



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	23.02.2021
Pronounced On	11.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. No. 32394 of 2018

and

W.M.P. Nos. 37589 of 2018 and 6646 of 2019

M/s.T.T.Krishnamachari & Co.,
No.06, Cathedral Road,
Chennai - 600 006.

Represented by its Power of Attorney Holder,
Mr.B.V.K.Durga Prasad

... Petitioner

Vs

The Assistant Commissioner of Income Tax,
Non-Corporate Circle 3, Chennai - 600 034.

... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the Petitioner on the file of the Petitioner on the file of the Respondent and quash the impugned notice No.ITBA/AST/S/148/2017-18/1009449470(1) dated 27.03.2018 in PAN:AAAF0395D for the Assessment Year 2011-12 passed under Section 148 of the Act and the consequential order passed by the Respondent in AAFT0395D/NCC3/2018-19 dated 19.11.2018 rejecting the objections.

For Petitioner : Mr.R.Vijayaraghavan
for Mr.Subbaraya Aiyar Padmanabhan

For Respondent : Ms.Hema Muralikrishnan
Senior Standing Counsel

ORDER

The Petitioner a partnership concern has challenged the impugned demand notice dated 27.03.2018 bearing Reference No.ITBA/AST/S/148/2017-18/1009449470(1) seeking to reopen the assessment for the Assessment Year 2011-2012 under Section 147 read with Section 148 of the IT Act, 1961 and the consequential order dated 19.11.2018 bearing Ref.No.AAFT0395D/NCC3/2018-19 passed by the respondent rejecting the objection filed by the



2. After the impugned notice was issued to the petitioner for the Assessment Year 2011-2012, the petitioner asked the respondents to furnish the reasons for reopening the assessment. The respondent has furnished the reasons for reopening of the assessment vide letter dated 23.04.2018. The reasons for reopening of the assessment reads as under:-

During the course of assessment proceedings of M/s Swiss Reinsurance Company, Zurich for AY 2014-2015, by the DCIT (International Taxation) -4(2)(2), Mumbai, it was found that during the financial year relevant to A.Y 2011-12, partners of the assessee firm Shri T.T.Raghunathan & Shri T.T.Jagannathan jointly have been allotted shares of TTK Healthcare TPA Private Ltd (formerly TTK Health Services Pvt. Ltd) at Rs.10 per share. This fact was intimated to the undersigned by the ACIT, Corporate Circle 3(1), vide letter dated 28.03.2017. Thus, it is found that the existing shareholders of TTK, viz., Shri T.T.Raghunathan jointly with Shri T.T Jagannathan as a firm has been allotted shares of the company at par value of Rs.10/-. Further, as per the information during the same period, these shares were allotted to M/s Swiss Reinsurance Company, Zurich at an aggregate fair market value of Rs.5141 per share on 05.08.2010.

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6. It is submitted that the so called income based on the difference in the allotted price on the par value of Rs.10 per share to the petitioner firm and the price at which shares were allotted to the Swiss Company namely M/s.Swiss Reinsurance Company Ltd., Switzerland (Swiss Re) cannot be a basis for reopening the assessment unless the Assessing Officer is clear as to how there was income that has the escaped assessment.

7. It is further submitted that as per the decision of the Bombay High Court in Vodafone India Services (P) Ltd., Vs Union of India, 369 ITR 511 and SKB BPO Services (P) Ltd., Vs ITO, 230 Taxmann 192, allotment of shares were capital income and therefore shares allotted to the petitioner were to be considered only as capital expenditure and therefore there is no justification in concluding that there was "income from other sources" for the purpose of determining whether there was any income that had escaped assessment in the hands of the petitioner firm.

8. The learned counsel for the petitioner also relied on other decision of the Hon'ble Supreme Court and the High Courts to state that the notice under Section 148 of the IT Act, 1961 as to have reasons and without any reasons, the proceedings were liable to be quashed.

9. In this connection, a reference was made to the decision in

- (i) Nestle SA Vs Assistant Commissioner of Income Tax, 417 ITR 213 (Del)
- (ii) Hindustan Lever Ltd, Vs R.B.Wadkar, 268 ITR 332 (Bom)
- (iii) G.S.Engineering & Construction Corporation Vs Deputy Director of Income Tax and others, 357 ITR 335 (Del.)
- (iv) Vodafone India Services (P) Ltd., Vs Union of India, 369 ITR 511
- (v) SKB BPO Services (P) Ltd., Vs ITO, 230 Taxmann 192

10. The learned counsel for the petitioner also relied on few circulars issued by the Central Board of Direct Taxes (CBDT) to stress the point that premium amount for shares were issued only on the of capital account transactions. In this connection, a reference was made by CBDT circular No.2/2015 dated 29.01.2015 which essentially accepted the view of the Bombay High Court in Vodafone India Services (P) Ltd., Vs Union of India.

11. The learned counsel for the petitioner also drew my attention to Circular No.10/2018, dated 31.12.2018, wherein, it was clarified as follows:-



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"4. It is apparent from the legislative intent that clause (viia) was inserted in section 56(2) of the Act as an anti-abuse provision to prevent the practice of transferring shares of a specified company for no or inadequate consideration. Thus, the intention was never to apply these provisions of said clause (viia) to the fresh issuance of shares as mentioned in para 2 above, by the specified company. Keeping in view the legislative intent to apply anti-abuse provision contained in section 56(2)(viia) to transfer of shares for no or inadequate consideration, it is hereby clarified that section 56(2)(viia) of the Act shall apply in cases where a specified company or firm receives the shares of the specified company through transfer for no or inadequate consideration. Hence, the provisions of section 56(2)(viia) of the Act shall not be applicable in cases of receipt of shares by the specified company or firm as a result of fresh issuance of shares as mentioned in para 2 above, by the specified company."

He further submits that circular was withdrawn on 04.01.2019 only on the ground that the issue is still pending before the judicial forums.

12. Apart from the above case, the learned counsel for the petitioner also relied on few other decisions which are detailed as under:-

- (i) ACIT vs Dhariya Construction Company, 328 ITR 515 (SC).
- (ii) Scan Holdings P Ltd vs ACIT, 402 ITR 290 (Del.)
- (iii) CIT vs Orientcraft Ltd., 354 ITR 536 (Del.)
- (iv) Prashant S.Joshi vs ITO, 324 ITR 154 (Bom.)
- (v) CIT vs Insecticides (India) Ltd., 357 ITR 330 (Del.)
- (vi) Nirma Bang Securities Pvt Ltd vs ACIT, 382 ITR 93 (Bom)
- (vii) Vodafone India Services (P) Ltd vs UOI, 369 ITR 511 (Bom)
- (viii) SKB BPO Services (P) Ltd vs ITO, 230 Taxman 192 (Bom)
- (ix) CIT vs D.P. Sandu Bros, Chembur (P) Ltd, 273 ITR 1 (SC)
- (x) Khoday Distilleries Ltd vs CIT - 307 ITR 312 (SC)
- (xi) CIT vs O.P.Srivatava - 357 ITR 1 (All)
- (xii) Scan Holdings P Ltd vs ACIT - 402 ITR 0290 (Del)
- (xiii) CIT vs Green World Corporation - 314 ITR 81 (SC)
- (xiv) CIT vs Orient Craft - (2013) 354 ITR 536 (Delhi)
- (xv) Bapalal & Co. Exports vs JT.CIT - 289 ITR 37
- (xvi) M/s. Tanmac India vs CIT - 97 CCH 189
- (xvii) Fenner (India) Ltd vs DCIT - 241 ITR 672
- (xviii) CIT vs Kelvinator India Ltd - 320 ITR 561 (SC)
- (xix) CIT vs SPL's Siddhartha Ltd - 345 ITR 223
- (xx) Sheo Narain Jaiswal & Ors. vs ITO - 176 ITR 35 (Pat.)



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- (xxi) CIT vs Aslam Ulla Khan - 321 ITR 150 (Kar)
- (xxii) CIT vs SFIL Stock Broking - 325 ITR 285 (Del)
- (xxiii) Vodafone India services Pvt Ltd vs Addl CIT,
368 ITR 001
- (xxiv) Pr. CIT vs Apeak Infotech Ltd - 378 ITR 148 (Bom).

13. Defending the impugned order, the learned counsel for the respondent submits that the petitioner has admitted to settle the proceedings are pending before the CIT (Appeals) for the previous Assessment Year 2010-2011. It is submitted that attempt of the petitioner was negated by Court by its order 07.02.2018 in W.P.Nos.1533, 1534, 1537, 1538, 1557, 1558, 1562 to 1565 of 2018 and W.P.Nos.1557 & 1558 of 2018 and pursuant to which, assessment orders came to be passed and the issue is now pending before the CIT (Appeals) for the Assessment Year 2010-2011. It is therefore submitted that any observation on merits in this writ petition would impact the outcome of the said proceedings.

14. The learned counsel for the respondent submits that in case, any orders are passed by this Court, the assessment proceedings and CIT (Appeals) filed by the petitioner will have to be decided in terms of the decision and therefore submits that the writ petition may be closed as was done on the previous occasion by an order dated 07.02.2018.

15. The learned counsel for the respondent also relied upon the decision of the Hon'ble Supreme Court in Raymond Wollen Mills Ltd. Vs. Income Tax Officer, [1999] 236 ITR 34 (SC), wherein, in Paragraph (3), it was held as under:-

"3. In this case, we do not have to give a final decision as to whether there is suppression material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing



authority. The appeals are dismissed. There will be no order as to costs."

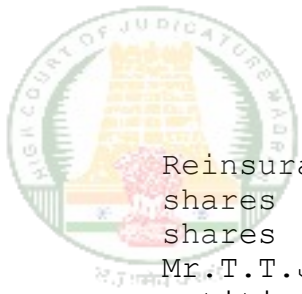
16. Finally, a reference was made by the decision of the Hon'ble Supreme Court in Commissioner of Income Tax Vs Zuari Estate Development & Investment Co. Ltd., (2015) 63 Taxmann.177 (SC), wherein, the Hon'ble Supreme Court held as follows:-

"4. We find that pursuant to the notice issued under Section 143 of the Income Tax Act, the assessing officer had computed the income by passing the assessment orders on merits and rejecting the contention of the respondent that the aforesaid transaction did not amount to a sale in the assessment year in question. Against that assessment order, the respondent had preferred the appeal before the Commissioner of Income Tax (Appeals) which was also dismissed. Further appeal was preferred before the Income Tax Appellate Tribunal. This appeal, however, has been allowed by the Tribunal vide orders dated 29.01.2004, simply following the impugned judgment of the High Court, whereby the assessment proceedings itself were quashed. Since we have set aside the judgment of the High Court, as a result, the orders dated 29.01.2004 passed by the Income Tax Appellate Tribunal also stands set aside. The matter is remitted back to the Income Tax Appellate Tribunal to decide the appeal of the respondent on merits."

17. I have perused the impugned notice dated 27.03.2018 and the impugned communication dated 19.11.2018 and the reasons given to the petitioner vide communication dated 23.04.2018 seeking to reopen the assessment under Section 148 read with Section 56(2)(vii) of the IT Act, 1961.

18. I have also considered the submission of the learned counsel for the petitioner and the learned senior standing counsel for the respondent.

19. The petitioner is a partnership firm carrying on the business. The petitioner firm is a share holder in a Joint Venture Company called M/s.TTK Healthcare T.P.A Pvt. Ltd., (TPA) along with a Swiss Company named M/s.Swiss Reinsurance Company Ltd., Switzerland (Swiss Re). In the said Joint Venture Company i.e., M/s.TTK Healthcare T.P.A Pvt. Ltd., (TPA), the petitioner was allotted share with a face value of Rs.10 per share, whereas, the joint promoter on the aforesaid company M/s.Swiss



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Reinsurance Company Ltd., Switzerland (Swiss Re) was allotted shares at premium sum of Rs.5,141/- per share. 74% of the shares are held in the joint name of its partners namely Mr.T.T.Jagannathan and Mr.T.T.Raghunathan for the benefit of the petitioner firm while the said Swiss Company holds 26% of the balance equity shares in M/s.TTK Healthcare T.P.A Pvt. Limited.

20. The petitioner filed original return on 27.09.2011 and thereafter a revised return 10.02.2012 and admitted a total income of Rs.27,19,58,060/-. The assessment of the petitioner firm was completed under Section 143(1) of the IT Act for the Assessment Year 2011-2012 on 03.01.2013.

21. The issue relating to the difference in the prices adopted for the shares allotted to the petitioner and the said swiss company in the joint venture company M/s.TTK Healthcare T.P.A Pvt. Ltd., (TPA) was subject matter of a dispute during the Assessment Year 2010-2011.

22. The petitioner had challenged the said proceeding in W.P.Nos.1567 & 1565 of 2018. The partners of the petitioner's firm namely Mr.T.T.Raghunathan and Mr.T.T.Jagannathan had also challenged the notices and the consequential orders for the Assessment Year 2011-2012 in W.P.Nos.1533, 1534, 1537, 1538, 1557, 1558, 1562 to 1565 of 2018 and W.P.Nos.1557 & 1558 of 2018 respectively. These writ petitions came to be disposed by a common order dated 07.02.2018 by directing both the petitioner firm and its partners to participate in the assessment proceedings by the respondent.

23. As on date, the issue now pending before the CIT (Appeals) on the very same issue for the Assessment Year 2010-2011. There the income was sought to be treated as "income from other sources" under Section 56(1) of the IT Act, 1961. During the Assessment Year 2011-2012, Section 56(2) (vii-a) had been introduced with effect from 01.10.2009.

24. Prima facie, the petitioner firm which has been allotted shares below the market value ought to have offered the differential amount to tax. A reading of the sub-clause (vii) to Section 56(2) of the IT Act, 1961 seems to indicate it applies to the facts and circumstances. Since the petitioner has not offered the differential amount of tax, in my view, the respondent was justified in reopening the assessment under Section 148 of the IT Act, 1961.

25. It is however open for the petitioner to substantiate before the respondent as to why sub-clause (vii) to Section 56 (2) of the IT Act, 1961 was not attracted. The shares are held in the name of the partners for the benefit of the petitioner



26. The two partners of the petitioner firm appear to have contended that the amounts for the purchase of shares were routed through bank account and that the investments were made in the share has been duly accounted and reflected in the balance sheet relating of the petitioner firm. Therefore, the deemed income cannot be assessed in their hands. This would imply even according to the partners of the petitioner firm, tax was payable by the petitioner firm under Section 56(2) (vii-a) of the IT Act, 1961.

28. Both the counsel for the petitioner and the respondent also confirm that the respective appeals are pending before the Commissioner of Income Tax (Appeals).

30. Therefore, I am not inclined to interfere with the reassessment proceedings as it will scuttle the proceedings pending before the Commissioner of Income Tax (Appeals) for the Assessment Year 2010-2011.

32. Since the dispute pertains to the Assessment Year 2011-2012, the respondent shall endeavour to pass appropriate orders on merits in accordance with law within a period of sixty days from the date of receipt of this order.

33. Liberty is given to the petitioner to file additional reply/representation, if any, within a period of thirty days from the date of receipt of this order.



34. It is made clear, while passing such orders, the respondent shall consider the issue independently on merits uninfluenced by any observation herein on merits of the case. The petitioner may be given opportunity of personal hearing.

35. This Writ Petition stands disposed of with the above observations. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To:

The Assistant Commissioner of Income Tax,
Non-Corporate Circle 3,
Chennai - 600 034.

+1cc to M/s.Subbaraya Aiyar Padmanabhan & Ramamani,
Advocate, S.R.No.27742

+1cc to M/s.Hema Muralikrishnan, Advocate, S.R.No.27695

W.P. No. 32394 of 2018

SR-II(CO)
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