BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.06.2022

CORAM:

THE HONOURABLE **MR.JUSTICE M.NIRMAL KUMAR**

W.P.(MD)No.13269 of 2022
and
WMP(MD) Nos.9420 and 9422 of 2022

Rathanachalam Chettiar Natarajan .. Petitioner

Vs

1. The Assistant Commissioner of Income Tax
Non- Corporate Circle-2
Central Revenue Building
No.2, V.P.Rathinasamy Nadar Road,
Viswanathapuram
Madurai- 625 002.

2. The Income Tax Officer
National Faceless Assessment Centre,
Income Tax Department,
Ministry of Finance,
Room No.421,2nd Floor, E.Ramp,
Jawaharlal Nehru Stadium,
Delhi- 110 003

3. The Principal Commissioner of Income Tax
Central Revenue Building,
No.2, V.P.Rathinasamy Nadar Road,
Viswanathapuram
Madurai- 625 002 .. Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for the records in DIN.ITBA/ AST /S/147/2021-22/ 1041121996(1) dated 21.03.2022 on the file of the 2nd Respondent relating to the A.Y 2013-14 and quash the same.

For Petitioner : Mr.G.Baskar

For Respondents : Mr.N.Dilip Kumar
Standing Counsel.

ORDER

The petitioner, who is an income tax assesse, has filed his annual return for the year 2013-2014 on 30.09.2013, declaring taxable income of Rs.27,53,640/-. Returns of income was taken for scrutiny by the first respondent herein by issuance of notice under Section 143(2) of the Income Tax Act (herein after "the Act") on 02.09.2014. During scrutiny, another notice was issued as per Section 142(1) of the Act on 25.02.2016, calling for documents/details with respect to Rs.48,25,654/-, which was not credited to the profit and loss account. Further complete details regarding agricultural income such as details of land, agricultural operations, gross receipts, gross expenses etc., cash book, bank book and bank statements along with sources for deposits etc., were called. The evidences for the land development expenses, documentation expenses and discount for cash purchases and also called for details of persons to whom properties worth more than Rs.10 lakhs were sold. Apart from the details of extent of land purchased and sold, production of stock register, the reason for difference between stamp and sale value for three documents namely 1051 of 2013, 4372 of 2012 and 4372 of 2012, also called for with corresponding day book, ledger journal, vouchers for payments of expenses etc.,

2. According to the petitioner, he had duly submitted the documents and details during the course of the scrutiny assessment proceedings. During scrutiny process, after due perusal and verification of the documents and details submitted by the petitioner, the first respondent passed the order of assessment under Section 143(3) of the Act on 16.03.2016, wherein explanation and income shown by the petitioner was accepted. Thereafter, after a period of seven years, the first respondent issued notice under Section 148 of the Act, reopening petitioner's assessment. This notice dated 31.03.2021 was issued to the E-mail address of the auditor of the petitioner on 01.04.2021 at 7.23 a.m. Since notice was issued to the petitioner's auditor's E-mail, the petitioner was unaware of the same and hence he could not proceed within 30 days

stipulated in the notice. The first respondent again issued notice under Section 142(1) of the Act dated 11.11.2021, calling for certain details such as bank statement and books of accounts maintained by the petitioner. Thereafter, reassessment proceedings were shifted to the National Faceless Assessment Circle (NaFAC) and thus the second respondent assumed jurisdiction over the assessment and issued notices under Section 142(1) of the Act dated 02.02.2022 and 15.02.2022 as reminders about the earlier notice, since the petitioner did not respondent to the earlier notices. Then, the second respondent issued a show cause notice dated 16.02.2022, proposing to disallow expenses of Rs.1,76,28,231/- In the absence of any response, the second respondent then issued non-response notice dated 18.02.2022 through post to the petitioner, calling his attention to the assessment proceedings and the notices issued till then. The second respondent had enclosed the show cause notice dated 16.02.2022 and directed the petitioner to submit the details called for. Further, in receipt of show cause notice, the petitioner became aware of the re-assessment proceedings and compiled the necessary details. Thereafter attempted to log into income tax E-filing portal and attempted to file the documents in response to the Section 148 notice, but was unable to file since it was disabled due to the expiry of 30 days from service of 148 notice. Thereafter, the petitioner filed response to the show cause notice dated 16.02.2022 and 26.02.2022 and complete ledger extracts relating to the discount expenses and documentation expenses were submitted.

3. The second respondent issued notice under Section 142(1) of the Act dated 02.03.2022, proposing disallowance of the following expenses:

a) cash expenses amounting to Rs.21,97,560 U/s.40A(3) of the Act.

b)Payments of Rs.42,63,725/- for Non-deduction of TDS u/s.40(1)(ia) of the Act.

c) Discount of Rs.62,42,435/-.

d) Documentation charges of Rs.49,34,281 and

e) Sought for details regarding agricultural income earned

The second respondent called for details regarding the above issued to be submitted on or before 07.03.2022. Thereafter, show cause notice cum draft assessment order dated 08.03.2022 was issued, proposing to disallow the expenses claimed and disallow the agricultural income earned by the petitioner. The petitioner was called to submit details by 11.03.2022. In fact, the petitioner was given only two days time to file his objections and submissions. The second respondent proceeded to pass an impugned order of assessment under Sections 147 r/w Section 144 r/w Section 144B of the Act on 21.03.2022, assessing income of Rs.2,24,76,810/- as against the returned income of Rs.27,53,640/-.

4.The petitioner further submitted that Finance Act, 2021 introduced a new machinery to govern the reopening of assessment vide insertion of new Section 148 A of the Act and amending the provisions of sections 147 to 153 of the Act w.e.f 01.04.2021. The impugned order passed by the second respondent is without jurisdiction as the reopening notice under Section 148 of the Act, dated 31.03.2021, has been issued following the erstwhile un-amended provisions of Section 148 of the Act by the first respondent on 01.04.2021. When notices were issued under the old provisions on or after 01.04.2021, the same were challenged before various Hon'ble High Court in India, which had then held that the reopening notices under Section 148 issued on or after 01.04.2021 under the un-amended provisions of the Act were invalid and thus quashed the reopening of assessments. When these decisions were challenged by the Department before the Hon'ble Supreme Court in the case of ***Union of***

India vs. Ashish Agarwasl, [2022]138 taxmann.com64(sc), the Hon'ble Supreme Court held that under Article 142 of the Constitution of India, the notices under Section 148 of Act issued on or after 01.04.2022 under the old provisions shall be deemed to be show cause notices issued under Section 148A(b) of the new provisions of the Act and then to proceed with the reassessment following the new provisions.

5. The primary contention of the petitioner is that the assessment order and the dispute is of the year 2013-2014 and the above re-assessment ought to be done within a period of six years i.e.,on 31.03.2020. Due to pandemic situation, one year period extended up to 31.03.2021. In this case, according to the petitioner, notice for reassessment has been given on 01.04.2021 and hence, there is no question of reassessment of the order. Further, the petitioner submits that subjective satisfaction of recording the reason for initiation of proceedings under Section 147 of the Act has not been followed as it could be seen from the endorsement made from the Principal Commissioner of Income Tax, wherein he has stated that " I am satisfied and this is a case for issuance of notice under Section 148 of the Act on a

perusal of the records by the assessing Officer. Further, the reasons given by the assessing officer on 08.03.2021 as could be seen from the same is that he has only stated about the cash payment made against the provisions under Section 40(a)(ia) of the Act, direct payment for deducting TDS under Section 40(a)(ia) expenses claimed by assessee on behalf of the purchaser are not evidenced with proper factor, thereby assessment has been re-opened. What is the escapement of the earlier assessment officer not considered is not shown. In fact, in this case, reassessment was done. The petitioner has given explanation and thereafter assessment was reopened. Further change of opinion cannot be the reason for reopening the assessment order. First notice dated 01.01.2021, thereafter second notice on 11.11.2021 and suddenly the third notice dated 02.02.2022 have been issued by the faceless authority and when it was sent and for what reason it was sent, there is no proof available. The petitioner was not given reasonable opportunity to give his explanation as well as to make his submission and no reason has been given that how the assessing officer has come to the conclusion.

6.Learned counsel further submitted that in view of the submission of the department counsel with regard to the issuance of the first notice dated 01.04.2021 and only after the verification of the records, it can be confirmed, further with regard to the reopening found in the note file does not disclose any reason. Separate report available to show subjective satisfaction is not proper, unacceptable, hence this petition to be entertained and assessment order to be quashed. Further, he relied on the following decisions:

a) ***Kanubhai M.Patel vs.Hiren Bhatt or His Successors to Office reported in [2011]12 taxmann.com, 198 (Gujarat).***

b) ***Daujee Abhushan Bhandar (P) Ltd vs Union of India, reported in [2022] 136 taxmann.com 246 (Allahabad).***

c) ***ITO vs. Techspan India reported in [2018]92 taxmann.com 361(SC)***.

7. The learned Standing Counsel appearing for the respondent/department would submit that the prayer sought for in the

writ petition is for a certiorarified mandamus calling to quash the assessment order dated 21.03.2022. Already assessment order has been passed and if at all the petitioner got any grievance on the assessment, order, he has to approach the appellate authority namely the Commissioner of Appeals (CIT) and thereafter, if he is still aggrieved, he has to approach the tribunal. The petitioner rushing to this Court without showing any violation of principles of natural justice and not following the procedures is not correct. In the absence of the same, the petition has to be dismissed.

8.Learned Standing Counsel for the respondents further submitted that in this case notice under Section 148 is not challenged. Notice was sent on 11.01.2021, 02.02.2022 and thereafter on 15.02.2022 following notice under Section 142 and on 16.02.2022 in the show cause notice gives particulars and provisions violated by the petitioner. Thereafter, on 18.02.2022, notice has been sent informing the petitioner that the faceless assessment not received any response from the petitioner. Thereafter, the petitioner has sent his response, which has been considered and following the same, notice dated 22.03.2022, giving all details issued. Finally on 08.03.2022, the second show cause notice along with the present assessment order was given. In pursuance of the assessment, the petitioner was given time till 11.03.2022 to give his reply and objection and thereafter, finally assessment order has been passed on 21.03.2022. The petitioner further submits that the assessment ought to have completed by 31.03.2020, hence within the stipulated period entire procedure has been followed and assessment order has been passed now. If the petitioner has any grievance in the assessment order, he has to file an appeal before the appellate authority.

9.Learned Standing Counsel further submitted that in the case of ***Doosan Bobcat India (P) Ltd vs. Deputy Commissioner of Income Tax, Corporate Circle-1(1) Chennai*** reported in ***[2019]111 taxmann.com 476(Madras)*** it is held that

> *" The petitioner has chosen to challenge the notice under Section 148 and the consequential assessment order by filing the present writ petition. I have already pointed out that the impugned assessment order is the consequence of reopening the assessment under Section 147. Therefore, the question whether the reopening is valid or not, is to be considered and decided based on the reasons for reopening, objections filed by the assessee against such reasons and order passed thereon rejecting such objections. As*

already pointed out that the assessee has not chosen to challenge the rejection order, on the other hand, they participated in the assessment proceedings"

10. Further, he also relied to para 18 in the said order, wherein it is held as follows:

> *"As rightly pointed out by the learned Counsel for the Revenue that none of the exceptions referred to in the above decision is attracted in this case to exercise the discretionary jurisdiction of this Court under Article 226 of the Constitution of India to examine the correctness or otherwise of the impugned order of assessment. The learned counsel for the petitioner relied on (1961) 41 ITR 191 (SC), Calcutta Discount Co. Ltd. vs. Income Tax Officer and (2017) 77, 176 (SC), Jeans Knit (P) Ltd. vs. Deputy Commissioner of Income Tax, in support of his submission on the maintainability of the writ petition. As rightly pointed out by the learned counsel for the Revenue, the facts and circumstances of both the cases would show that challenge made in those cases before the Court was against notice issued for reopening the assessment, even before an order of assessment was passed. There is no doubt that the petitioner is entitled to approach this Court and challenge the very reopening proceedings, provided they approach the Court well before the Assessing Officer proceeded to the next stage of passing the order of assessment. In other words, if the assessee failed to challenge the reopening at the appropriate time before the Court, he is not entitled to seek such indulgence, after allowing the Officer to pass the order of assessment and thereby, allowing the reopening proceedings to get merged with the order of assessment, since the Writ Court cannot sit*

as an Appellate Authority and decide the merits of the assessment. It is not that this Court is powerless to decide the merits but the question is whether such power is need to be exercised, while invoking the discretionary jurisdiction under Article 226 of the Constitution of India. My considered view is that under the guise of questioning the reopening, an assessee should not be encouraged to challenge the order of assessment straight away before this Court by filing a writ petition, when he miserably failed to challenge the reopening at the appropriate time. In fact, I myself considered the issue in a case reported in (2018) 99 taxmann.com 340 (Mad), A.Sridevi vs. ITO and found that providing certain materials earlier cannot be equated with the disclosure of true and full material facts necessary for assessment, unless such material was already placed on record at the time of filing the original return itself. The above said decision was confirmed by the Division Bench of this Court Smt.A.Srivei (Supra).

11. Further, in the case referred to ***Archid pharm***'s case, it is stated that when assessment was in progress, appeal has been filed and in the meanwhile, assessment order has been passed and hence, it is not proper for the Court do decide on the factual issue. Further, learned counsel referred to the decision of this Court in ***Chhabil Dass Agarwal*** case, wherein it is held that an efficiaious remedy is available, hence the writ petition should not be entertained ignoring statutory dispensation.

12. On the submission made by either side, this Court finds that the petitioner made a forcible submission stating that though initial notice dated 31.03.2021 was issued under Section 148 of the Act, which according to the petitioner, it was received only on 01.04.2021 as it could be seen from his E-mail on at 7.20 a.m. only. All these factors are factual in nature. Further it is submited by the learned Standing Counsel for the respondent would submit that the cut off date and time to upload the same is upto 23.59 hours, however, it might not have been uploaded due to various reasons like jaming or system hash value etc. In view of the petitioner's contention that the notice dated 31.03.2022, received only on 01.04.2022, cannot be accepted, for which records have to be summoned. This process can be taken only on appeal proceedings and not in the writ proceedings. Thereafter, the other contention of the petitioner can be considered. Finding that the contentions are factual, the Apex Court has time and again in factual matters deprecated interference of this Court. Hence, this Court is not inclined to entertain this petition.

13. In the result, the Writ Petition stands dimissed. No costs. Consequently connected miscellaneous petitions are closed. In view of the same, if the the petitioner files a stay petition, the same to be considered by the concerned authorities.

14. It is seen that the petitioner had approached this Court and by this time appeal period might get lapsed. In view of the petitioner's apprenseion that his appeal will not considered on merits seems to be reasonable. In view of the same, this court grants four weeks time to the petitioner to file his appeal and the appellate court is directed to take the appeal on file and also consider the stay application, if any, filed by him, in accordance with law.

27.06.2022

Index: Yes/No
Internet : Yes/No
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M.NIRMAL KUMAR, J.

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