IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :01.07.2021

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM
W.P.Nos.33134 & 33139 of 2018
and
W.M.P.Nos.38431 & 38436 of 2018

Mr.K.Rajesh ...Petitioner in both Wps.

Vs

1.The Assistant Commissioner of Income Tax,
Non-Corporate Circle - 1,
63, Race Course Road,
Coimbatore - 641 018.

2.Commissioner of Income Tax (Appeals) - 3,
63, Race Course Road,
Coimbatore. ... Respondents in both Wps.

PRAYER in W.P.No.33134/2018: Writ Petition filed Under Article 226 of the Constitution of India to issue a writ of certiorari, calling for the records relating to the notice issued by the 1st respondent under Section 148 of the Income Tax Act, 1961 dated 28.02.2018 in respect of the petitioner, K.Rajesh, PAN No.ACTPR3290A, to quash the same.

PRAYER in W.P.No.33139/2018: Writ Petition filed Under Article 226 of the Constitution of India to issue a writ of certiorari, calling for the records relating to the order passed by the 2nd respondent in ITA No.191/16-17 dated 18.11.2016 in the case of M/s.B.Rangaswamy Naidu Orchards Pvt.Ltd., quash the same.

For Petitioner : Mr.Niranjan Rajagopalan

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel
for Income Tax

..in both Wps.

COMMON ORDER

The writ petition in W.P.No.33134 of 2018 is filed challenging the notice issued by the first respondent under Section 148 of the Income Tax Act on 28.02.2018 and another writ petition in W.P.No.33139 of 2018 is filed to call for the records relating to the order passed by the second respondent in

ITA No.191/16-17 dated 18.11.2016 in the case of M/s.B.Rangaswamy Naidu Orchards Private Limited.

2. Admittedly, in the said order dated 18.11.2016, the petitioner was not a party and he challenges a particular portion of the observations made by the second respondent, which would affect the interest of the petitioner.

3. The petitioner is an assessee and filed his return of income regularly. The facts as narrated and with reference to the shares purchased by the petitioner are not disputed. However, the learned counsel for the petitioner made a submission that the petitioner, Mr.K.Rajesh was not a Director of the Company, namely M/s.B.Rangaswamy Naidu Orchards Private Limited and without even hearing him and not providing any opportunity to defend his case in the impugned order dated 18.11.2016, the order was passed under Section 143 (3) of the Act. The second respondent made an observation in Paragraph No.5.4, as under:

> “5.4 However, what is allowed as expenditure has been receipt in the hands of the erstwhile directors of the appellant company. The receipt of Rs.5.50 crore do partake the character of income in the hands of erstwhile directors of the appellant company. It has been stated in Paragraph 4.3 of the assessment order that the erstwhile director of the company have admitted income from capital gain on sale of shares in than Income Tax return for the Assessment Year 2009 - 10. The erstwhile directors have received Rs.2.75 crore each (by repayment of loan taken from the Escrow agent Shr Vikram Mohan and Rs.2.75 crore liabilities waived, when the present directors took over the appellant company). The total amount of Rs.5.50 crore will have to be considered for assessment in their hands under Section 28 (iv) of the Income Tax Act, 1961. The Assessing Officer is to consider this in their hands for assessment for the appropriate financial year. Direction is given for this by invoking provisions of Section 150 (1) and (2) of the Income Tax Act, 1961.”

4. The contetions in the above paragraph would affect the interest of the petitioner. Then the petitioner claims that he was not the Director of the said Company. Such an observation made against him without even providing an opportunity to him is in violation of principles of natural justice and based on the observations, the first respondent issued notice under Section 147 of the Act, for reopening of assessment for the Assessment Year 2009 - 10. Thus, both the orders dated 18.11.2016 and the consequential notice under Section 148 of the Income Tax Act on

28.02.2018 are to be set aside. It is further contended that the impugned notice was issued beyond the period of limitation contemplated and on that ground also the orders are unsustainable.

5. The learned Senior Standing Counsel appearing on behalf of the respondents disputed the said contention by stating that the order dated 18.11.2016 was passed under Section 143 (3) of the Act. The observations made by the Commissioner of Income Tax (Appeals) in Paragraph No.5.4 are the facts which were considered and an observation made with reference to certain transactions. Thus, the said observations are considered as an information for the purpose of reopening of assessment under Section 147 of the Act. However, no final decision is taken directly based on the observations made in the said order dated 18.11.2016. The Petitioner is entitled for an opportunity and the directions issued by the Hon'ble Apex Court in the case of GKN Driveshafts India Ltd., vs. ITO reported in 2003 259 ITR 19 (SC), are to be followed scrupulously. Thus, the Authorities have not been taken any decision based on the observations made by the second respondent in order dated 18.11.2016 and thus the order impugned has not caused any prejudice to the interest of the petitioner and he has to defend the reopening proceedings in the manner known to law.

6. The learned counsel for the petitioner relied on the judgment of the High Court of Delhi in the case of Rural Electrification Corporation Ltd., vs. Commissioner of Income Tax – (LTU), dated 23.04.2013. However, the said facts are dissimmilar and in the present case, this Court of an opinion that the observations or certain considerations made in an order passed under Section 143 (3) of the Act, against the assessee M/s.B.Rangaswamy Naidu Orchards Pvt.Ltd., and no direct action was taken against the petitioner and admittedly in the present case no direct orders are passed and the Assessing Officer has reason to believe for reopening of assessment under Section 147 of the Act and consequently issued a notice under Section 148 of the Act. Thus the petitioner is entitled for an opportunity to defend his case including the factual aspects submitted even before this Court. If at all, the petitioner claims that he was not a director of the said Company M/s.B.Rangaswamy Naidu Orchards Pvt.Ltd., it is for the petitioner to establish the same before the Authorities Competent. However, those disputed facts cannot be adjudicated in writ proceedings under Article 226 of Constitution of India and the only question would be an opportunity to be provided and the procedures which all are to be followed based on the directions given by the Apex Court in the case of GKN Driveshafts India Ltd., vs. ITO reported in 2003 259 ITR 19 (SC).

7. The learned Senior Standing Counsel though disputed the fact that the petitioner was not a director of the Company, said that the petitioner was the Ex-director of the Company. However, all such disputed facts with reference to the relevant dates and documents are to be verified by the Authorities Competent and the petitioner by availing an opportunity has to establish the said facts.

8. As far as the observations / considerations recorded in Paragraph No.5.4 of the order impugned dated 18.11.2016 is concerned, it is to be construed only as an information for the purpose of invoking Section 147 of the Act and all further procedures contemplated under the Acts as well as the directions of the Hon'ble Apex Court in the case of GKN Driveshafts India Ltd., vs. ITO reported in 2003 259 ITR 19 (SC) are to followed scrupulously by the Assessing Officer, while undertaking the process of completion of proceedings initiated.

9. The petitioner is at liberty to raise both the legal grounds as well as the factual grounds including the point of limitation now raised in these writ petitions before the Authorities Competent and the Authorities Competent shall consider all the facts and the legal grounds raised by the writ petitioner and proceed in accordance with law.

10. With these observations, both the writ petitions stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//
Sub Assistant Registrar

Pns
To
1.The Assistant Commissioner of Income Tax,
Non-Corporate Circle - 1,
63, Race Course Road,Coimbatore - 641 018.

2.Commissioner of Income Tax (Appeals) - 3,
63, Race Course Road, Coimbatore.

+1cc to Mr.G.R.Associates , Advocate SR.No. 30690
+1cc to Mr.A.P.Srinivas, Advocate SR.No. 30559

W.P.Nos.33134 & 33139 of 2018
and W.M.P.Nos.38431 & 38436 of 2018

pch(CO)
A.SK(04.08.2021)