IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	07.01.2022
Pronounced On	22.04.2022

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.350 and 356 of 2019
and
W.M.P.Nos.351, 354 and 359 of 2019

(Through Video Conferencing)

Fairmacs Shipping and Transport
Services Private Limited,
Represented by its Director,
Mr.Sunil Shete,
New No.31, B.A. Estates, Moore Street,
Parrys, Chennai - 600 001.. ... Petitioner
in Both W.Ps.

Vs.

1.The Deputy Commissioner of Income-tax
Corporate Circle - 2(1),
Room.No.511, Wanaparthy Block,
121, M G Road, Nungambakkam,
Chennai - 600 034.

2.The Assistant Commissioner of Income-tax,
Corporate Circle - 2(1),
Wanaparthy Block,
121, M G Road, Nungambakkam,
Chennai - 600 034. ... Respondents
in Both W.Ps.

Prayer in W.P.No.350 of 2019:- Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the second respondent and quash the impugned notice under Section 148 of the Act in PAN: AAACF0474A dated 17.01.2018 and the consequential impugned order in PAN: AAACF0474A/13-14 dated 17.12.2018 issued by the first respondent for the Assessment Year 2013-2014.

Prayer in W.P.No.356 of 2019:- Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records in PAN: AAACF0474A dated 20.12.2018 for the Assessment Year 2013 to 2014 on the file of the first respondent and quash the same.

For Petitioner : Mr.R.V.Easwar
in both W.Ps. Senior Counsel
for Sandeep Bagmal

For Respondents: Mrs.Hema Muralikrishnan
in both W.Ps. Senior Standing Counsel

C O M M O N O R D E R

By this common order, both Writ Petitions are being disposed of.

2. The petitioner has challenged in these writ petitions the speaking order passed by the respondents on 17.12.2018, overruling the objections to reopening of the assessment under and the consequential assessment order dated 20.12.2018 in W.P.Nos.350 and 356 of 2019 respectively.

3. Earlier the petitioner had challenged the notice dated 17.01.2018 issued under Section 148 of the Income Tax Act, 1961 in W.P.No.33072 of 2019. Meanwhile, the objection filed by the petitioner were disposed on 22.11.2018.Under these circumstances, the said writ petition was disposed on 12.12.2018 with the following observations.

> “6. As rightly pointed out by the learned standing counsel for the respondents, the Assessing Officer while rejecting the objections raised against the re-opening, has only referred to the objection dated 18.11.2018 and not the objection dated 19.11.2018, wherein, the Assessee has specifically raised the question with regard to the applicability of Section 50C of the IT Act, 1961. Perusal of the impugned order further indicates that the Assessing Officer except extracting some case laws and making his general observation on the power under Section 147, has not adverted to any of the contentions raised by the petitioner in their objection against the reasons for re-opening, more particularly, with regard to the applicability of Section 50C of the IT Act, 1961 to the facts and circumstances of the present case. Needless to state that the Assessing Officer while considering the objections raised against re-opening has to necessarily deal with each of the objections raised and express his decision on those objections. A mere statement of power vested on the authority under Section

> 147 is not enough to presume that he has applied his mind to the objections. At the same time, this Court makes it very clear that it is not expressing any view on the merits of the above contentions raised by the learned Senior Counsel for the petitioner, as this Court is inclined to set aside the order dated 22.11.2018 and remit the matter back to the Assessing Officer to pass fresh orders, by considering all the objections raised by the petitioner, through their communications dated 09.11.2018 and 18.11.2018.
>
> 7. Accordingly, this writ petition is allowed and the impugned order is set aside. Consequently, the matter is remitted back to the first respondent/Assessing Officer to pass fresh orders after considering the objections raised by the petitioner against the re-opening of the assessment on merits and in accordance with law. No costs. Consequently, connected miscellaneous petition is closed."

4. The dispute pertains to assessment year 2013 to 2014 [Previous year 2012 to 2013]. The petitioner purchased about 150 acres of land for being sold to Zuari Cements Limited for setting up their Cement grinding unit at Solapur, Maharashtra. According to the petitioner, the petitioner had received a sum of Rs.7,08,39,862/- towards land development income and it had expended about Rs.2,98,97,537/- for development of the land. It is the further case of the petitioner that the land in question was purchased from several owners and was converted for use by Zuari Cements Limited after obtaining necessary permission from the appropriate authority under the local enactment in force in Maharashtra.

5. It is the further case of the petitioner that during previous year 2012 to 2013, a portion of the land was sold to Zuari Cements Limited for a sum of RS.97,37,500/-. It is the further case of the petitioner that assessment was also accepted and the scrutiny assessment under Section 143(3) of the Income Tax Act, 1961 was also passed on 27.03.2016.

6. It is the case of the petitioner that the respondents thereafter issued notice dated 17.01.2008 under Section 148 of the Income Tax Act to reopen the assessment completed on 27.03.2016. It is submitted that though the aforesaid notice was issued within a period of four years [before 31.03.2018], the entire exercise was carried out by the respondents for reopening the assessment was without jurisdiction, as there was true and full disclosure by the petitioner while filing

the returns under Section 139 of the Income Tax Act, 1961 and that the Assessing Officer while passing the scrutiny assessment order dated 27.03.2016 had considered the fact that the petitioner had sold the land to the said Company namely, Zuari Cement Limited and had received a sum of Rs.7,08,39,862/- towards land development.

7. In this connection, a specific reference was made to consider the reply filed by the petitioner before the assessment was completed under Section 143(3) of the Income Tax Act, wherein the issue relating to disallowance of TDS for land development expenses was considered by the Assessing Officer and while passing the assessment order dated 27.03.2016. A reference was made to paragraph 8, in particular paragraph 8.2 which reads as under:

> "8.2. On March 7th, 2016, the Authorised Representative of the assessee submitted details of party wise Land Development Expenses. From the break-up of the land development expenses, out of 1.04 acres it is seen that the land development expenses is Rs. 0.92 crores and the stamp duty is Rs.0.1 Crore and TDS borne by the Company is Rs.2,48,615/-. The AR was asked as to why the TDS was borne by the Company. The AR stated that the parties did not agree to accept
>
> the consideration net of TDS and hence the Company had deducted TDS on the net amount. On verification of the MOU, it is seen that there is no agreement between the Company and the parties that the TDS should be borne by the Company. This is not arisen out of any binding contractual obligation. Therefore, this expenditure does not relate to business and hence the amount of Rs.2,48,615/- is disallowed. Additionally, TDS is no an allowable item of expenditure u/s 40(a)(ii)."

8. Appearing on behalf of the petitioner, the learned Senior Counsel submits that the exercise taken by the respondents while issuing the impugned notice under Section 148 of the Income Tax Act, 1961 on 17.01.2018 is without jurisdiction as it is motivated on account of the change of opinion and contrary to the decision of the Delhi Court made in the case of CIT Vs. Kelvinator of India Limited reported in [2002] 256 ITR 1 (Del), as affirmed by the Hon'ble Supreme Court in [2010] 320 ITR 561 (SC).

9. Explaining the background of the case, the learned Senior Counsel would also submit that the petitioner is primarily engaged in clearing and forwarding operation and had

an occasion to enter into an agreement with Zuari Cement Limited which lead to the purchase of lands and sold to Zuari Cement Limited for a sum of Rs.97,37,500/-.

10. It is submitted that the reasons given for reopening the assessment of the petitioner is based on the information received from ITO (I & CI) - 2, Pune with approval of DIT (I & CI), Pune. As per the report, it was noted that an enquiry was conducted in the case of Shri.Dattatray Ramkrushna Shete, Pune and was based on the AIR information with respect to sale of property by TIO (I & CI) - 2, Pune. It is mentioned that Shri.Dattatray Ramkrushna Shete, Director of M/s.Fairmacs Shipping and Transport Services Pvt. Ltd., has sold property for Rs.97,37,500/- on 23.07.2012. During the course of verification, it was noted that the given transaction is signed by him in the capacity director of the company. On perusal of the financials of the company, the said transaction has been duly considered in the income of the above mentioned company. As per the financials, the assessee received a sum of Rs.97,37,500/- as sales consideration from the sale of immovable property to the Zuari Cement on 23.07.2012.

11. However, the market value of the property was Rs.3,21,61,000/-. As market value of the given property sold was more than the amount on which property has been sold by the assessee, the provisions of Section 50C of the Income Tax Act, 1961 was made applicable. It is submitted that it cannot be countenanced, in the light of the disclosure made before the scrutiny assessment was completed by the Assessment Officer while passing the order on 27.03.2016. The case of the petitioner is that the land sold by the petitioner was an agricultural land and the same are not capital assets within the meaning of Section 2(14) of the Income Tax Act, 1961.

12. The learned counsel for the respondent submits that as far as the challenge to the communication dated 17.12.2018 is concerned, it was passed pursuant to the order dated 12.12.2018 in W.P.No.33072 of 2018 and it is submitted that the said writ petition was rendered infructuous in the light of the subsequent development i.e., passing of the assessment order dated 20.12.2018. It is therefore submitted that in W.P.No.350 of 2019 challenging the communication dated 17.12.2018 overruling the objection of the petitioner issued under Section 148 of the Income Tax Act, 1956 has become infructuous and is therefore liable to be dismissed.

13. As far as the challenge to the impugned assessment order under Section 143(3) r/w Section 147 of the Income Tax Act, 1956 vide order dated 20.12.2018 in W.P.No.356 of 2019 is concerned, it is submitted by the learned counsel for the respondent submits that the petitioner has an alternate remedy before the Appellate Authority under Section 246A of the Act

and therefore, the Writ Petition is liable to be dismissed. It is further submitted that the petitioner had wrongly treated the land purchased for being sold to Zuari Cement Limited as business asset to wrongly claim business expenses.

14. It is further submitted that the original scrutiny assessment made under Section 143(3) of the Income Tax Act by the respondent on 27.03.2016 proceeded on the assumption that the petitioner had acquired the properties from various persons as a business asset for being sold to Zuari Cement Limited and therefore, the scope of enquiry at that point of time pursuant to the notice under Section 142(1) of the Act was confined

to the extent of business expenditure that can be allowed, where there was no TDS by the petitioner.

15. It is therefore submitted that the entire scrutiny assessment was predicated on the premises that the property in question were acquired as business assets and sold as business assets and therefore, there was no reasons for the Department to suspect that the assets were to be treated as capital assets. It is further submitted that none of the documents relating to the transactions were furnished by the petitioner.

16. The learned counsel for the respondent further submits that the transaction in question pertains to the assessment year 2013 to 2014 [previous year 2012 to 2013] and precedes an agreement dated 30.07.2011 where the petitioner had undertaken to aggregate 75 to 100 acres of land and to sell the same. It is submitted that the Articles of Memorandum of Association of the petitioner at the time of agreement did not contemplate sale of land as the business was confined only to clearing and forwarding as in the Memorandum of Association as it stood. It is therefore submitted that the Memorandum of Association of the petitioner was amended only post facto for real estate business.

17. It is further submitted that even otherwise under the law in force in Maharashtra, the Agricultural lands cannot be purchased and sold by the Company. However, the transactions have been booked in the name of the petitioner/Company, even though the transactions are in the name of the Director of the Company namely Dattatreya Ramkrishna shete.

18. The learned counsel for the respondent also submits that the registration of total extent of 133.62 Acres [54.09 Hectares] under the 24 different sale deeds have spanned to the period of about 3 years starting from the year 2012 and ended in the year 2015 and therefore, the claim of the petitioner that the petitioner incurred the entire expenses during the relevant assessment year cannot be countenanced.

19. The reasons for reopening of the assessment was on account of information received from ITO [I & CI] - II, Pune. The learned counsel for the respondent has drawn the attention to the reasons for reopening the assessment dated 20.04.2018 which reads as follows:

> “2.2.Meanwhile, information was received from ITO (I & CI) – 2, Pune with approval of the DIT (I & CI), Pune. As per the report, it is noted that an enquiry was conducted in the case of Shri.Dattatray Ramkrushna Shete, Pune based on the AIR information with respect to sale of property by ITO (I & CI) – 2, Pune. It is mentioned that Shri.Dattatray Ramkrushna Shete, Director of M/s.Fairmacs Shipping and Transport Services Pvt Ltd has sold property for Rs.97,37,500/- on 23.07.2012. During the course of verification, it is noted that the given transaction is signed by him in the capacity director of the company. On perusal of the financials of the company, the said transaction has been duly considered in the income of the above mentioned company. As per the financials, the assessee considered Rs.97,37,500/- as sales consideration on account of sale of immovable property to the Zuari Cement on 23.07.2012. However, the market value of the property was Rs.3,21,61,000/-. In this case, as market value of the given property sold was more than the amount on which the property has been sold by the assessee, the provisions of Sec.50C of the Income Tax Act, 1961 is applicable.

20. By way of rejoinder, learned Senior Counsel for the petitioner submits that the total consideration received from the transaction is Rs.7,08,39,852/- and that the petitioner was following mercantile system of accounting and booked the receivables and expenses during the relevant assessment year as was explained at the time of scrutiny assessment vide communication dated 26.02.2016. It is submitted that from and out of the total consideration of Rs.7,08,39,852/-, the petitioner had incurred a sum of Rs.2,98,97,357/- as land development expenses and amount paid to the individual sellers of the land is detailed below:

1	Total consideration received from the sale of land	Rs.4,69,72,500/-
2	Total expenses incurred for purchasing the land	Rs.1,94,55,337/-

1	Total consideration received from the sale of land	Rs.4,69,72,500/-
	Balance Amount	Rs.2,75,17,163/-

21. A sum of Rs.97,37,500/- which is the subject matter of the present dispute and the reasons for reopening of the assessment is confined to sale of 7.79 Hectares = 19.24 Acres out of the total of 133.65 Acres conveyed to Zuari Cements Limited.

22. The learned Senior Counsel also submits that when the scrutiny assessment was made, the Department had also not treated the asset as a capital asset to bring it within the purview of Chapter IV E of the Income Tax Act, 1961 and the computation attached to the scrutiny assessment dated 27.03.2016 also did not contain any long term or short term capital gain for the petitioner. It is therefore submitted that the entire reopening of the assessment and the consequential order passed on 17.12.2018 overruling the objection of the petitioner against reopening of the assessment vide notice dated 22.01.2018 and the impugned assessment dated 20.12.2018 are liable to be quashed, as there is no case made out for reopening of the assessment under Section 148 of the Income Tax Act, 1961, even though the assessment has been reopened within 4 years from the date of original scrutiny assessment on 27.03.2016.

23. The learned Senior Counsel also submitted that the submission of the learned counsel for the respondent that the documents are fabricated cannot be countenanced, as such a finding has been arrived for the first time in the impugned assessment order dated 20.12.2018 and therefore, there is manifest violation of principles of natural justice.

24. I have considered the arguments advanced by the learned Senior Counsel for the petitioners and the learned Senior Standing Counsel for the respondents.

25. The facts on record indicate that the petitioner company had entered into an agreement for sale of land to Mrs.Zuari Cement Limited for setting up a cement plant in Solapur, Maharashtra. One of the copy of the sale deed, dated 23.07.2012, which has been enclosed along with the typed set of documents shows that the lands were purchased in the name of Mr.Dattatreya Ramkrishna Shete, the Director of the petitioner company whose occupation has been declared as Agriculturist in the sale deed. The petitioner company could not directly purchase the agricultural lands and therefore, the lands were perhaps purchased in the name of the individual Mr.Dattatreya Ramkrishna Shete, the Director of the petitioner company.

26. Different parcels of lands were purchased by the said Director as an Agriculturist and thereafter sold/transferred to Zuari Cements Limited. It is not clear that how the funds of the petitioner could have been used to finance the purchase by its Director. The sale is also by the said Director in his individual capacity as an Agriculturist on 30.07.2011 to Zuari Cements Limited. However, the income from the land development cost has been shown as Rs.7,08,39,862/- during the previous year. Further, a sum of Rs.2,98,97,357/- has been shown as expenses incurred towards land development charges. Further, the land sold during the relevant year was only for Rs.97,37,500/-. There is no clarity on this aspect.

27. The guideline value of the property sold during the period in dispute was Rs.3,21,61,000/-. Therefore, Section 50C of the Income Tax Act was invoked, as if the land was a capital asset of the petitioner company. The Department wanted to include an amount of Rs.2,24,23,500/- [Rs.3,21,61,000 - Rs.97,37,500] as income having escaped assessment during 2013 to 2014, it is however not clear which the entire parcel of land was sold or only an extent of land was sold during the previous year for Assessment Year 2013-2014. It is also not clear how the land can be treated as a capital asset of the petitioner company when the land was neither purchased nor sold by the petitioner Company.

28. These aspects are not forthcoming clearly either in the reply of the petitioner or in the orders passed by the respondent earlier on 22.11.2018 which was earlier quashed by an order dated 12.12.2018 or in the impugned orders dated 17.12.2018 disposing objection of the petitioner against reopening of the assessment under Section 148 of the Income Tax Act, 1961 and the consequential assessment order passed on 20.12.2018 impugned in this writ petition.

29. Under these circumstances, while upholding the impugned order, dated 17.12.2018, impugned in W.P.No.350 of 2019 overruling the objection against re-opening the assessment, I am inclined to set aside the consequential assessment order dated 20.12.2018, passed by the first respondent and remit the case back to the first respondent to pass a de novo orders on merits and in accordance with law within a period of six months from the date of receipt of a copy of this order. Needless to state, the petitioner shall be heard before such orders are passed.

30. In the result, W.P.No.350 of 2019 is dismissed and W.P.No.359 of 2019 is disposed of in terms of the above observations. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

rgm/pgp

To

1.The Deputy Commissioner of Income-tax
Corporate Circle - 2(1),
Room.No.511, Wanaparthy Block,
121, M G Road, Nungambakkam,
Chennai - 600 034.

2.The Assistant Commissioner of Income-tax,
Corporate Circle - 2(1),
Wanaparthy Block,
121, M G Road, Nungambakkam,
Chennai - 600 034.

+1 cc to M/s.Sandeep Bagmal, Advocate Sr.NO.27851
+1 cc to Mrs.Hema Muralikrishnan, Advocate Sr.NO. 27868

W.P.Nos.350 and 356 of 2019
and
W.M.P.Nos.351, 354 and 359 of 2019

sj(CO)
A.SK(04/05/2022)