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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.07.2021

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THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.No.28176 of 2018
and
W.M.P.No.32836 of 2018

M/s.Kone Elevator India Private Limited,
Represented by its Director
Mr.C.V.S.Krishna Kumar,
S/o.C.V.Seshadri, Aged 53 years,
Prestige Centre Court, 9th Floor,
The Forum Vijaya Mall,
Plot No.183, NSK Salai,
Arcot Road, Vadapalani,
Chennai - 600 026.

.. Petitioner

-vs-

The Assistant Commissioner of Income Tax,
Corporate Circle 4(2),
Room No.433, 4th Floor, Main Building,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.

.. Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, calling for the records in Corporate Circle-4(2)/PAN:AAACK2567P/2018-19 dated 11.10.2018 on the file of the respondent relating to the A.Y.2013-14 and quash the same.

For Petitioner : Mr.G.Baskar

For Respondent : Mr.D.Prabhu Mukunth Arunkumar
Junior Standing Counsel

ORDER

The writ on hand is filed challenging the validity of the proceedings dated 11.10.2018 passed by the respondent disposing of the objections filed by the petitioner/assessee.

2.The petitioner is engaged in the business of design, manufacture, supply, erection and installation of lifts and



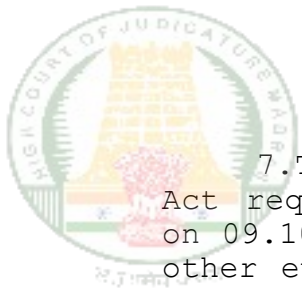
supply, erection, installation of escalators. The petitioner is engaged in maintenance of such erected elevators and escalator. The petitioner filed its return of income for the assessment year 2013-14 on 29.11.2013. Form No.3CEB was filed on 23.11.2013 since there were international transactions during the previous year. The return of income was taken up for scrutiny. In respect of transfer pricing issue, a reference was made to the Transfer Pricing Officer under section 92CA(1) of the Income Tax Act [hereinafter referred to as "the Act"] on 31.08.2015. Notice under section 92CA(2) was issued by the Transfer Pricing Officer [TPO] to the petitioner on 08.09.2015 calling for information which the petitioner submitted and appeared before the Transfer Pricing Officer.

3.The Transfer Pricing Officer passed an order under Section 92CA(1) recommending an upward adjustment of Rs.25,73,41,261/- towards international transactions vide his report dated 31.10.2016. Upon receipt of the said report, the Assessing Officer issued a draft assessment order under Section 144C dated 21.12.2016. The said draft assessment order was served on the petitioner on 03.01.2017.

4.The petitioner had not chosen to file any objection against the said draft assessment order neither before the Dispute Resolution Panel [DRP] on or before 02.03.2017 being 30 days limit prescribed for filing objections nor before the Assessing Officer. Since the petitioner did not object within 30 days on receipt of draft assessment order, the Assessing Officer ought to have passed a final assessment order confirming the draft assessment order on or before 31.03.2017 being the end of one month from the end of the month in which the period for filing of objections under section 144C(2) of the Act expires. However, the respondent failed to pass a final order within the limitation provided and long thereafter, the respondent issued a notice under section 148 of the Act on 28.03.2018. In response to the said notice, the petitioner filed a return of income electronically on 19.04.2018.

5.The petitioner vide letter dated 20.04.2018 sought reasons for reopening the assessment for the assessment year 2013-14. The respondent communicated the reasons for reopening the assessment to the petitioner vide office letter dated 20.08.2018.

6.The petitioner in letter dated 14.09.2018 objected to the reopening on the ground that the assessment cannot be reopened merely because there was a failure on the part of the Assessing Officer to complete the assessment in accordance with law and within the time frame provided by law by observing that income had escaped assessment.

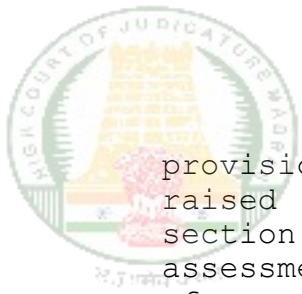


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7. The respondent issued a notice under section 143(2) of the Act requiring the petitioner to attend the respondent's office on 09.10.2018 at 10.30 a.m. with all the documents, accounts and other evidences in support of the return filed. The petitioner appeared before the respondent. Thereupon, the respondent vide impugned order dated 11.10.2018 rejected the objections filed by the petitioner for reopening of assessment.

8. The learned counsel for the petitioner with reference to the facts in nutshell narrated above, contended that the reopening of assessment is per se illegal and beyond the scope of jurisdiction and not warranted against the mandate as under the provisions of the Income Tax Act. In this context, the learned counsel for the petitioner relied on section 92CA at the first instance to establish that reference to the Transfer Pricing Officer was admittedly made in the case of the petitioner/assessee in view of the admitted international transactions as explained in the return of income by the petitioner/assessee. However, the procedures contemplated more specifically in sub-clause (4) to section 92CA of the Act, it is contended that on receipt of the order under sub-section (3) the Assessing Officer shall proceed to compute the total income of the petitioner under sub-section (4) to section 92CA in conformity with the Arm's Length price as so determined by the Transfer Pricing Officer.

9. In this context, the attention of this Court is drawn with reference to the order passed by the Transfer Pricing Officer wherein the Transfer Pricing Officer fixed the Arm's length price of international transactions. Additions were made and the proceedings of the Transfer Pricing Officer was communicated to the Assessing Officer and based on the said report of the TPO, the Assessing Officer passed the draft assessment order on 30.12.2016 under section 143(3) r/w. Section 92CA of the Act. It is contended that beyond the report of the Transfer Pricing Officer, the Assessing Authority considered the disallowance under section 40(a)(ia) and made additions and thereafter the Assessing Officer considered the claim of the assessee regarding the expenditure and other aspects of the matter. In paragraph 6 of the draft assessment order, total taxable income is computed. Relying on the said draft assessment order, the petitioner states that once the draft assessment order is passed by the Assessing Officer then under section 144C, he has to pass the final assessment order within a period of 30 days from the end of the month. Section 144C stipulates reference to Dispute Resolution Panel. Sub-clause (4) enumerates "the Assessing Officer shall notwithstanding anything contained in section 153 or section 153B pass the assessment order under sub-section (3) within one month from the end of the month in which; (a) the acceptance is received; or (b) the period of filing of objections under sub-section (2) expires. Relying on the said



provisions, it is contended that the petitioner assessee had not raised any objections. Therefore, under sub-clause (4) to section 144C the Assessing Officer is mandated to pass an assessment order. Admittedly in the present case no final order of assessment was passed. However, the respondent has chosen to invoke the powers under section 147 of the Act and issued a notice under Section 148 of the Act for reopening of assessment. Admittedly the procedures are followed as directed by the Apex Court of India in the case of GKN Driveshafts (India) Ltd., vs. Income Tax Officer [(2002) 125 Taxman 963(SC)]. However, the reopening of proceedings under section 147 of the Act on completion of draft assessment order issued pursuant to the report of the TPO is impermissible and beyond the jurisdiction of the Assessing Authority.

10.The learned counsel for the petitioner is of an opinion that sub-clause (4) to section 144C contemplates "the Assessing Officer has to pass an order within one month from the end of the month". In the present case admittedly no final order of assessment was passed. As far as the present facts are concerned, the reason for reopening of assessment is culled out from the report of the TPO and therefore the reopening of assessment is not permissible. In other words, the Arm's length price was determined by the TPO who is an expert body constituted under the provisions of the Act. When the expert body constituted considered the issues and determined the Arm's length price by making additions in the present case, the same cannot be a ground for reopening of assessment under section 147 of the Act by the Assessing Authority as the materials regarding international transactions were considered and determined by the Transfer Pricing Officer. In the draft assessment order, two more additions were also made by the Assessing Authority. Therefore, with reference to the additions made in other items which forms part of reasons for initiation of reopening proceedings, there is no jurisdiction for the authority to invoke section 147 of the Act and thus the proceedings are to be set aside.

11.The learned counsel for the petitioner elaborated the scope of section 147 of the Act to determine the income escaping assessment. In his opinion, section 147 of the Act enumerates such income and also any other income chargeable to tax which has escaped assessment. When the language is adopted "such income" and when that income which is the reason for reopening was adjudicated by the Transfer Pricing Officer and a draft assessment order is passed, there cannot be any power under section 147 of the Act for reopening of assessment and issue notice under Section 148 of the act". Thus, in the absence of any scope for reopening, the Assessing Authority cannot further stretch the provisions for the purpose of reopening of assessment, which is illegal and without jurisdiction. The



learned counsel for the petitioner reiterated that section 153 of the Act prescribes time limit for completion of assessment, re-assessment and re-computation. Therefore, in the present case, none of these procedures contemplated are followed by the Assessing Authority and for all these reasons, the writ petition is to be allowed.

12. The learned counsel for the petitioner in support of his contentions relied on the judgment of the Hon'ble Supreme Court and various High Courts.

(i) In the case of KLM Royal Dutch Airlines vs. Assistant Director of Income Tax [(2007) 292 ITR 0049], the High Court of Delhi made an observation as extracted hereunder:

"15. Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular AY, it would have to be assumed that since proceedings had not been opened under Section 143(2), the Return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the AO after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

16. Suffice it to state that wherever and whenever it appears to the High Court that proceedings have been initiated or are continuing without the authority of the law the High Court would be in dereliction of duty if it hesitated in exercising the extraordinary powers contained under Articles 226/227 of the Constitution of India. In the present case since the AO was duty-bound to conclude the assessment before resorting to Section 147 of the IT Act, it is our bounden duty to issue a writ of Certiorari so as to bring these legal proceedings to a definitive halt. The dicta in GKN Drive has been not duly followed since the



Objections filed by the Petitioners, in our view, have been disposed off contrary to law."

(ii) In the case of Smt. Sova Sarkar and others vs. Income Tax Officer [(1983) 139 ITR 0386], the High Court of Calcutta made an observation as extracted hereunder:

"14. It thus appears to be well-settled that when a return has been filed by an assessee, it cannot be ignored by the ITO and he will have no jurisdiction to issue a notice under Section 148 without completing the assessment on the return filed by the assessee. Even though a return is invalid in the sense that it is not correct and complete within the meaning of Section 139 of the I.T. Act, 1961, the ITO cannot ignore or disregard the same for the purpose of issuing a notice under Section 148 of the Act, unless the return can be regarded as not a return in the eye of law as in the case of the two illustrations given above. In the instant case, the ITO acted on the returns filed by the appellant, issued notices under Section 143(2) and heard the appellant for the assessment years in question under Section 143(3), but without completing the assessments he took recourse to reopen the assessments under Section 147 by issuing the impugned notices under Section 148 of the Act. In our view, the ITO has acted without jurisdiction in issuing the impugned notices."

(iii) In the case of T. Manavedan Tirumalpad and another vs. Commissioner of Income Tax [(1955) 28 ITR 0615], the High Court of Madras made an observation as extracted hereunder:

"5..... We have come almost to the end of the financial year and it is necessary that the assessment should be completed early. I therefore complete the assessment tentatively now leaving the question of assessment of the income from forests on lands assessed to land revenue to be considered later. Action under Section 34 of the Act would be taken in due course to assess such income from forests on lands assessed to land revenue as has now escaped assessment.

6..... It was just a case of piecemeal assessment in the course of the proceedings in the assessment year 1941-42. Section 23 of the Act does not provide for such piecemeal assessment. It was true that a



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portion of the assessee's income had not been taxed, and in that sense it had escaped assessment. But that escape was fully known to the Income-tax Officer even before 28th February, 1942 and was the result of a procedure deliberately adopted by the Income-tax Officer, a procedure which turned out to be wrong in law. There could be, in the circumstances of this case, no fresh discovery after 28th February, 1942, that the forest income had escaped assessment in 1941-42. A deferred assessment is not discovery of escaped assessment. Section 34 could not have been called in aid to complete an assessment deliberately deferred. Authority is not wanting either to negative the contention of the department, see *Debi Prasad Malaviya v. Commissioner of Income-tax* (1952) 22 ITR 539, where the learned Judges referred to two earlier decisions *Fazal Dhala v. Commissioner of Income-tax* (1944) 12 I.T.R. 341 and *Chuni Lal Nayyar v. Commissioner of Income-tax* (1951) 20 I.T.R. 568. We answer the third question in the negative and in favour of the assessee."

(iv) In the case of *Gemini Leather Stores vs. Income Tax Officer* [(1975) 100 ITR 1(SC)], the Hon'ble Supreme Court of India ruled as follows:

".....In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income-Tax Officer discovered. After this discovery the Income-tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inferences as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income-tax officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income tax officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147(a) to remedy the error resulting from his own oversight.



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(v) In the case of Vijay Television (P) Ltd. Dispute Resolution Panel and others [(2014) 369 ITR 0113(Mad)], the High Court of Madras made the following observations:

"23. It is evident from the above decision of the Honourable Supreme Court that if an order is passed beyond the statutory period prescribed, such order is a nullity and has no force of law. In that case before the Honourable Supreme Court, the period for assessment proceedings expired and thereafter, fresh assessment orders have been issued by anti-dating it. In those circumstances, it was held that the High Court ought not to have remanded the matter back to the assessment officer and by doing so, the statutory period prescribed for completion of assessment has been extended by conferring jurisdiction upon the Assessing Officer, which he otherwise lacked on the expiry of the said period. In that case, the Honourable Supreme Court also held that there is a distinction between an order which is a nullity and an order which is irregular and illegal. Where an authority making order lacks inherent jurisdiction, such an order will be null and void ab initio, as the defect of jurisdiction goes to the root of the matter and strikes at his very authority to pass any order and such a defect cannot be cured even by consent of the parties.

24. This decision squarely applies to the facts of this case. In this case, the order passed by the second respondent lacks jurisdiction especially when it is beyond the period of limitation prescribed by the statute. When there is a statutory violation in not following the procedures prescribed, such an order cannot be cured by merely issuing a corrigendum."

(vi) In the case of Parashuram Pottery Works Co. Ltd. vs. Income Tax Officer [(1977) 106 ITR 0001], the Hon'ble Supreme Court held as follows:

"15. It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we



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have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as income-tax assessment orders are concerned, they cannot be reopened on the scope of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, 'this cannot be said in the present case. The appeal is consequently allowed; the judgment of the High Court is set aside and the impugned notices are quashed. The parties in the circumstances shall bear their own costs throughout.'

(vii) In the case of K.M.Sharma vs. Income Tax Officer [(2002) 254 ITR 772 (SC)], the Hon'ble Supreme Court held as follows:

13. Fiscal statute more particularly on a provision such as the present one regulating period of limitation must receive strict construction. Law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation to litigant for indefinite period on future unforeseen events. Proceedings, which have attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. The amendment to sub-section (1) of Section 150 is not expressed to be retrospective and, therefore, has to be held as only prospective. The amendment made to sub-section (1) of Section 150 which intends to lift embargo of period of limitation under Section 149 to enable Authorities to reopen assessments not only on the basis of Orders passed in proceedings under the IT Act but also on Order of a Court in any proceedings under any law has to be applied prospectively on or after 1.4.1989 when the said amendment was introduced to sub-section (1). The provision in sub-section (1) therefore can have only prospective



operation to assessments, which have not become final due to expiry of period of limitation prescribed for assessment under section 149 of the Act.

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(viii) In the case of Hope Textiles Ltd. vs. Union of India [(1994) 205 ITR 508(SC)], the following observations are made by the Apex Court:

".....The writ petition was dismissed observing that no mandamus can be issued compelling the Income-tax Officer to make an order of assessment beyond the period of limitation prescribed by Section 153(2). In this appeal, it is urged by Sri Sen, learned Counsel for the appellant, that by virtue of Clause (ii) of Sub-section (3) of Section 153, the High Court could have directed the Income-tax Officer to pass an order of reassessment pursuant to the aforesaid notice, notwithstanding the expiry of the period prescribed in Sub-section (2) of Section 153. We are not prepared to agree. A writ of mandamus can be issued to a statutory authority to compel it to perform its statutory obligation. It cannot issue to compel him to pass an order in violation of a statutory provision. The Income-tax Officer had no power to make a reassessment beyond the period prescribed by Sub-section (2), unless the case fell under any of the other sub-sections under Section 153 or other provision extending the said period of limitation."

(ix) In the case of Commissioner of Income Tax vs. Anjum M.H.Ghaswala [(2001) 252 ITR 1 (SC)], the Apex Court ruled as under:

"24.....It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. If that be so since the Commission cannot exercise the power of relaxation found in Section 119(2)(a) in the manner provided therein it cannot invoke that power under Section 119(2)(a) to exercise the same in its judicial proceedings by following a procedure contrary to that provided in sub-section (2) of Section 119."

(x) In the case of TANMAC India vs. Deputy Commissioner of Income Tax [(2016) 97 CCH 0189], the High Court of Madras held as follows:



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"12.If the assessing officer, after issuing intimation u/s section 143(1) does not to issue a notice u/s 143(2) of the Act to initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of re-assessment, but of review. The reasons make it abundantly clear that the re-assessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the assessing officer since 2.11.1998 and which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.3.2001, prior to issue of notice u/s 148. The notice under section 148 dated 9.12.2002 is thus an arbitrary exercise of power and a review of proceedings impermissible in law."

(xi) In the case of Smt.Savitri Rani Malik vs. Commissioner of Income Tax [(1990) 186 ITR 701], the High of Gauhati made the following observations:

"17.Before we part with this opinion, we may advert to one argument that was advanced in this regard by learned counsel for the Revenue. Counsel referred to the facts in the instant case showing that there are no extenuating circumstances to stretch the provisions of the enactment to benefit the assessee in this regard. Like pleas are often advanced whenever questions of limitation have the effect of saving the individuals who, by their conduct, do not deserve any compassionate consideration. In courts where British jurisprudence prevails, statutes of limitation are jurisprudential necessities. See the American case, Bell v. Mormon [1828] 1 Peters 351 at page

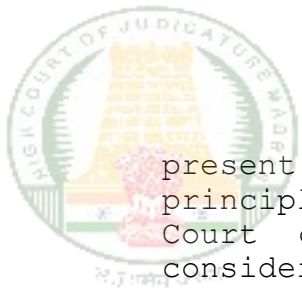


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360. Limitation is said to be "a statute of repose". Corpus Juris Secundum, Vol. 53, at page 901 : "Statutes of limitation are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidences are lost or the facts have become obscure from the lapse of time or the defective memory or death, or removal of witnesses that the statute (of limitation) is for the benefit and repose of individuals and not to secure general objects of policy and morals." In the U.K., the most ancient case is that of A' Court v. Cross [1825] 3 Bing 329 at page 360, in that limitation was described as "an act of peace". In an opinion expressed in Ampthill Peerage's case [1976] 2 All ER 411 at p. 423, the House of Lords observed : "Truth may be shut out (by operation of limitation) but society considers truth may be bought. . . the fundamental principle ... (is) that there should be some end to litigation . . .". We find solace in what is stated to be the eternal verity of life and law that statutes of limitation achieve peace and good administration but do not advance morals and good conduct.

18. We answer that the assessment order for 1970-71 and the assessment proceedings are barred. The answer is recorded against the Revenue. As respects 1971-72, the assessment order is not barred, and we answer the question against the assessee and in favour of the Revenue. No costs."

13. Relying on the above judgments, the learned counsel for the petitioner reiterated that the Courts have consistently held that the scope of section 147 cannot be extended in such circumstances where the TPO determined the Arm's length price and the Assessing Authority passed a draft assessment order considering the materials as well as the report of the TPO and additions are also made. It is not only beyond the scope of jurisdiction it is not within the time limit prescribed. Some of the judgments are cited to elaborate the importance of the limitation prescribed under the Income Tax Act which is mandatory. The other judgments are cited for the purpose of understanding the procedures to be followed for reopening of assessment. Certain judgments are for the purpose of contending that reopening of assessment in certain circumstances are impermissible. Broadly these contentions are raised in support of the case of the petitioner and it is contended that in the



present case, the respondent has not followed any of the principles settled by the Courts across the Country and the Apex Court of India. Thus the writ petition deserves to be considered in favour of the petitioner.

14. The learned standing counsel appearing on behalf of the respondent objected the contentions of the petitioner in entirety. It is contended that the petitioner cannot sustain his claim based on erroneous interpretation of the provisions of the Act. The learned Standing counsel strenuously contended that the writ petition is not entertainable. The scope of jurisdiction is well defined under the scheme of the Act and thus the interpretation offered on behalf of the petitioner is not in consonance with the spirit of the procedures as well as the scheme contemplated under the Act. Thus the writ petition is devoid of merits. The learned standing counsel proceeded with by elaborating the scope of section 147 of the Act. There is no embargo to initiate proceedings under section 147/148 of the Act in such circumstances with reference to the facts placed by the petitioner. There is no bar absolutely for reopening of assessment even in such cases where draft assessment orders are passed or the issues relating to international transactions were referred to the Transfer Pricing Officer. The scope of section 147 of the Act is wider enough and conferred on the Assessing Officer to reopen the assessment if he has reason to believe that income chargeable to tax escaped assessment. Thus the scope of wider interpretation as rightly accepted by the Constitutional Courts cannot be narrowed down for the purpose of limiting the power conferred on the authority to reopen the assessment in such circumstances where the issues are referred to the TPO and a draft assessment order has been passed.

15. The learned standing counsel referred section 148 of the Act and stated that sub-clause (1) commence as "before making the assessment, re-assessment and re-computation under section 147, the Assessing Officer shall serve on the assessment a notice requiring him to furnish within such period as it may specific in the notice". Relying on the said clause, the learned standing counsel contended that a notice under section 148 of the Act may be issued before making the assessment, re-assessment or re-computation. In the present case, admittedly no assessment order has been passed. The Transfer Pricing Officer submitted his report, and draft assessment order was passed. However under section 144C(4), no final assessment order has been passed and therefore, the respondent is vested with power to invoke section 147 of the Act and issue notice under section 148 of the Act.

16. The learned standing counsel referred section 149 of the Act which stipulates time limit for notice. Relying on sub-clause (1)(b) which states that "if four years, but not more



than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year". In the present case admittedly the reopening of assessment is made within four year, therefore, there is no irregularity or infirmity as such. The Assessing officer has not passed any final assessment order under section 144C(4) of the Act, therefore, he is well within his power to invoke section 147 and issue notice under section 148 which states that such notice can be issued before making any assessment, re-assessment or re-computation. Therefore, the circumstances as narrated would establish that the notice under section 148 was issued by following the procedures as contemplated under sections 147 and 148 of the Act and thus, there is no perversity and the writ petition is to be rejected.

17. Considering the arguments, two issues are to be considered, with reference to the facts and circumstances. Firstly, whether the Assessing Officer can issue notice under section 148 of the Act when the Assessing Officer has not passed an assessment order under section 144C(4) of the Act? Secondly, whether the Assessing Officer can cover up the lapses and whether there is such provision under the Income Tax Act to do so?

18. Let us consider the procedures contemplated in Chapter XIV of the Act for the purpose of cogent understanding with reference to the purpose and object of the Act which is to be considered as paramount. Any such procedures contemplated under Chapter XIV of the Act must have nexus, purpose and object sought to be achieved and therefore the Courts cannot adopt an isolated approach with reference to the procedures as well as the object sought to be achieved. As far as the procedures are concerned, pragmatic and constructive interpretations are mandatory.

19. The golden rule of interpretation would be that, the language employed in the Statute must be read over as it is and the Courts cannot substitute any other language for the purpose of interpretation of statutes. Thus the Courts cannot add words to a statute and offer a different interpretation. However, the rule of constructive interpretation require that the language employed in the statutes are to be interpreted with reference to the purpose and object sought to be achieved under the Act.

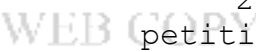
20. With this, let us consider the scope of section 147 of the Act at the first instance though the Constitutional Courts have repeatedly considered the same in umpteen number of judgments. Undoubtedly, consideration of the provision is imminent as the facts of the particular case warrant the same. Section 147 of the Act stipulates that if the Assessing Officer has reason to believe that any income chargeable to tax escaped



assessment for any assessment year, he may subject to the provisions of sections 148 to 153, assess or reassess such income and also 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.

21. In the present case, reopening of assessment is made within a period of four years. Therefore, the proviso clause may not have any application. Perusal of Section 147 of the Act and its scope undoubtedly is wider enough to cover numerous circumstances, wherein the Assessing Authority can invoke if he has reason to believe that any income chargeable to tax has escaped assessment. Many other circumstances are also elaborated in explanation (1) and explanation (2) to Section 147 of the Act. As far as the reopening of assessment is concerned, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. As far as the reopening of assessment is concerned, if the Assessing Officer has reason to believe that any income chargeable to tax escaped assessment for any assessment year. Therefore irrespective of the assessment order and within the period of limitation contemplated under the proviso clause the Assessing Officer is empowered to reopen the assessment by following the procedures contemplated.

22. There is no other condition stipulated under Section 147 of the Act with reference to the procedures contemplated under Section 92CA or under Section 144C of the Income Tax Act. Contrarily section 144C(4) states that the Assessing Officer shall notwithstanding anything contained in section 153 or section 153B pass an assessment order. Therefore there is a scope for reopening of assessment even in cases where no assessment order is passed under sub-clause (4) to section 144C of the Act. Undoubtedly, in the present case, the petitioner assessee had not raised any objection. Therefore, under sub-clause (4) the Assessing Officer is empowered to pass an order of assessment, however, he has not passed any orders and has chosen to reopen the assessment by invoking the powers conferred under section 147 of the Act. Section 147 of the Act provides power to assess or re-assess. The section did not contemplate the stages under which such assessment or re-assessment can be made. For this purpose, Chapter XIV of the Act is to be read cogently to form an opinion that the assessment or re-assessment shall be made at any point unless there is a specific prohibition contemplated under any of the clauses under Chapter XIV of the Act. When there is no embargo under Section 147 of the Act with reference to the stages under which reopening can be made there is no impediment for the Assessing Officer to invoke powers under Section 147 of the Act and in the present



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learned Dispute Resolution Panel against the order. However, when a copy of the objections before the learned Dispute Resolution Panel was called for from the assessee, the assessee feigned ignorance. Hence, as the assessee's income i.e, the additions and disallowances as mentioned above has escaped assessment for the year 2013-14 and to bring the same to tax, the assessment has been reopened.

27.Regarding the impugned order disposing of the objections, the Assessing Officer made a finding which reads as follows:

"For making this claim, the assessee has relied on three case laws which are either not related to the facts of this case or supportive of the department's action of issuing notice u/s.148. The same are discussed as under:

The first case viz T.Manavedan Tirumalpad vs. CIT [1955] deals with the provisions of Act as they exist prior to independence which are redundant after the 1961 Act came into force.

The second case Viz, Parashuram Pottery Works Co. Ltd. vs. ITO [1977] relates to the invoking of Section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year, where as in the instant case the provisions of sec. 147 have been invoked within the stipulated period of four years.

The third and last case viz. KLM Royal Dutch Airlines vs. ADIT speaks mainly about the distinction between the time limits set down by section 153 for framing the assessment u/s. 143 and u/s.147. Interestingly, at para8 of this case law relating to the Judgment of the honourable High Court of Delhi the following was quoted from the decision in an Australian case law to define assessment.

"Assessment means the completion of the process by which the provisions of the Act relating to liability to tax are give concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case."

The instant case perfectly fits into this comprehensive definition, as 'the process of giving concrete application of the provisions of the Act resulting in a specified amount of money becoming due and payable as the proper tax' has not been completed due to the reason that the demand notice u/s.156 along with the regular assessment order has not been served on the assessee company within the statutory period. This means that no assessment has



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been made in the instant case and the provisions of section 147 of the Income Tax Act 1961 read with its explanation 2(b) are squarely applicable to this case.

With regard to the assessee's reference to various other case laws stating that reassessment has to be based on 'fresh material' and reopening based on reappraisal of existing material is invalid, attention is drawn to the decision of the honourable Supreme Court of India in the case of M/s.Krishna Developers and Co. versus Dy. Commissioner of Income Tax, Special Leave to Appeal (C)No(s).23760/2017 dated 08.02.2018 where the honourable Apex Court has held that 'the A.O can reopen the case on the same basis as was there in the original assessment which was quashed for technical reasons' by observing that 'once the original assessment is declared as invalid as having been completed without the service of notice on the assessee within the statutory period, there would be thereafter no assessment in the eye of law. The situation therefore, be akin to where return of the assessee has been accepted without a scrutiny. Reopening of the assessment, if the Assessing Officer has the reason to believe that income chargeable to tax has escaped assessment, would be entirely permissible under section 147 of the Act.

Merely on the ground that the reasons recorded by the Assessing Officer proceeded on the same basis on which the Assessing Officer initially desired to make additions but which failed on account of setting aside of the order of assessment, would not preclude the Assessing Officer from carrying out the exercise of reopening of the assessment.

On the conspectus, there is no irregularity or illegality in issue of notice u/s.148 of the Act for taking up the assessment w.r.t. the provisions of section 153 of the Act.

As elaborated in the foregoing paragraphs, the objections of the assessee company have been rebutted effectively and reasonably and the assessee's request to drop the reassessment proceedings stands rejected and the assessment proceedings u/s. 148 are continued. The assessee company is hereby afforded personal hearing as requested on 22.10.2018 @ 11.00 a.m."

28.Close reading of the disposal of objections would reveal that the respondent has considered the objections including the judgments relied on by the petitioner. The findings would

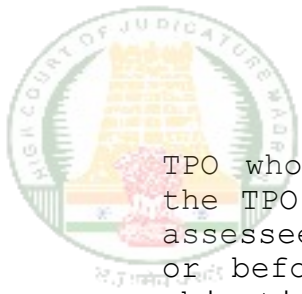


reveal that "merely on the ground that the reasons recorded by the Assessing Officer proceeded on the same basis on which the Assessing Officer initially desired to make additions but which failed on account of setting aside of the order of assessment, would not preclude the Assessing Officer from carrying out the exercise of reopening of the assessment". With reference to the reasons stated in proceedings dated 20.08.2018, the objections raised were considered by the authority and reasonings are also given.

29. This Court is of the considered opinion that the satisfaction of the reasons alone are to be considered by the High Court. The sufficiency of the reasons cannot be gone into by the High Court. The sufficiency of the reasons may differ from case to case, however, the principle is that the reasons as well as the findings would be sufficient to form an opinion that the Assessing Officer has reason to believe. If the reasons furnished passed the test, then the assessee is bound to co-operate for the re-assessment proceedings. Therefore, the High Court cannot go into the adjudication of the reasons furnished with reference to certain materials. If the reasons furnished are prima facie satisfied with reference to the ingredients contemplated under section 147 of the Act, then the authority must be allowed to continue the proceedings. The assessee is getting further opportunity to submit their documents or explain the nature of transaction, etc before passing the final order of assessment/re-assessment. Thus the intervention after initiation and before completion must be expected to be cautious and only on certain grounds wherein the assessee could able to establish that the authority reopened has no jurisdiction or directly in violation of the provisions of the Act.

30. As far as the lack of jurisdiction is concerned, numerous writ petitions are filed on the facts and circumstances. Such jurisdictional ground is popularly taken in order to overcome the entertainability of the writ petition as the proceedings at the budding stage is challenged. Therefore, the Courts are expected to be cautious. The jurisdictional point raised closely connected with the facts and circumstances must be adjudicated by the authority competent. When there is a blatant violation of provisions of law hitting the power directly, then alone writ proceedings can be entertained and not otherwise. Therefore, merely raising a jurisdictional ground is insufficient to interfere with the proceedings and the jurisdictional ground raised hitting the provisions directly alone would be acceptable ground for the purpose of entertaining a writ petition.

31. As far as the present writ petition is concerned, admittedly the case was referred under Section 92CA before the



TPO who in turn submitted his report. Based on the report of the TPO, draft assessment order was passed as contemplated. The assessee has not submitted any objection either before the DRP or before the Assessing Officer. In view of the fact that objection was not received, it is contended that sub-clause (4) warrants passing a final assessment order by the authority. Admittedly, no such final assessment order is passed. Under these circumstances, there is no prohibition under section 147/148 of the Act for initiation of reopening of assessment.

32. A plain reading of the draft assessment order would mean that it is a draft and cannot be considered as final. Thus, any such draft assessment order is subject to alteration or changes. In this view of the matter, the discrepancies or materials tangible culled out from and out of such draft assessment order that also is an acceptable ground for the purpose of reopening of assessment under section 147 of the Act as the Assessing Authority has reason to believe that tax chargeable to tax escaped assessment.

33. The very concept of reopening of assessment and the wider scope provided for reopening of assessment is undoubtedly in favour of revenue. The very purpose of such wider provision is that the initial assessment order is passed based on the return of income filed by the assessee. Once the return of income is accepted as it is the Income Tax Department did not go further for any other enquiry, i.e. limited scrutiny. Therefore, in all circumstances, the Income Tax Act Act trust the assessee through the return of income filed and only when the discrepancy or income escaped assessment is identified, the procedures are set in motion for further action under Chapter XIV of the Act. Thus there cannot be any other opinion that the re-assessment provisions are for the benefit of revenue and the revenue being the backbone of the economy of the Nation, such provisions are necessary to protect the interest and welfare of the Nation in consonance with the Constitutional principles.

34. As far as the other contentions raised that once the draft assessment order is passed and the assessee has not raised any objections with reference to the draft assessment order, the Assessing Officer has to necessarily pass the final assessment order. Undoubtedly, in the present case the assessee has not raised any objection, however, the same would not preclude the Assessing Authority as there is a scope for reopening of assessment if he has reason to believe that the income chargeable to tax escaped assessment. Therefore, in cases, where no assessment orders are passed under sub-clause (4) to section 144C, the Assessing Officer is empowered to invoke section 147 of the Act if he has reason to believe that the income chargeable to tax escaped assessment.



35. The order of the TPO is independent and unconnected with the powers conferred on the Assessing Officer under section 147 of the Act. Therefore, the report of the TPO cannot be conclusive for the purpose of its acceptance by the Assessing Officer, who is empowered to go into the contents of such report and make an assessment and if any materials are available, he is at liberty to invoke section 147 of the Act.

36. Reference to the Transfer Pricing Officer more specifically sub-clause (4) reveals that on receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) to section 92C so as to be determined by the Transfer Pricing Officer.

37. The above provision unambiguously clarifies that on receipt of the order passed by the TPO, the Assessing Officer shall proceed to compute the total income of the assessee and in conformity with the Arm's length price. Therefore, the Assessing Officer is empowered to pass draft assessment order with reference to section 144C by taking into consideration the report of the TPO and the other aspects of the matter. In other words, the draft assessment order is not confined actually to the report of the TPO and therefore, there is a scope for re-assessment.

38. As far as determination of Arm's Length Price or consideration of other disallowance, etc. in the draft assessment order are to be considered at the time of adjudication of reopening proceedings and the assessee is at liberty to raise any further ground in respect of those aspects which all are relatable to the merits and with reference to the documents and evidences to be scrutinized. However, mere consideration of Arm's Length Price and other disallowance in the draft assessment order would not preclude the Assessing Authority for reopening of assessment under section 147/148 of the Act as the spirit of the above provisions are providing wider scope to reopen the assessment and the only object is to ensure that the income chargeable to tax escaped assessment is brought within the tax net. Thus the object plays a pivotal role in the matter of reopening proceedings and the other procedures contemplated in Chapter XIV of the Act must be read cogently along with the purpose for which such procedures are contemplated and any interpretation overlapping the provisions would defeat the object and thus, this Court is of the opinion that the power of reopening under section 147 of the Act cannot be restricted, even in such circumstances, the TPO submitted a report and a draft assessment order is passed, with reference to certain materials available, and the Assessing Officer has



reason to believe that the income chargeable to tax escaped assessment, then he is well within his powers to invoke section 147/148 of the Act. Accordingly, the issues raised are answered in favour of the revenue.

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39. Thus, the writ petition is devoid of merits and stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

cse

To

The Assistant Commissioner of Income-Tax,
Corporate Circle 4(2),
433, 4th Floor, Main Building,
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Nungambakkam Chennai-34.

+1cc to M/s.D.Prabhu Mukunth Arunkumar, Advocate, S.R.No.34130
+1cc to M/s.G.Baskar, Advocate, S.R.No.34202

W.P.No.28176 of 2018

GPL (CO)
SB (23/08/2021)