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W.P.Nos.34759 & 33363 of 21



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 12.10.2022 and 04.11.2022

PRONOUNCED ON:18.11.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.Nos.33363 and 34759 of 2019

W.M.P.Nos. 33822, 33823, 35507 and 35509 of 2019
and 22681 of 2022

WP.No.33363 of 2019:

Ramesh Kymal

... Petitioner

Vs

The Deputy Commissioner of Income Tax,
International Tax – 1(1),
121, Nungambakkam High Road,
Chennai-600 034.

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari, calling for the records on the file of the Respondent in PAN. AETPK8597D and quash the impugned notice in No.ITBA/AST/S/148/2018-19/1015611733(1) dated 31.03.2019 issued under Section 148 of the Act for the Assessment year 2012-13 along with the consequential proceedings dated 19.11.2019 as illegal and without jurisdiction.

AND

WP.No.34759 of 2019:

Mr.Mangal Chand Ostwal

... Petitioner



Vs

Income Tax Officer,
Non-Corporate Ward 10(3),
Chennai – 600 034.

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari, calling for the records in Notice No.ITBA/AST/S/148/2018-19/1015434279(1) dated 26.03.2019 on the file of the respondent under Section 148 of the Income Tax Act and quash the same.

(In WP.No.33363 of 2019)

For Petitioner : Mr.R.Sivaraman
For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

(In WP.No.34759 of 2019)

For Petitioner : Mr.G.Ashokapathy
for M/s.Pass Associates
For Respondent : Mr.D.Prabhu Mukund Arun Kumar
Junior Standing Counsel

COMMON ORDER

W.P.No.33363 of 2019 was heard on 12.10.2022 and reserved for orders. In the meanwhile, W.P.No.34759 of 2019 was heard on 04.11.2022 and found to raise identical legal issues premised on comparable factual matrix. Hence, this common order is passed disposing both Writ Petitions.

2. The brief facts are as follows:

Facts in W.P.No.33363 of 2019:



The petitioner is an individual who challenges proceedings for re-assessment in terms of Sections 147/148 of the Income Tax Act, 1961 (in short 'Act'). He is the Managing Director of a company by name M/s.Gamesa Wind Turbines Private Limited and in his income tax return for assessment year 2012-13 had admitted income comprising salary, capital gains, consultancy and interest.

3. After an intimation was issued under Section 143(1), the return was selected for scrutiny and notice under Section 143(2) was issued, followed by a questionnaire calling for various details in support of the return.

4. Point 19 of the questionnaire under Section 142(1) specifically called for the following particulars:

'in respect of income offered under the head long term/short capital gains on account of sale of shares please submit the workings for the computation with necessary self-supporting evidences'.

5. The assessment was completed taking note of the working provided for short term capital gains (STCG), by order dated 25.03.2015. The petitioner had challenged the assessment by way of first appeal, where he obtained part relief. The disallowance of interest on loan and deposit was reversed, as was the disallowance under Section 14A of the Act. Deduction had been claimed



under Chapter VIA that was remanded to the Assessing Officer for examination. Depreciation claim had been restricted to 10% of the claim.

6. This computation assumes relevance in light of one of the observations by the Assessing Authority in the reasons for re-assessment, which I shall advert to shortly.

7. On 31.03.2019, notice under Section 148 was issued beyond 4 years from the end of the relevant assessment year. Thus the revenue is statutorily bound to establish that the disclosure made by the assessee at the original stage was not full and true. This arises from a reading of the proviso to Section 147, as follows:

147. Income escaping assessment

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, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub- section (3) of section 143 or 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 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



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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.

8. In response to the notice, the petitioner has filed a return that contains a variation between the original return and that filed in response to notice under Section 148 of the Act. This is one of the reasons put forth by the revenue in support of their argument that the disclosure made originally was not full and true.

9. According to the petitioner, the enhanced income offered in the return filed in response to Section 148 only takes note of the adjustments that had been made by the first appellate authority and there was no other, or additional income that had been offered in that return. However, this Court, sitting in Writ jurisdiction is not inclined to look into the computational aspects of the assessment, to decide this issue and it is for the assessee to have explained this aspect of the matter before the officer.

10. In any event, and as per the judgment the Hon'ble Supreme Court in the case of *GKN Drive Shafts (India) Private Limited V. Income Tax Officer* (259 ITR 19), upon filing of a return and having furnished in the reasons for re-assessment, the petitioner is entitled to object to the assumption of jurisdiction and such objections, if filed, are to be disposed by way of a speaking order. It



is only after passing of the aforesaid order, that the assessment may be taken up on merits, if at all.

11. The reasons recorded are as follows:

Details of information collected:-

The information has been received from the O/o the Director General of Income Tax (Investigation), Mumbai that Search & Seizure operation carried out on the many entry operator and hawala operators revealed that these entry operators were involved in providing entries of bogus long term capital gain, bogus short term capital loss and bogus business loss through manipulation of stock prices on the stock exchanges. Shri Ramesh Khymel was one of the beneficiaries of Rs.89,05,000/- in the scrip Scan Steels Ltd. Scrip No.511672.

Analysis of Information:-

As part of the election related monitoring, investigation of certain entry providers and hawala operators was undertaken by the investigation directorate. Consequently, a search and seizure operation was carried out on many entry and hawala operators at various locations across the country on 19.03.2019, which providing entries of bogus long term capital gains, bogus short term capital loss and bogus business loss through manipulation of stock prices on the stock prices on the stock exchanges.

During the course of search action, the data pertaining to AY 2012-13 has been analysed and it was found to be concerning many beneficiaries spread across the country.

On verification of the STCG computation the assessee has shown STCG of Rs.42,01,123/- on trading of shares of Claurus Infrastructure on sales of Rs.88,77,778/-. The assessee vide letter dated 24.02.2015 clarified that the name Claurus Infra has been changed to Scan Steels Ltd. However, as per the information received the assessee has received sale consideration of



Rs.89,05,000/- on sale of Scan Steel Ltd., Shares. Thus, the assessee has not admitted sale consideration of Rs.27,222/-.

The assessee is beneficiary of the accommodation entry provided by the hawala operator by way of less rate of tax on STCG.

Basis, forming reason to believe and details of escapement of income:-

From the above discussion, it is evident that the assessee has not admitted sale consideration of Rs.27,222/-. The assessee is beneficiary of the accommodation entry provided by the hawala operator by way of less rate of tax on STCG. Hence, I have a reason to believe that an amount of Rs.42,28,345/- (4201123 + 27222) has escaped assessment for the AY 2012-13.

Applicability of section 147/151 to the facts of the case

The assessee, Shri Ramesh Kymat, Director of Director of M/s.Siemens Gamesha Renewable Pvt Ltd filed its return of income for the A.Y.2012-13 on 27.07.2012 admitting a total income of Rs.5,56,09,880/-. The case was selected for scrutiny and assessment under section 143(3) of the IT Act was completed on 25.03.2015 after making an addition of Rs.14,81,561/- the income was assessed at Rs.6,71,43,440/-.

Since, 4 years from the end of the relevant assessment year has expired in this case, the requirements to initiate proceeding u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (Refer paragraphs 11.2 & 11.3). I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed the



material facts necessary for the assessment for the assessment year under consideration.

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It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for the assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

12. The petitioner filed objections on 03.07.2019 to the effect that the re-assessment is i) without any fresh material, ii) beyond 4 years and does not establish that the assessee had not made a full and true disclosure, iii) based upon a change of opinion and iv) alternatively, not justified even on merits. The officer has passed the impugned order revising the gains from speculative business upwards by a sum of Rs.2,89,960/- + Rs.48,003/-. Income from other sources had also been revised upwards by a sum of Rs.45,149/- from Rs.5,56,09,8802 (numeral '2' in the figure to be ignored) to Rs.5,59,92,990.

Facts in W.P.No.34759 of 2019:

13. The petitioner, an individual, challenges an order of re-assessment under Section 147 of the Act. The re-assessment relates to assessment year (AY) 2012-13, in respect of which a return of income had been filed that was initially processed under Section 143(1) and thereafter taken up for finalization under scrutiny.

14. In the course of assessment, the petitioner had received notices and questionnaires calling upon it to furnish details in connection with various



works/issues arising from the return filed by it. Pursuant to a hearing in December, 2014, the petitioner claims to have filed letter dated 27.01.2015 referring to the hearing conducted and furnishing various details relating to bank accounts, income from immovable properties, short term capital loss on sale of shares and short term capital gains.

15. Thereafter, an e-mail was received by the petitioner on 06.03.2015 wherein at point 3, which is relevant to the issue arising in this Writ Petition, the officer refers to the loss claimed on sale of shares. The petitioner was called upon to file a demat statement, the officer requiring the same, since only statements of monthly holding of shares upto 31.01.2012 had been filed by the petitioner.

16. One of the issues that arise in this matter is as to whether letter dated 27.01.2015, whereunder the details of short term capital loss are stated to have been filed, has, at all, been filed before the officer. It is the case of the respondent that no such letter has been found in the records. The respondent was directed to furnish the records.

17. Despite the grant of several opportunities and till the last date of hearing, being 04.11.2022, the file was not produced. It is in this context that e-mail dated 06.03.2015 assumes importance, since, according to the petitioner, the statement at point no.3 relating to the discussion that the parties have had



on the loss claimed on sale of shares clearly emanates from the reply filed by it, which is dated 27.01.2015.

18. The extract of letter dated 27.01.2015 and relevant point, being point No.3, in e-mail dated 06.03.2015 are set out below for completion of narration:

Letter dated 27.01.2015

‘.....’

5.Detail of Short term capital loss on sale of shares is herewith enclosed. I herewith also enclose the brokers contract notes of anand rathi share and stock brokers ltd for the purchase and sale of shares as reflected in the detail of STCL. Also enclosed is my demat account with anand rathi share and stock brokers ltd for the period 1-4-11 to 31-3-12.’

E-mail dated 06.03.2015

‘Sir,

1.In connection to the pending assessment proceedings in the above case and w.r.t. hearing dated 27.1.2015, you were requested to file copy of sale deed sold for consideration of Rs.1.05 crores. Please file the same immediately. Annexure to the sale deed is also to be enclosed.

2.You have claimed cost of acquisition – Rs.61,86,324. Please file the working for the value thus arrived.

3.You have declared loss on sale of shares. You were requested to file demat statement. You have only filed monthly holding of shares upto 31.1.2012. You are requested again to file the demat statement for the purchase and sale made during the year.



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4. Please also mention the bank account in which the share transaction has been carried out. If the said bank statement has not been submitted so far, please file the same.

5. Please give details of dividend received from the following companies during the year and in which account the dividends have been credited. Dividend warrants if received may be submitted in this connection:

(a) Banas Fin (b) Ashutosh Pap (c) Clarus (d) GFL Fin

6. You were requested to file statement for wealth tax liability. Please file the same immediately.

7. Please file proof for deduction under Chapter VI-A claimed.'

19. There is a subsequent reply filed by the petitioner on 16.03.2015 which also does not contain any acknowledgement, which at point no.5 confirms that the petitioner has not been in receipt of any dividend from a) Banas Fin b) Ashuthos Pap © GFLFIN. On 20.03.2015, there is yet another reply filed, wherein at point 3 there are some more details set out in regard to the purchase of shares of Banas Fin, in the following terms:

'

3. As regards the purchase of shares of Banas Fin, The number of shares purchased is 82,500 as per the contract cum bill of the broker which has been filed with your goodself and produced herewith.'

20. A culmination of the aforesaid discussion resulted in an order of assessment dated 20.03.2015 passed under Section 143(3). The order contains no discussion except to refer to the exchange of communication and the



submissions made in support of the return of income filed. The return came to be accepted thereafter. This was followed by a notice under Section 148 of the Act dated 26.03.2019, just a few days short of the expiry of 6 years. Since the notice was issued beyond the period of 4 years, the primary ground of challenge is the bar of limitation.

21. According to the petitioner, all details in regard to the return of income and the issues arising therefrom had been filed even at the time of original proceeding and the disclosure was made by it full and true. The reasons dated 31.05.2019, based upon which notice of re-assessment was issued, were sought and was furnished, reading as follows:

‘

“Based on the investigation report on trading through BSE listed Penny Stocks and information received from DIT(Inv), Mumbai, the report reveals that the trading in penny stock was a manipulated affair to generate entries of bogus LTCG/STCL facilitating tax evasion.

In this regard, it is seen that the assessee had entered into transaction relating to sale of M/s Banas Finance Limited shares for a sum of Rs.18,48,000/- during the financial year 2011-12 (relevant to AY: 2012-13). As per the investigation report, shares of M/s. Banas Finance Limited of BSE Listed stocks have been used for generating bogus LTCG. The assessee has sold shares of the company M/s. Banas Finance Limited for Rs.18,48,000/- and has not filed the return of income for AY 2012-13.”



22. The petitioner raised objections to the assumption of jurisdiction that have come to be rejected. The officer proceeds on the basis that the re-assessment is based on information received from the Director of Income Tax (Investigation), Mumbai to the effect that the transaction leading to the conclusion of capital loss was nothing but manipulated trading in penny stock to facilitate tax evasion.

23. Mr.Prabhu Mukund Arun Kumar, learned Junior Standing Counsel also circulates a copy of the letter received from the Director of Income Tax prior to the impugned re-assessment.

24. There are slight differences in the facts relating to the two writ petitions, as would be seen from the preceding paragraphs. However, the determinative factual matrix revolves around whether a full and true disclosure was made of the primary facts, in the course of original assessment.

25. As regards the legal issue on assumption of jurisdiction, the petitioner in W.P.No.3363 of 2019 has relied upon the following decisions:

(1)*New Delhi Television Limited v. Deputy Commissioner of Income Tax* (424 ITR 607) – Hon’ble Supreme Court

(2)*Priti Paras Savla v. Income-tax Officer, Ward (3)(2)(4)* [(2021) 130 taxmann.com 5 (Gujarat)]

(3)*Jainam Investments v. Assistant Commissioner of Income-tax, Central Circle-8(1), Mumbai* [(2021) 131 taxmann.com 327 (Bombay)]



(4) *South Yarra Holdings v. Income Tax Officer, 16(1)(1)(4), Mumbai [(2019) 104 taxmann.com 216 (Bombay)]*

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26. As far as the decisions of the High Courts are concerned, all three decisions have been rendered under Article 226 of the Constitution of India and are somewhat analogous to the factual matrix before me. In all cases, the reassessments were beyond the period of 4 years and thus the respective Benches considered the impact of the proviso to Section 147.

27. The Hon'ble Supreme Court in the case of *New Delhi Television Limited* (supra) considered a similar case concluding that the assessee therein had disclosed all primary facts necessary for assessment. Thus, and relying upon the judgment of the Constitution Bench in *Calcutta Discount Company Limited V. Income Tax Officer and another* (41 ITR 191), the Bench concluded that it was not the burden or responsibility of the assessee to offer any further assistance to the assessing officer by disclosure of additional facts. Based on the facts presented, the Assessing Authority had drawn an inference without doubting the genuineness of the transaction.

28. In fact, the Court held that information obtained subsequent to the framing of assessment was sufficient to form such a view. Thus the first question, in regard to whether facts that came to the knowledge of the Assessing Officer after completion of assessment proceedings could be taken



into consideration to come to the conclusion that there had been escapement of income, had been answered adverse to the assessee.

29. The second question related to whether there had been failure on the part of the assessee to make a full and true disclosure. At paragraphs 27 to 31, the Court went into the primary documents necessary to enable a proper adjudication of the issue in that case and thereafter came to the conclusion that a full and true disclosure had been made.

30. In the aforesaid circumstances, the legal issue that arises for determination is as to whether there has been a full and true disclosure by the petitioners that would justify reopening beyond the period of 4 years.

31. In W.P.No.33363 of 2019, the reasons reveal that investigation had been carried out on entry providers and hawala operators by the Investigation Directorate, resulting in a search and seizure operation on several such operators at various locations across the Country. The search yielded entries relating to bogus Long Term Capital Gains (LTCG), STCG and business loss through manipulation of stock prices on stock exchanges.

32. On an analysis of the data, it was found that it concerned several beneficiaries, of which the petitioner was one. In the financial year relevant to the assessment year in question, the petitioner had admittedly dealt with shares of one Clarus Infra. There appears to be an amalgamation of the said Clarus



Infra with a company by name Scan Steels Ltd. The scheme of amalgamation was ordered by the Company Division of the Bombay High Court in Company Petition No.731 of 2011.

33. One of the points raised by the petitioner is that his transaction had only been with Clarus Infrastructure Realities Limited and had nothing to do with Scan Steels Ltd. However, the reasons referred to a letter dated 24.02.2015 filed by the petitioner to the effect that there had been only a change of name from Clarus Infra to Scan Steels Ltd.

34. The impact of a bogus transaction would be that the petitioner would be liable to remit tax at regular rate of tax. The Department was asked to produce the note under which the respondent assessing officer was furnished the incriminating material and has circulated an e-mail from the Investigation Wing, Mumbai to various assessing officers in Chennai.

35. The annexure to the e-mail contains 7 instances of allegedly bogus transactions, including one engaged in by the petitioner with scrip code 511672 for an amount of Rs.89,05,000/-.

36. The petitioner has admittedly made a disclosure of the primary material, being the details of scrips and the computation of LT/ST CG on account of sale of shares, and the original assessment was completed only on



that basis. It is the subsequent information received by the Investigation Wing, Mumbai that has brought to light the possibility of the entries being bogus.

37. In the case of the Petitioner in W.P.No.34759 of 2019, the return filed had contained a claim of short term capital loss on the sale of shares of Banas Finance Limited for a sum of Rs.18.48 lakhs. The return in this case was picked up for scrutiny on 23.09.2013, followed by multiple hearings before the assessing authority, before whom the file was transferred.

38. In letter dated 27.01.2015, the petitioner has clearly drawn attention to the claim of capital loss and states that this includes brokers contract notes of Anand Rathi Share and Stock Brokers Ltd. as well as demat account for the relevant period. Let us assume worst against the assessee, that letter dated 27.01.2015 was never filed. Even then, in e-mail dated 06.03.2015, the assessing officer has specifically noticed the claim of loss on sale of shares. He reminds the assessee that despite a request to file demat statement, only a statement of monthly holding upto 31.01.2012 has been filed and reiterates the request.

39. He also asks for the details of the bank account from which the share transactions have been carried out. At point 5, he asks for the details of dividend received from multiple companies, including Banas Fin. There is a single sheet placed at page 9 of the compilation accompanying the Writ



affidavit, which, in the index to the typed set is stated to be the continuation of e-mail dated 06.03.2015.

40. In the counter, e-mail dated 06.03.2015 and the accompanying page have not been disputed by the authority and hence, this Court proceeds on the basis that these documents have, in fact, been sent to the petitioner by the officer. In this document, the transaction of trading in share of Banas Fin is mentioned at point No.3, as follows:

‘

3.Assessee is owning 63766 shares of Banas fin as per purchase transaction statement as well as statement of holding as on 28.2.12. However, sale of shares of Banas fin in 82,500. Please explain with supporting documents.’

41. Communications dated 16.03.2015 and 20.03.2015 are not disputed by the respondent and both refer to trading of shares of Banas Fin. The narration as above leaves me no doubt that the transaction of trading in shares of Banas Fin has been duly disclosed by the petitioner. Thus, in this case as well, it is the information received from the Directorate of Income tax, Mumbai that suggests that the transaction was a manipulated one.

42. To decide the question of assumption of jurisdiction, this Court has to proceed on the basis of the tests laid down by the Hon’ble Supreme Court in the case of *Calcutta Discount* (supra) and reiterated manifold thereafter. The returns of income and subsequent correspondences make a full disclosure in the



case of both petitioners, and assessments have been framed after discussion and exchange of correspondence.

43. It then falls upon the Income tax Department to anticipate any lacunae or deficiencies in the material supplied and call for such other material to conduct a thorough examination of the issues, if it believes the same to be necessary.

44. Having allowed matters to rest for so long, and in the light of the full and true disclosure made at the original instance, the impugned proceedings initiated beyond the period of four years, are barred by limitation and are quashed.

45. These writ Petitions are allowed. No costs. Connected Miscellaneous Petitions are closed.

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Index : Yes
Speaking Order
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To

1.Income Tax Officer,
Non-Corporate Ward 10(3),
Chennai – 600 034.



2. The Deputy Commissioner of Income Tax,
International Tax – 1(1),
121, Nungambakkam High Road,
Chennai-600 034.



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DR. ANITA SUMANTH, J.

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