

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2021

CORAM

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

W.P.No.14021 of 2017

and

W.M.PNos.15232 & 15233 of 2017

Indian Syntans Investments Private Limited,
Represented by
its Director Mr.N.Narayanan
No.71, Third Main Road,
Kasturba Nagar, Adyar,
Chennai - 600 020

..Petitioner

vs

The Deputy Commissioner of Income Tax,
Company Circle II (3)
121, Nungambakkam High Road,
Chennai - 600 034.

...Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, call for the records on the files of the respondent and quash the impugned notice issued u/s 148 of the Act in PAN No.AAACI1775K dated 30.03.2010 and consequentially quash the proceedings in PAN No.AAACI1775K / A.Y-2005-06 dated 20.04.2017 as illegal and without jurisdiction.

For Petitioner : Mr.R.Sivaraman

For Respondent : M/s.Hema Muralikrishnan
Senior Standing counsel
[For Income Tax]

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O R D E R

The initiation of proceedings under Section 147 of the Income Tax Act by issuing a notice under Section 148 of the Income Tax Act in proceedings dated 30.03.2010 and the consequential proceedings dated 20.04.2017 are under challenge in the present writ petition.

2. The petitioner is a Private Limited company, carrying on business as non banking financial company, dealing in investments, broking in shares and securities, land and buildings etc., For the assessment year 2005-06, the petitioner company had filed its return of income on 20.10.2005, admitting a total income of Rs.3,90,15,137/-. Subsequently, the assessment was taken up for scrutiny together with calling certain details.

3. The respondent issued a notice under Section 148 for reopening of assessment for the Assessment Year 2005-06 on 30.03.2010. The petitioner company filed a letter dated 31.03.2010, to treat the return filed by the petitioner company on 28.10.2005 as the return filed in response to the notice under Section 148 of the Act. The petitioner company, in the said letter, made a request to the respondents to furnish reasons to believe that income liable to tax had escaped assessment within the meaning of Section 147 of the Act. The respondent in their letter dated 05.05.2010, furnished reasons for reopening the assessment for the Assessment Year 2005-06.

4. The petitioner company, by their letter dated 27.05.2010, furnished their detailed reply along with annexure, requesting the respondent to drop the proceedings. However, the reply had not been considered and issued notice under Section 143 (2) dated 18.11.2010, fixing the date of hearing on 25.11.2010. The petitioner filed W.P.No.27139 of 2010 and this Court directed the respondent to consider the legal submissions taken by the petitioner on the aspect of jurisdiction by giving the assessee an opportunity to place their submissions. But, the writ petition was dismissed. The petitioner filed Writ Appeal in W.A.No.2646 of 2010 and the Hon'ble Division Bench of this Court passed an order as follows:

"This writ appeal is disposed of by modifying the order dated 30.11.2010 passed by the learned Single Judge and setting aside only impugned order dated 30.03.2010. We confirm the direction to the respondent to consider the objections on the assumption of jurisdiction after granting the assessee an opportunity of personal hearing. Accordingly, the respondent is directed to pass a speaking order on the aspect of jurisdiction under Section 147 of the Act, within a period of four weeks from the date of receipt of a copy of this order. No costs."

5. Pursuant to the orders of the Hon'ble Division Bench, the petitioner company by their letter dated 14.02.2017, had filed detailed objections to the reopening of the assessment and sought for personal hearing before the respondent. However, the respondent without considering the directions passed by this Court nor considering the legal objections raised by the writ

petitioner, passed the impugned order dated 20.04.2017, rejecting the objections filed by the petitioner. Challenging the said impugned order dated 20.04.2017 as well as the notice dated 30.03.2010, the present writ petition is filed.

6. The learned counsel appearing on behalf of the writ petitioner mainly contended that the element of reasons to believe as contemplated under Section 147 of the Income Tax Act is absolutely missing in the present case. In fact, it is a change of opinion as the material facts now relied on in the impugned order for reopening of assessment were made available by the petitioner even during the original assessment for the year 2005-06.

7. The learned counsel for the writ petitioner relied on the return of income, wherein the petitioner solicited the attention of this Court with reference to the IL & FS Growth & Value fund Semi Annual Dividend Redemption of units and the dividend received and loss occurred et., All such particulars made available in the return of income were relied on by the petitioners established that the Assessing Officer has no reason to believe for reopening of assessment. Thus, the initiation of proceedings under Section 147 is change of opinion.

8. The learned counsel for the petitioner with reference to the returns of income and the particulars stated therein, compared the same with the reassessment proceedings initiated under Section 147 of the Act and more specifically, the reasons as recorded by the respondent. By comparison, it is contended that both are one and the same and therefore, it is only a change of opinion. Relying on the said details, the learned counsel for the petitioner made a submission that the impugned orders are liable to be set aside.

9. The learned counsel for the petitioner relied on the judgment of the High Court of Madras in the case of PVP Ventures Ltd., Vs. ACIT, reported in (2016) 65 taxmann.com 21 (Madras), wherein the Court held as follows:

"30. As we have indicated earlier, cases where the reopening is found to be within the parameters of the prescription contained in Sections 147 and 148, the additions made subsequently in the course of the proceedings, have always been upheld by Courts. But, where the reopening of assessment cannot stand on the strength of the reasons recorded under Section 148(2), the Revenue cannot seek to justify the reopening, by finding some point or the other post-facto after the reopening of assessment.

31. Sub-Sections (1) and (2) of Section 148 and Explanation 3 under Section 147 contemplate two entry

points or two gate ways. The first entry point or the outer gate is the formation of an opinion that there was some income, which escaped assessment and which is reflected in the reasons recorded under Section 148(2). The Assessing Officer will be permitted entry through this outer gate only if he satisfies three criteria namely (i) the existence of a reason to believe that an income chargeable to tax has escaped assessment (ii) the recording of reasons under Section 148(2) and (iii) the issuing of notice under Section 148(1). Once the Assessing Officer satisfies these three criteria, he is allowed entry through the outer gate or the first check-post. The moment he has gained entry lawfully through the first check-post, the proceedings for reassessment begin. In the course of those proceedings, if issues other than those, which triggered the formation of his opinion under Section 147, come to his notice, he would be permitted, by virtue of Explanation 3, to gain entry into all other check-posts located within the prohibited area. Therefore, Explanation 3 comes into play only after the Assessing Officer gains entry through the first door. If the Assessing Officer is imagined to be an air passenger, travelling by flight to another destination, his reason to believe, his recording of reasons and the issuance of notice can be compared to a valid ticket that he holds. Only if he holds such a valid ticket, he will be permitted entry into the airport. After gaining entry into the airport, he may also be permitted to visit restaurants, dutyfree shops etc., before boarding the flight. His access to the facilities inside the airport is dependent upon his right of entry into the airport. This is how Sub-Sections (1) and (2) of Section 148 and Explanation 3 to Section 147 have to be understood."

10. In the case of Commissioner of Income Tax Vs. Elgi Tread (India) Ltd., reported in (2018) 96 taxmann.com 254 (Madras), the Hon'ble Division Bench of this Court held as follows:

"24. The short question, which falls for consideration, is whether the reopening of the assessments both within four years and beyond four years could have been done for the reasons assigned by the Revenue. We are required to take a decision in respect of the other substantial questions of law, after deciding the first question and if this question is answered in favour of the Revenue, then we may be required to examine the other substantial questions of law. However, if we answer the said question in favour of the assessee, then nothing further remains to be decided in these appeals. As pointed out in the

preceding paragraphs, the Assessing Officer, while reopening the assessment, has not disclosed the reasons for reopening. This is evident from the assessment order dated 05.03.1999, which only states that the assessment was reopened to consider certain points with prior permission of the Commissioner of Income Tax. Thus, the basic requirement for recording reasons to believe that income chargeable to tax has escaped assessment is absent in the instance case, which would be sufficient to hold that the reopening proceedings are wholly without jurisdiction.

35. In the light of the above discussion, we hold that the reopening proceedings was wholly without jurisdiction and we affirm the view taken by the Tribunal and accordingly, dismiss all the tax cases (appeals) filed by the Revenue by answering the first substantial question of law as framed above in favour of the assessee and hold that the Assessing Officer was not empowered to reopen the assessment for all the assessment years. Consequently the other substantial questions of law as framed are left open."

11. The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Corporation Bank Limited, reported in (2002) 122 Taxman 826 (SC), held as follows:

"6. Turning attention to the first question as regards the provisions under Section 147(a) be it noted and as the facts depict, there is no failure on the part of the assessee in furnishing the particulars pertaining to the above noted sum as not recoverable for the relevant accounting year and the statements filed along with the original return disclosed the full details of the aforesaid account. There is, therefore, no failure on the part of the assessee to disclose fully and truly the material facts necessary for the assessment years for the respective years and as such Section 147(a) has no manner of application and is not attracted in the facts of the matter under consideration. The High Court on consideration of the facts came to the conclusion that the Tribunal was justified in coming to the said finding and we also record our concurrence therewith"

12. In the case of Assistant Commissioner of Income Tax Vs. ICICI Securities Primary Dealership Limited, reported in (2012) 24 taxmann.com 310 (SC), it is stated as follows :

"Section 147 of the Income tax Act, 1961 - Income escaping assessment - General - Assessment year 1999-

2000 - Assessing Officer completed assessment of assessee under Section 143(3) after taking into consideration account furnished by assessee - After lapse of four years from relevant assessment year Assessing Officer reopened assessment of assessee on ground that during relevant year assessee company had incurred a loss in trading in share, which was a speculative one and therefore, chargeable to tax - Accordingly, passed order under Section 147 - Whether since after a mere re-look of accounts which were earlier furnished by assessee, Assessing officer had come to conclusion that income had escaped assessment, same was not permissible under Section 147 as it was clearly a change of opinion - Held, yes - Whether therefore, order reopening assessment was not permissible - Held, yes."

13. Relying on the above judgments, the learned counsel for the petitioner is of an opinion that case on hand is a change of opinion by the Assessing Officer and absolutely, there is no reason to believe.

14. The respondents filed their counter affidavit, by stating that the writ petition is untenable. The respondents have stated that the allegation of petitioner that its claim regarding Section 94(7) was examined by the respondent during the course of original proceedings is against facts and records. The petitioner did not produce any evidence to substantiate the claim of exemption on this issue in the original assessment. It is stated that two sheets of papers at page nos.142 & 143 of the typed set filed by the petitioners in the present writ petition were filed subsequently to the completion of original assessment proceeding and that is the reason why the petitioner not mentioned date of submission of the document in the index to typed set of papers. Therefore, the petitioner's claim that the details of two transaction coming under the Short term Capital gains were furnished and respondents had completed the Assessment under Section 143 (3) on 29.11.2007, after considering the same is absolutely incorrect. It is contended that the petitioner has come before the Courts with unclean hands and therefore, the writ petition is to be dismissed.

15. The respondent has stated that with regard to the petitioner's claim under Section 94 (7) was formed during the original assessment proceedings and therefore, the petitioner's allegations that the revision of assessment is based on the change of opinion is wrong and cannot be sustained. It is contended that the issues discussed in the reasons recorded for reopening was not considered during the course of original assessment proceedings, since no opinion was formed on such

issues during the course of original assessment proceedings. Thus, there is no question of change of opinion as alleged by the petitioner. The petitioner is not disputing the reasons given by the Assessing Officer for reopening the assessment. There is no mandatory condition that tangible material for the reopening of the assessment should come from external source. In the present case, the reopening is done within four years from the end of the assessment year. Thus, Proviso to Section 147 is not applicable.

16. It is further contended that the reopening on the basis of Audit objections was upheld by the Hon'ble Supreme Court of India in the case of CIT Vs. P.V.S. Beedies Pvt Ltd., reported in 237 ITR 13.

17. The respondent has duly considered all the objections and case laws submitted by the petitioner. In the impugned order dated 20.04.2017, some of the decisions cited by the petitioner were not discussed as they pertain to reopening after expiry of four years from the end of the relevant assessment year and in such proviso 147 is applicable. However, in the present case, reopening has been made within four years from the end of the Assessment Year. Thus, the respondent has duly complied with the orders of this Court. The writ petition is premature as the petitioner has to now file objections on the merits of the issues and convince the Assessing officer about the merits of its claim and therefore, the Assessment officer is duty bound to pass revised order either accepting or rejecting the claim of the writ petitioner.

18. The respondent had not formed any opinion on any of the issues that are now the subject matter of proceedings under Section 147 at the time of original assessment. Section 94(7) was substituted with effect from 1st April 2005. Thus, any assessment made contrary to the said provision is liable to be reopened. The petitioner has claimed loss on transfer of shares from stock in Trade to investments. It is settled position that one cannot earn income from himself. Hence, the Assessing Officer followed the decision of Calcutta High Court to reopen the assessment. The petitioner fails to note that the direction issued by the RBI cannot override the proviso of Income Tax Act as held by the Hon'ble Supreme Court in the case of Southern Technologies Ltd., reported in 320 ITR 577.

19. When an income liable to tax has been escaped from assessment in the original assessment proceedings due to the oversight and inadvertence or mistake committed by the Assessing Officer, still he has the jurisdiction to reopen the assessment as held by the Hon'ble Supreme Court of India.

20. Relying on all these grounds, the respondent sought for the dismissal of the writ petition.

21. Relying on the above contentions, made a submission that the case on hand is the case of reopening within a period of four years and therefore, the contention of the petitioners are liable to be rejected.

22. The Courts have held that disputed facts and circumstances cannot be adjudicated in a writ proceedings and once, there is a reason to believe that the income has escaped from assessment, then the Assessing officer is empowered to institute proceedings under Section 147 and further, certain materials were identified by the Assessing officer are provided cause for reopening of assessment by initiation under Section 147 of the Act and as such there is no infirmity. Thus, the writ petition is liable to be dismissed.

23. Perusal of the reasons provided by the Assistant Commissioner of Income Tax, in proceedings dated 05.05.2010, the same reveals that the assessee has claimed loss of Rs.53,34,895/- on transfer of shares from trading to investment. This is an internal transfer of conversion of certain shares and securities held as stock in trade into investments. The assessee has transferred shares of Rs.6,81,08,496/- from trading account to investment account (as against nil last year). The assessee has not given any computation as to how the loss came to be incurred. The loss on conversion of shares and securities held as stock in trade into investment is not an allowable deduction. The deduction claimed by the assessee is therefore erroneous and there is reason to believe that income has escaped assessment due to this incorrect claim.

24. In Annexure 'A' to Audit Report dated 21.06.2004 for Assessment Year 2004-05, the auditors have specifically stated that company has taken loan from financial institution and purchases shares for Rs.165.19 lakhs, which were treated as long term investments. However, no interest disallowance has been considered, though the learned counsel for the petitioner states that the Audit report cannot be a source for initiation of proceedings under Section 147 of the Act.

25. This Court is of the considered opinion that the source of information may be irrelevant for the purpose of initiation of proceedings under Section 147 of the Act. Section 147 unambiguously enumerates that if the Assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any Assessment Year. Further the Section contemplates 'any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in

the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned'.

26. Explanation 1 to Section 147 contemplates that "Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso. Therefore, even in case, where certain informations were drawn after passing of the assessment order and materials were identified, which all are not adjudicated, then the Assessing officer has reason to believe for reopening of the assessment. Undoubtedly, the power under Section 147 for the Assessing Officer is wider enough to intervene in all the cases, where any income chargeable to tax has escaped assessment for any assessment year. The escaped assessment includes even the subject matters considered in the assessment, which all are escaped, the word "escape" undertakes that it is not only the materials, which were not adjudicated during the original assessment but the materials adjudicated and certain aspects escaped from assessment during such original assessment. Thus, it is made clear that even the material facts, which all are provided by the assessee during the original adjudication and the Assessing Officer also passed an order under Section 143(3) of the Act, thereafter, if any materials are made available to establish that any income chargeable to tax has escaped assessment for the assessment year, then the Assessing officer is well within his power to institute proceedings under Section 147 of the Act.

27. It is insufficient that the assessee has compared the reasons stipulated in the order by the respondents with reference to certain informations provided in the original assessment order. Beyond such comparable factors, with reference to the original assessment order and the reasons furnished for reopening of assessment, the Assessing Officer, if found any new materials, which were not considered, though provided, constitute a cause for 'reason to believe' regarding the income escaped assessment, then also the Assessing Officer is empowered to reopen the assessment by invoking the powers under Section 147 of the Act.

28. Undoubtedly, the informations or materials etc., for reopening of the assessment must be new and not considered by the Assessing Officer during the original assessment. However, the word 'New' does not mean that there is an impediment to cull out the new facts from the informations or materials provided by the assessee at the time of original assessment. Even the

materials, facts, informations, which were made available during the original assessment and not considered by the Assessing Officer, while passing the assessment order and it constitute a reason to believe regarding the escapement, then also, the Assessing Officer may have reason to believe for reopening of the assessment.

29. At the outset, the power conferred on the Assessing Officer under Section 147 is wider enough to cover the informations, materials and evidences, which were not considered during the original assessment and there is a reason to believe that such non-consideration constitute a cause for reopening of assessment.

30. The very purpose and object of the proviso under Section 147 is to ensure that the assessee pays the income tax in the manner prescribed under the Statute and therefore, the Courts are expected to be cautious, while dealing with such intricacies and the disputed facts, which all are to be adjudicated by the competent authority by following the procedures as contemplated. High Court shall scrutinize the processes, through which, a decision is taken by the competent authorities with reference to the provisions of the Statute and the established principles and certainly, not the decision itself. Roving enquiry cannot be undertaken by the High Court in a writ proceedings under Article 226 of the Constitution of India. Contrarily, the assessee must be provided with an opportunity to putforth his case before the Assessing Officer, who in turn, is bound to consider all the documents and evidences available and pass appropriate orders.

31. Thus, this Court has no hesitation in forming an opinion that the petitioner has not made out any acceptable ground for the purpose of interfering with the initiation of proceedings for reopening of assessment under Section 147 of the Income Tax Act. Accordingly, the Writ Petition fails and stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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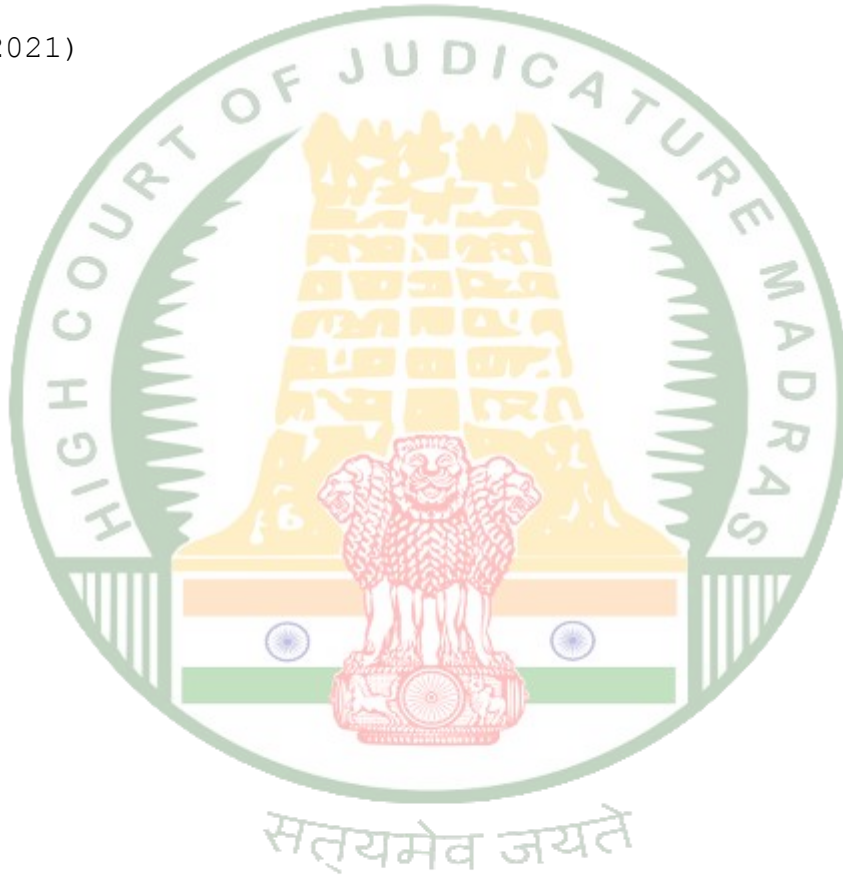
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