



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2022

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J. SATHYA NARAYANA PRASAD

Writ Appeal No. 429 of 2022
and
C.M.P. No. 3181 of 2022

Pentamedia Graphics Limited
Represented by its Director
T.S. Srinivasan
Son of Late. T.K. Seshadri
T-2 , III Floor, Nutech Plaza
73, Arcot Road, Kodambakkam
Chennai - 600 024

...Appellant

Versus

The Assistant Commissioner of Income Tax
Non Corporate Circle 10(1)
Room No.620, Sixth Floor
Wanaparthy Block
No.121, Mahatma Gandhi Road
Chennai - 600 034.

...Respondent

Appeal filed under Clause 15 of Letters Patent against the order passed by this Court in W.P. No. 28305 of 2021, dated 04.01.2022.

Prayer in W.P. No. 28305/2021:

Petition filed under Article 226 of the Constitution of India praying this Hon'ble Court to issue a Writ of Certiorari calling for the records in DIN & Letter No:ITBA/COM/F/17/2021-2022/1036663655(1) dated 29.10.2021 on the file of the Respondent relating to the Assessment Year 2004-2005 and quash the same.

For Appellant	:	Mr .G. Baskar
For Respondent	:	Mrs. Hema Murali Krishnan Senior Standing Counsel



JUDGMENT

(Judgment of the Court was delivered by R. Mahadevan, J)

WEB COPY This Writ Appeal is directed against the order dated 04.01.2022 passed by the learned Judge in W.P. No. 28305 of 2021, dismissing the writ petition filed by the appellant herein.

2. The appellant has filed the above said writ petition challenging the communication dated 29.10.2021 issued by the respondent rejecting the objections made by the appellant to the re-opening of the assessment proceedings for the assessment year 2004-2005.

3. The appellant company is engaged in the business of development and export of computer software. They have filed their return of income for the assessment year 2004-05 on 30.10.2004, declaring an income of Rs.7,71,323/-. The return so filed by the appellant was processed and an intimation under Section 143 (1) was issued on 30.03.2005. Subsequently, a notice dated 15.12.2005 was issued by the respondent under Section 148 of the Income Tax Act (in short, the Act) requiring the appellant to furnish certain details and they were furnished by the appellant on 21.11.2006. Ultimately, the assessment proceedings was completed on 08.12.2006 disallowing Rs.4,00,00,000/- towards webcasting charges and making deductions under Section 10B of the Act to the tune of Rs.21,70,97,394/-. Resultantly, the income of the appellant was assessed at Rs.38,91,87,715/- and a total demand of Rs.18,53,14,951/- was raised towards tax.

4. Aggrieved by the order of assessment dated 08.12.2006, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals), who, by order dated 11.01.2008, partly allowed the appeal deleting the disallowance of Rs.4,00,00,000/- towards webcasting charges. In compliance of the order dated 11.01.2008 of the Appellate Authority, the respondent herein has passed an order dated 12.09.2008.

5. While so, a notice dated 21.03.2011 was issued by the respondent invoking Section 148 of the Act, proposing to reopen the concluded assessment on the ground that he had reason to believe that there had been an escapement of income for the assessment year 2004-2005. Objecting to the notice proposing to reopen the assessment, the appellant sent a letter dated 14.04.2011 requesting to treat the return filed by them on 30.10.2004 as the one in response to the notice under Section 148 of the Act inter alia requesting the respondent to furnish the



reasons which prompted to reopen the assessment. By a communication dated 21.12.2011, the respondent has stated that the appellant has not deducted Tax Deducted at Source (TDS) under Section 195 of the Act on the amount paid to the foreign companies towards multimedia charges which warranted reopening of the assessment. To this letter dated 21.12.2011, the appellant sent their objections in the form of a letter dated 26.12.2011 and requested the respondent to drop the reopen proceedings. Thereafter, the respondent passed the order dated 28.12.2011 under Section 143 (3) read with Section 147 of the Act raising an additional demand of Rs.33,52,80,175/- towards tax.

6. Aggrieved by the order dated 28.12.2011, the appellant filed WP No. 2520 of 2012 before this Court. This Court on appreciation of the rival submissions, held that the objections raised by the appellant on 26.12.2011 have not been considered by the respondent while passing the order dated 28.12.2011. Therefore, this Court, by order dated 30.07.2021, allowed the writ petition and remanded the matter back to the respondent. Pursuant to such direction, the respondent passed an order dated 29.10.2021, rejecting the objections raised by the appellant on 26.12.2011. Challenging the order dated 29.10.2021, the appellant has filed the instant writ petition in WP No. 28305 of 2021 before this Court.

7. The learned Judge, by order dated 04.01.2022, dismissed the writ petition by observing that the respondent has passed the impugned order/ communication over ruling the objections raised by the appellant. It was also held that the fact that the assessment has been reopened itself does not mean that the reassessment has been completed. Therefore, it was observed by the learned Judge that it is open to the appellant to participate in the proceedings and make appropriate submissions that there is no case made out for revising the assessment which was already completed. It was further held by the learned Judge that if an adverse order is passed by the respondent, then it is open to the appellant to approach the appellate authority by filing an appeal. Accordingly, the writ petition filed by the appellant herein was dismissed by the learned Judge on 04.01.2022 against which the present writ appeal is filed.

8. The learned counsel for the appellant submitted that the respondent has no jurisdiction to reopen the assessment beyond four years and hence the entire re-assessment proceedings are barred by limitation. The assessment proceedings were completed on 08.12.2006 and after four years, the notice dated 21.03.2011 was issued to reopen the concluded assessment.



According to the learned counsel for the appellant, it is well settled that on a mere change of opinion, reassessment proceedings should not be resorted to. In the present case, the respondent, without any fresh material, has proceeded with the reassessment proceedings only upon a mere change of opinion which is legally impermissible. Further, the re-assessment proceedings were initiated on the sole ground that the appellant has not deducted TDS under Section 195 of the Act on the amount paid to foreign companies towards multimedia charges. However, the respondent failed to take note of the fact that such amounts were directly paid by the customer abroad and the same are debited in the appellant's account. In any event, there was no fresh tangible material available with the respondent to reopen the assessment and therefore, the entire reassessment proceedings are vitiated. There is no fault attributable on the part of the appellant in not disclosing truly and fully the income earned by them during the assessment year in question, while so, the question of reopening the assessment will not arise. The respondent has taken a different view than that of the one taken by his predecessor without any fresh materials to initiate reassessment proceedings, and hence, the reassessment proceedings are not legally sustainable.

9. The learned counsel for the appellant submits that the respondent, as an assessing officer, can only re-assess the income for levying the tax and not to review the materials available on record. In this context, the decision of the Honourable Supreme Court in the case of Commissioner of Income Tax Appeals vs. Kelvinator of India reported in 320 ITR 561 is referred to wherein it has been held as follows:-

"Though the power to reopen under the amended Section 147 is much wider, one needs to give a schematic interpretation to the words "reasons to believe" falling which Section 147 would give arbitrary powers to the AO to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. One must also keep in mind the conceptual difference between power to review and power to re-assess. The AO has no power to review, he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garbof re-opening the assessment, review would take place. One must



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treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 01.04.1989, the AO has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. This is supported by Circular No.549 dated 31.10.1989 which clarified that the words "reasons to believe" did not mean a change of opinion".

However, the learned Judge, without considering the above aspects, has dismissed the writ petition filed by the appellant. Therefore, the learned counsel for the appellant prayed for allowing the writ appeal.

10. The learned Standing Counsel appearing for the respondent submitted that the Commissioner of Income Tax, vide his order dated 29.10.2021 held that the Assessing Officer has taken a prima facie view while issuing notice under Section 148 of the Act on the ground that the assessee ought to have deducted tax at source on payments made to the non-residents under Section 195. In that process, the income of the appellant to the extent of Rs.56.27 crore was escaped from assessment which requires re-assessment. Therefore there was a prima facie reason available for reopening the assessment and it is legally sustainable. The learned Judge, taking note of the fact that the order dated 29.10.2021 is not an order determining the tax amount payable by the appellant, but only an order rejecting the objections raised by the appellant, directed the appellant to participate in the re-assessment proceedings to be taken up by the respondent. Therefore, the learned counsel for the respondent submitted that the prayer sought for in the writ petition itself was premature and that was rightly taken note of by the learned Judge, which does not call for any interference.

11. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

12. On perusal of the order dated 29.10.2021, which was impugned in the writ petition No. 28305 of 2021, it is seen that pursuant to the order dated 30.07.2021 passed by this Court in WP No. 2520 of 2012 filed by the appellant herein, the objections raised by the appellant in its communication dated 26.12.2011 was taken up for consideration. After examining the objections so raised by the appellant, the respondent has



concluded that there are tangible material evidence made available to resort to re-assessment proceedings and rejected the same. In effect, the respondent has only rejected the objections raised by the appellant and re-assessment proceedings are yet to be initiated. It is to be mentioned that earlier, a final order dated 28.12.2011 was passed by the respondent under Section 143 (3) read with Section 147 of the Act raising an additional demand of Rs.33,52,80,175/- towards tax. However, the said order was set aside by this Court in the order dated 30.07.2021 passed in WP No. 2520 of 2012 filed by the appellant herein. Thus, a final order in the re-assessment proceedings initiated by the respondent is yet to be passed. While so, as rightly pointed out by the learned counsel for the respondent, the writ petition itself was premature and no relief could be granted thereof. The learned Judge has only directed the appellant to participate in the re-assessment proceedings and to place all the materials and legal issues before the Assessing Authority for consideration. Such a direction issued by the learned Judge, in the given facts and circumstance of the case, is proper and it does not call for any interference by this Court.

13. At this stage, the learned counsel for the appellant prayed this Court to issue appropriate direction to the respondent to afford an opportunity of personal hearing before passing final order in the re-assessment proceedings for which the learned Standing counsel appearing for the respondent has no objection. Therefore, the respondent is hereby directed to afford an opportunity of hearing to the appellant and after considering all the objections raised, pass appropriate orders on merits and in accordance with law within a period of three months from the date of receipt of a copy of this order.

14. With the above direction, this Writ Appeal stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

rsh/gba



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To

The Assistant Commissioner of Income Tax,
Non Corporate Circle 10(1),
Room No.620, SixthFloor, Wanaparthi Block ,
No.121, Mahatma Gandhi Road,
Chennai - 600 034.

+1 CC to Mr.G.Baskar, Advocate sr 14347
+1 CC to Mr. Hema Muralikrishnan, Senior Standing Counsel sr
14393.

WA No. 429 of 2022

SV(CO)
SP(04/04/2022)