



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P. (MD)No.26911 of 2019

and

W.M.P. (MD)Nos.23255 to 23257 of 2019

WEB COPY

M.Shajahan

... Petitioner

-Vs-

1.The Deputy Commissioner of Income Tax,
Central Circle 2,
Income Tax Officer Quarters Complex,
Kulamangalam Road,
Meenambalpuram,
Madurai-625 002.

2.The Income Tax Officer,
Ward 5, Palakkad.

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records pertaining to impugned notices issued by the first respondent in PAN:AIYPS 1815P, dated 29.03.2019 and in PAN:AIYPS1815P/CC-2/MDU/2019-20, dated 29.10.2019 and quash the same as illegal and without jurisdiction.

For Petitioner	: Mr.T.N.Seetharaman Senior Counsel for Mr.R.Subramanian
For Respondents	: Mrs.S.Srimathy Standing Counsel

ORDER

Heard the learned Senior Counsel appearing for the petitioner and the learned Standing Counsel appearing for the respondents.

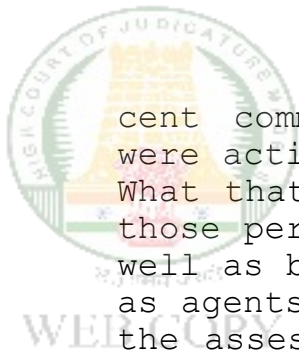
2.The petitioner is carrying on business as a trader in copra. The case on hand pertains to the assessment year 2012-13. The petitioner is carrying on his business in the name and style of "M/s.Madheena Traders". He had filed his return of income for the said assessment year namely 2012-13 on 30.10.2012 admitting total income of Rs.6,25,210/-. Whiles, the jurisdictional assessing officer selected his case for scrutiny assessment under Section 143 (3) of Income Tax Act and passed an order on 19.03.2015 determining his total income as Rs.21,25,210/-. The petitioner did not choose to challenge the said scrutiny assessment order and it had become final.



3.The petitioner is having transactions with a number of persons, one of them being M/s.V.V.D & Sons Private Limited, Tuticorin. The business premises of the said entity were searched on 17.11.2015. Since the petitioner had sold copra to them, assessment proceedings were initiated against the petitioner under Section 153C of Income Tax Act. In response to the notice dated 06.12.2017, the petitioner filed a return on 14.12.2017 admitting total income of Rs.21,25,250/-. The assessing officer reassessed the petitioner's income for the said year vide order dated 31.12.2017 by adding a sum of Rs.5,45,52,015/-. Aggrieved by the said order dated 31.12.2017, the petitioner filed an appeal before the Commissioner of Income Tax(Appeals)-19, Chennai. The Appellate Authority, vide order dated 29.11.2018 in ITA No.359 to 362/2017-18, partly allowed the appeal, in the following terms.

"9.The perusal of the above statement shows that the persons are acting on behalf of the appellant and are earning commission from the services they are providing to the appellant. Even the payments are further made to the agriculturists. It is nowhere the case of the Assessing Officer that the transaction of purchase of Copra from these entities is bogus or the purchases are inflated. Thus, the obvious conclusion is that these are indeed actual transactions. The other fact is that payment for these purchases are made by RTGS to the appellant who in turn issues self cheques to his agents who further disburse them to the farmers. The self cheques are encashed and payments are further disbursed to agriculturists in a mode otherwise than account payee cheques/DD, thus attracting the mischief of the Section 40A(3). However, the Section 40A(3) is to be applied by taking the exceptions provided in Rule 6DD. The Rule 6 DD is about cases and circumstances in which a payment or aggregate of payments exceeding twenty thousand rupees may be made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft. The case of the assessee is that the payment through self cheques have been made to agents and these agents have made payments on behalf of the appellant to the farmers and the case of the assessee is covered under the exemption provided in Rule 6DD(k) that states that "where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such person", then such person is exempt from the application of the provisions of Section 40A(3). In the case under consideration in fact that is the factual situation. A similar issue also came before the Hon'ble Madras High Court in the case of Shanmuga Ginning Factory Vs. CIT. In that case, the Hon'ble Court observed as follows:-

"Therefore, after rendering such a factual finding on the status of those persons as agents, the first appellate authority rejected the contention of the Assessing Officer. On further appeal, the Tribunal further found that all those persons to whom the payment made by the assessee had charged 1 per



cent commission from the assessee and therefore such persons were acting on behalf of the assessee in the process of auction. What that being the factual finding in respect of the status of those persons, concurrently, by the first appellate authority as well as by the Tribunal by holding that those persons have acted as agents of the assessee, we have no hesitation in holding that the assessee is entitled to protection under Rule 6DD(i) of the said Rules as the disputed payments were made only to its agents. Apart from that aspect, an element of commercial expediency was also involved in this case, which we can take judicial notice. There are no other materials placed before us by the Revenue to take a different view, moreover when those findings rendered by the first appellate authority as well as the Tribunal is totally a finding of fact, we are not inclined to interfere with the same. Consequently, we find no merits in this appeal and the question of law is answered against the revenue. Accordingly, the tax case appeal is dismissed". (2013) 37 taxmann.com422 (Madras).

In the above Judgment though the rule referred is 6DD(i) which is an inadvertent mistake however the matter pertains to rule 6DD(k) only.

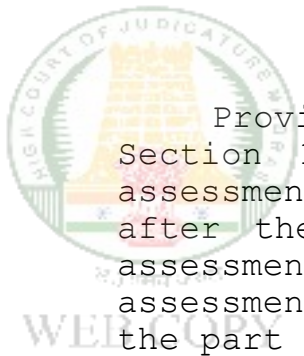
10. In view of the facts in the present case and also in view of the jurisdictional Judgment on a similar issue the disallowance made under Section 40A(3) is not sustainable as the appellant is covered by the protection offered by the rule 6DD (k). Hence, the disallowance made by the AO is required to be deleted."

4. The Department, aggrieved by the said deletion made by the appellate authority, had preferred the second appeal before the Income Tax Appellate Tribunal and it is still pending. At this stage, the petitioner has been issued with one more notice for reopening the assessment for the said year namely 2012-13 under Section 147 of Income Tax Act, 1961. The same is questioned in this writ petition on a host of grounds.

5. The respondent had filed a detailed counter affidavit calling for dismissal of the writ petition. Though the counsel on either side raised very many grounds, I am of the view that the issue raised in the writ petition can be answered in favour of the petitioner on a short ground. There is no dispute that the impugned proceedings have been initiated under Section 147 of Income Tax Act, 1961. The said provision reads as follows:-

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has 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

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Provided that where an assessment under sub-section (3) of Section 143 of this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

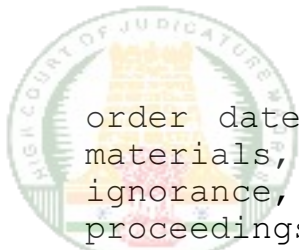
Provided also that the Assessing Officer may assess or reassess such income other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment." The third proviso categorically states that the Assessing Officer may assess or reassess such income other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

6. In the case on hand, admittedly, the Department had filed an appeal before the ITAT questioning the order passed by the appellate authority in favour of the assessee. When the appeal proceedings are still pending, it is clearly not open to the respondent to initiate proceedings under Section 147 of Income Tax Act. It is barred under third proviso to Section 147 of the Act.

7. On this sole ground, the notice impugned in the writ petition is liable to be quashed and it is accordingly quashed. Of-course, I must also record that the other contentions advanced by the learned counsel appearing for the petitioner are having equal force and substance. The petitioner herein is a trader in copra. He has to purchase them from the agriculturists who are based in various places. The petitioner's place of operation is Pollachi and the surrounding regions. Of-course, the petitioner cannot deal with the agriculturists directly. He has to source his materials only through various agents. The petitioner has been making payments to his agents only through banking channels. The petitioner was the habit of issuing self cheques to the agents who present the same before the various bank account maintained by the petitioner and encash them and thereafter, pay the agriculturists in cash directly.

8. The learned counsel appearing for the petitioner states that such payments would fall under Rule 6DD(k) and therefore, deduction has to be necessarily allowed for such expenditure. This contention

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order dated 29.11.2018. He would further point out that all the materials, about which the assessing officer is now feigning ignorance, were very much available before him during the earlier proceedings. The petitioner has today filed a typed set of papers. It can be seen therefrom that one of the petitioner's agent namely Kannan, Pollachi had given a certificate confirming that he had acted as agent for the petitioner and that the amount required for the payment to the farmers was received from the petitioner by self cheque and the same was distributed to the farmers who supplied copra. In fact, along with the said certificate, the details regarding the bank transactions as reflected in the ledger account has also been placed.

9.The learned counsel appearing for the petitioner would also draw my attention to the fact that even the Pollachi bank account of the petitioner was brought to the notice of the assessing officer in the previous proceedings. It is obvious there is no new material discovered by the respondents. On mere change of opinion, the impugned proceedings could not have been initiated. This is all the more so because, the proceedings have been initiated after a lapse of four years from the end of the assessment year. Since the impugned proceedings are sought to be initiated after a lapse of four years from the end of the assessment year, the authority has to necessarily bring the case within the exceptional circumstances set out in the provision. Since it has been convincingly established that the case of the respondent will not fall under any of the exceptional circumstances, I have no hesitation to quash the impugned proceedings as totally lacking in jurisdiction.

10.In this view of the matter, the impugned proceedings are quashed. The Writ Petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AD II)

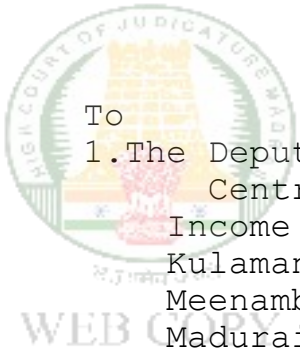
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Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To

1.The Deputy Commissioner of Income Tax,
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Kulamangalam Road,
Meenambalpuram,
Madurai-625 002.

2.The Income Tax Officer,
Ward 5, Palakkad.

+1 CC to M/s.S.SRIMATHY, Advocate (SR-13753[F] dated 25/03/2021)

+1 CC to M/s.R.SUBRAMANIAN, Advocate (SR-13876[F] dated
26/03/2021)

W.P.(MD)No.26911 of 2019

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