged the said order by filing a writ petition stating that there is no allegation against the assessee for having not fully and truly disclosing all the relevant materials at the time of relevant assessment proceedings and there is no whisper of suppression of materials by the assessee and the respondent having not disputed the said fact, the question of reopening of assessment would not arise, especially, when the Assessing Officer had not pointed out that there are tangible materials available for the reopening of assessment.

10. The assessee placed reliance on decision of the Hon'ble Supreme Court in CIT Vs. Kelvinator of India Ltd reported in [2010] 320 ITR 561 (SC). On merits, the assessee submitted that the legal issue has been decided in favour of the assessee by the Hon'ble Division Bench of this Court. The department filed a counter-affidavit reiterating the stand taken by the Assessing Officer while issuing notice under Section 147/148 of the Act and that there is no change of opinion.

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11. Further, it was contended that the petitioner is not following the consistent policy in accounting the retention money, the assessee is offering retention money on some completed projects and has not offered retention money on on-going projects. The Learned Writ Court was of the view that there was an incorrect claim and reduced income was identified by the Assessing Officer. However, we find that there is no specific finding rendered by the Learned Writ Court that there was a failure on the part of the assessee to make a full disclosure at the time of original assessment, nor there is any specific finding tangible material available with the Assessing Officer to reopen the assessment.

12. In the preceding paragraphs, we have noted that after completion of the assessment under Section 143(3) of the Act, the Assessing Officer has issued notice seeking certain clarifications. However, there appears to be no power vested with the Assessing Officer to seek such clarifications, as the Assessing Officer does not possess power under Section 154 of the Act. Nevertheless, the assessee has furnished the reply and the reply specifically stated that the retention money has already been offered to tax in the subsequent period. Hence, charging to tax will not be in compliance of the Accounting Standards and the provisions of the Act and the same income cannot be taxed twice. Further, the concept as to why the retention money is retained by the assessee was explained by stating that the retention money accrues only after the defect liability period is over, which is generally one year after the execution of works contract and until the project is not completed, there is no right to receive the money. When there is no right to receive the money, the income does not accrue or arise to the assessee. Further, if this income has not been offered at the time of execution of the contract it is not possible, since the quantum of how much amount would be known only after the defect liability period.

13. Further, it was pointed out that the assessee has been consistently following the same method of accounting for the last twenty five (25) years and there is no change in the method of accounting is warranted on a continuing job. Thus, it is clear that the Assessing Officer seeks to review the decision taken by its predecessor in office under the guise of exercise of power under Section 147/148, which is impermissible under law.

14. On facts we have satisfied that there is no allegation against the assessee on any failure on his part to disclose full particulars at the time of original assessment, nor there is any fresh tangible material brought out by the assessee on record justifying his exercise of power under Section 147 of

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the Act. Therefore, we hold that the reopening proceedings is bad in law.

15. In Commissioner of Income-tax -vs- Ignifluid Boilers (I) Ltd. reported in 2006 283 ITR 295 (Madras), the assessee was carrying on business of erection and sales of boilers and it entered into a contract for erection of boilers, wherein there was a specific clause that 10% of the contract amount would be retained by the principal contractor and it would be paid after one month subject to the satisfactory performance of the boilers. The Assessing Officer brought into account 10% of the contract amount which had been retained by the principal contractor and levied tax on the ground that the assessee was maintaining mercantile system of accounting and in respect of 10%, retention, the bill has been raised on completion of work and brought the same into account on accrual basis. On appeal before the Commissioner (Appeals), that portion of amount was deleted, which was confirmed by the Tribunal. On appeal by the Revenue before the Hon'ble Division Bench, it was held that 10% of the retention money had not been received in respect of the relevant assessment year, though the work had been completed and the assessee was entitled to receive the amount only after successful completion of work and in such circumstances, it could not be said that the 10% of the retention money retained by the principal contractor accrued to the assessee during the relevant assessment year for consideration. Accordingly, the order passed by the Tribunal was affirmed and the operative portion of the judgment reads as follows :-

> " The facts are not disputed 10 per cent of the retention money has not been received in respect of the relevant assessment year though the work has been completed. The assessee is entitled to receive the amount only after successful completion of work. In such circumstances, it cannot be said that 10 per cent retention money retained by the principal contractor accrued to the assessee during the relevant assessment year for consideration?
>
> Under the Income-tax Act, the income accrued or received by The assessee alone is taxable. This position is fortified by/the decision of the Supreme Court in the case of CIT v. Shoorji Vallabhdas and Co. [1962] 46 ITR 144 wherein it has been held as follows (page 148):
>
> "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not

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materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

This is what exactly happened in this case. In view of the categorical pronouncement of the Supreme Court and the facts and circumstances of the case, we are of the view that the appellate authority as well as the Tribunal are correct in their view. The order of the Tribunal requires no interference.

Accordingly, the tax case (appeal) is dismissed."

16. As pointed that the legal issue is also squarely covered in favour of the assessee. Though we may not be required to consider the said aspect, nevertheless since the Hon'ble Division Bench of this court has settled the legal position in a tax case appeal, we are obliged to point out the same at this juncture in Commissioner of Income Tax, Chennai -vs- Voltech Projects (P.) Ltd. reported in [2020] 122 taxmann.com 284 (Madras), the assessee therein was engaged in contract business and claimed deduction of amount retained by its client as per the contract. The Assessing Officer held that such retention money is amounted to income of the assessee, who was following the mercantile system of accounting. On appeal, the Tribunal held that such retention money could not be included in the assessee's income for the relevant assessing year. The said view of the Tribunal was affirmed by the Hon'ble Division Bench.

17. Thus, for the above reasons, the appellant is entitled to succeed. Accordingly, the Writ Appeal is allowed, the order passed by this Court in W.P.No.34632 of 2018 dated 26.04.2021 is set aside, the writ petition is allowed, and the notice issued by the respondent dated 29.03.2018 under Section 148 of the Act and the consequential proceedings dated 18.12.2018 are quashed. Consequently, the connected Civil Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS-VII)

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Sub Assistant Registrar

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Sp/Maya

To

The Assistant Commissioner of
Income Tax,
Corporate Circle 6(2)-Chennai,
121, Mahatma Gandhi Road,
Chennai - 600 034.

W.A. No. 2456 of 2021

NR(CO)
GMY(18/10/2021)