IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.10030 of 2021 and
W.M.P. Nos.10657, 10663 and 21467 of 2021

Pattabi Sai Venkat Prasad,
S/o Late R.Pattabi, No.1A,
Parasu Street, Kilpauk,
Chennai - 600 010. .. Petitioner

Vs.

1. The Assistant / Deputy Commissioner of Income Tax,
   Corporate Circle 3(2)
   Wanapathy Block, 4th Floor,
   121, Mahatma Gandhi Road, Nungambakkam,
   Chennai - 600 034.

2. Additional / Joint / Deputy / Assistant,
   Commissioner of Income Tax,
   National E-Assessment Centre,
   Delhi. ..Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records in PAN: APFPS2992P and quash the impugned notice issued on 20.03.2020 passed by the 1st Respondent proceedings in ITBA/AST/S/148/2019-20/1026822648(1) dated 20.03.2020 passed by the 1st Respondent as illegal and without jurisdiction.

For Petitioner : Ms.Vandana Vyas
For Respondents : Mrs.Premalatha
Standing Counsel

ORDER

The writ petition is filed challenging the impugned notice dated 20.03.2020 primarily on two grounds viz., that the impugned notice stands vitiated in the absence of a specific finding that the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Secondly, the issue which is now sought to be reassessed has already engaged the attention of the Assessing Authority who had completed the assessment, the reassessment is thus made on the basis of mere change of opinion which has been consistently held to be a circumstance / ground which does not enable reassessment under Section 147 read with Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "Act").

2. The petitioner herein is the Director of a Company called Vinplex India Pvt. Ltd. and was assessed to tax in PAN No.APFPS2992P presently under the jurisdiction of the National e-Assessment Centre, Delhi. The petitioner filed its return of income for the Assessment Year 2014-15 on 27.07.2014, declaring a Gross Total Income of Rs.54,19,094/-. The petitioner's case was selected for scrutiny under CASS and a notice under Section 143(2) of the Act was served on the petitioner on 15.09.2015 informing the petitioner that there are certain

aspects with the return requiring clarification. There was a change of the office of the assessing officer, thus another notice dated 16.08.2016 calling upon the petitioner to appear and furnish certain information which *inter-alia* included the following:

> *"5. Details of transactions of movable/ immovable property during the Financial Year 2013-14 along with copy of sale deed and purchase deed.*
>
> *6. Reason for the variation in sale consideration reported in TDS return under Section 1941 A and in the income-tax return."*

3. The petitioner responded to the above notice vide letter dated 26.12.2016 *inter alia* highlighting the following:

> *a. I have sold two land properties and received the sale consideration by way of cash and this sales have been offered to income under short term capital gains for the Assessment Year 2014-15.*
>
> *b. I have constructed a residential house for a total value of Rs.1,32,45,600/- and payments for the above construction have been made by way of cheques, RTGS transfers and cash payments whatever required.*
>
> *c. I have withdrawn cash from my bank account on the basis of necessity to meet the expenses towards construction of residential house in anticipation of cash payment mode to the*

suppliers, contractors and other construction related jobs.

d. As most of the parties have accepted cheques / RTGS transfers mode of payment towards their supplies and payments prior to cash deposits by way of RTGS transfers Cheques and Demand Draft pertaining to the financial year 2013-14.

3.1. The assessment was thereafter completed under section 143(3) of the Act dated 29.12.2016 by making an addition of Rs. 3,00,000/- which was not challenged by the petitioner. While so, after more than 4 years from the end of the relevant assessment year, a notice dated 20.03.2020 under Section 148 of the Act was issued stating that the respondent has reason to believe that the income chargeable to tax for the assessment year 2014-15 has escaped assessment within the meaning of Section 147 of the Act. The petitioner sought for reasons for reopening. In response, the 2nd respondent vide letter dated 03.03.2021 furnished the reasons for reopening which reads as under :

"It is seen that the computation statement of income, the assessee had claimed exemption under Section 54E of the IT Act, in respect of the LTG on the sale of properties amounting to Rs.1,01,60,974/-. It is seen from the details provided in respect of the same, the assessee has sold properties as detailed below,

Sale of plot at Injambakkam (1.11.13) for	*Rs.1,20,15,000*
Less: Purchase cost after indexation (17.6.10)	*Rs.69,18,401*
LTCG	*Rs.50,69,591*
Sale of Flat (24.2.14) for	*Rs.1,29,00,000*
Less: Purchase cost after indexation (5.3.04)	*Rs. 78,35,613*

Total LTCG	*Rs.1,01,60,974*
Less: Exemption u/s 54E on investment in a residential house	*Rs.1,10,00,000*

However in the Return of Income for AY 2014-15 filed on 27.07.2014 the assessee has claimed exemption u/s 54F amounting to Rs.1,10,00,000. The assessee has not submitted any corroborative evidence to prove his claim of exemption during assessment proceedings. Therefore, the claim of exemption u/s 54F is required to be disallowed and brought to tax."

3.2. The learned counsel for the petitioner submitted that neither the notice nor the reasons for reopening contain any finding / allegation that the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee / petitioner to disclose fully and truly all material facts necessary for assessment, which is a condition precedent for invoking extended period of limitation i.e., beyond four years from the relevant assessment year. Secondly, as seen from the above extracts the petitioner even before making the original assessment had submitted that he had sold two land properties and received the sale consideration by way of cash and has offered the same under short term capital gains. Importantly, the petitioner has also furnished the statement of income along with the copy of the return as early as on 16.08.2016 which has also been taken into account while making assessment under Section 143(3) of the Act. The reasons for reopening state that it is made on the basis of computation statement of income and the return of income, both the documents were available even when the assessment was made under Section 143(3) of the Act. Thus, the reassessment is nothing but an attempt to exercise power of reassessment on a mere change of opinion.

4. To the contrary, it is submitted by Mrs.Premalatha, learned counsel for the respondent that the finding that income chargeable to tax has escaped assessment by reason of failure to disclose fully and truly material particulars is not a condition precedent and even in the absence of such finding, there is no restriction under Section 147 and 148 of the Act to exercise the power of reassessment. It was also submitted that the question as to whether there is change of opinion or otherwise is a question of fact which ought to be examined by the statutory authority.

5. Heard Both sides and perused the material on record.

6. This Court finds that the issue that arises for consideration viz., whether absence of a finding that the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment would vitiate / prove fatal to a reassessment invoking the extended period of limitation under Section 147

of the Act is no longer *res-integra*. It has been decided by the Division Bench of this Court in the case of ACIT vs. *Seshasayee paper and Board Ltd.,* reported in *(2023) 148 taxmann.com 432 (Madras)* and *Durr India (P.) Ltd., vs. ACIT* reported in *(2023) 152 taxmann.com 303 (Madras)* that finding as to failure on the part of the assessee to disclose fully truly material particulars is a condition precedent for invoking extended period and in the absence of such finding, initiation of invoking extended period would stand vitiated. In this regard it may be useful to refer to the portion of the judgment :

> *"8. ....*
>
> *a) That the impugned proceeding is admittedly initiated invoking the extended period under Section 147 of the Act. The relevant portion of the said Section is extracted below:*
>
> *--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 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 the assessment year.--*
>
> *A reading of the above provision would show that while it is open to the Assessing Officer to invoke Section 147 of the Act within a period of four years, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, subject to the provisions of Sections 148 to 153 of the Act. The proviso to Section 147 of the Act, enables the Assessing Officer to make reassessment even after the expiry of four years from the end of the relevant assessment year, but, within six years from the relevant assessment year, if the income chargeable to tax has escaped assessment under*

the following circumstances, viz.,

a. Failure of the assessee to make a return under Section 139 of the Act.

b. Does not make a return in response to a notice issued under Sub~Section (1) to Section 142 or Section 148 of the Act.

c. Failure of the assessee to disclose fully and truly all material facts necessary for assessment.

9. In the present case, admittedly the extended period of six years is being invoked not under (a) or (b) set out above but only in view of (c) i.e., failure to disclose fully and truly all material facts necessary for assessment. It is submitted by the learned counsel for the respondent/assessee that while furnishing the reasons for reassessment vide its communication dated 06.01.2014, there is no finding that there was failure on the part of the appellant to fully and truly disclose all material facts necessary for assessment. It is submitted that in the absence of any finding on the above jurisdictional fact, the entire proceeding would be void and a nullity. We find there is merit in the above submission inasmuch as the normal period of limitation for exercising the power of reassessment under Section 147 of the Act is four years. The extended period of six years could be invoked only under three circumstances set~out/ mentioned above. Admittedly, the only circumstance which could have enabled the respondents to invoke the extended period of 6 years in the present case is to bring the proceedings under clause (c). <u>To invoke the extended period of six years for reassessment, the reasons furnished for reassessment ought to contain a finding that the appellant herein had failed to disclose fully and truly all material facts necessary for assessment.</u> We say this, since it appears to us that the whole idea of furnishing reasons before embarking on a full fledged exercise of reassessment was to ensure that the powers of reassessment are exercised only in circumstances which the statute permit. The above limitation/restriction on the power of reassessment was intended to ensure transparency in the proceeding and to avoid abuse of power. It is trite law that power of reassessment must be exercised with a degree of caution and an element of circumspection and must be strictly in compliance with the procedure and only in circumstances which warrants exercise of that power. <u>In the present case, though admittedly the power to reassess has been exercised by invoking the extended period of limitation in terms of the proviso to Section 147 of the Act, there is no recording of the existence of the circumstances, viz., failure to disclose fully and truly all material particulars which</u>

would confer jurisdiction to proceed / initiate reassessment proceeding beyond four years and within six years. In this regard, it may be relevant to refer to the following judgments to appreciate the relevance and importance of existence of jurisdictional facts and an application of mind as to its existence by the authority concerned before assuming jurisdiction. It is relevant to extract the judgment of the Hon-ble Supreme Court in the case of Arun Kumar v. Union of India reported in (2007) 1 SCC 732, which reads as under:

--74. A jurisdictional fact is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non~existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency-s power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.--

75. In Halsbury-s Laws of England, it has been stated: Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive.

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction."

(emphasis supplied)

10. The Hon-ble Supreme Court in the case of Arun Kumar, thereafter proceeded to rely upon the decision in the case of White & Collins vs. Minister of Health reported in (1939) 2 BK 838 and observed as under:

"80. The Court relied upon a decision in White & Collins v.Minister of Health [(1939) 2 KB 838 : 108 LJ KB 768 : (1939) 3 All ER 548 (CA) sub nom Ripon (Highfield) Housing Order, 1938, Re] wherein a question debated was whether the court had jurisdiction to review the finding of administrative authority on a question of fact.

The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was a part of park. The Minister directed public inquiry and on the basis of the report submitted, confirmed the order.

81.Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated;

"The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order."

(emphasis supplied)

11. While on the question of existence or otherwise of jurisdictional fact which would enable the authority to invoke the extended period of limitation of six years for reassessment, it may also be relevant to note that the question of limitation has been understood to be one involving jurisdiction even under the Excise Law and in the absence of finding of the existence of the circumstances enabling the invoking of the extended period, it has been held by the Hon-ble Supreme Court that the issuance of Show Cause Notice itself is impermissible. In this regard, it may be relevant to refer the judgment in the case of ITW Signode India Ltd v. CCE reported in (2004) 3 SCC 48, wherein, after extracting the judgment of the Hpn-ble Supreme Court in the case of Easland Combines, the Court proceeded to conclude as under:

"68. Even in Easland Combines [(2003) 3 SCC 410 : (2003) 152 ELT 39] this Court held: (SCC pp. 424~25, para 31)

"31. It is settled law that for invoking the extended period of limitation duty should not have been paid, short~levied or short~paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision is not

sufficient to attract the extended period of limitation."

69. The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short~levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, wilful misstatement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show~cause notice in terms of Rule 10 could have been issued."

(emphasis supplied)

12. From the above decisions, it is clear that existence of --jurisdictional fact-- is sine qua non for the exercise of power. If the jurisdictional fact exists, only then the authority can proceed with the case and take an appropriate decision in accordance with law. It leaves no room for any doubt that to invoke the extended period, the Assessing Officer ought to show/ demonstrate the existence of any of the three circumstances set out in the proviso to Section 147 of the Act. In this case, failure on the part of the assessee to fully and truly disclose all material particulars in our view would constitute the "jurisdictional fact" for invoking extended period of limitation and failure to record the existence of the above jurisditional fact while invoking the extended period under the proviso to Section 147 of the Act, would vitiate the entire proceedings. In this regard, it may be relevant to refer the following judgments, wherein it was held that failure to render a finding as to the existence of the above circumstance warranting invocation of the extended period in terms of the proviso to Section 147 of the Act would vitiate the entire proceedings. In this regard, it may be relevant to refer to the following judgements:

a) Duli Chand Singhania vs ACIT (269 ITR 192):

...that the reasons recorded for issue of notice showed that the satisfaction recorded therein wes merely about the escapement of income. <u>There was not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment. Absence of this finding which is a "sine qua non" for assuming jurisdiction under section 147 of the Act in a case falling</u>

under the proviso thereto, made the action taken by the Assessing Officer wholly without jurisdiction. The notice was not valid and was liable to be quashed. "

(emphasis supplied)

b) Commissioner of Income Tax vs. Eigi Ultra industries Ltd. (296 ITR 573):

"...the reopening of the assessment under s. 148 beyond the period of four years at the end of the relevant assessment year can be sustained only if it is established that there is a failure on the part of the assessee to disclose fully and truly all material facts. in this case there is no finding that there is failure on the part of the assessee to disclose fully and truly all material facts".

(emphasis supplied)

c) Commissioner of Income~Tax v. Premier Mills Ltd., (2008) 296 ITR 157:

"6. In case where the assessment is completed under section 143(3) of the Income~tax Act, the reopening of the assessment under section 148 beyond the period of four years at the end of the relevant assessment year can be sustained only if it is established that there is a failure on the part of the assessee to disclose fully and truly all material facts. In this case there is no finding that there is failure on the part of the assessee to disclose fully and truly all material facts. Further, all the material facts are available at the time of making original assessment. The Tribunal has correctly followed the principles enunciated in the Supreme Court judgment reported in CIT v. Foramer France, [2003] 264 ITR 566, as well as this court judgment reported in the case of CIT v. Elgi Finance Ltd., [2006] 286 ITR 674 and came to the correct conclusion."

(emphasis supplied)

d) CIT v. A.V. Thomas Exports Ltd., (2008) 296 ITR 603:

"6. The Tribunal has applied the correct principle of law and held as follows:

"But whether recourse to section 147 could be made beyond four years is the real question in the present appeal. Circumstances for extending limitation beyond four years do not exist in the facts of the

present case. As such on the ground of limitation assumption of jurisdiction under section 147 is bad. In the case of CIT v. Foramer France, [2003] 264 ITR 566 (SC), it was held that if there is no failure to file return or to disclose fully and truly all material facts, issuance of notice beyond the period of four years is barred by limitation. In the case of CIT v. Annamalai Finance Ltd., [2005] 275 ITR 451 (Mad) it was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. It is incumbent on the Assessing Officer to prove that there was a failure to disclose material facts necessary for the assessment for the issuance of notice beyond the period of four years.“

7. It is thus evident that finding that income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment is a *sine qua non* and a condition precedent to invoke power of reassessment under Section 147 read with Section 148 of the Act beyond 4 years from the relevant assessment year and failure to render such a finding would prove fatal to the validity of such proceeding.

8. In view of the above, the impugned notice is set-aside. The writ petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

08.11.2023

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
spp/shk

MOHAMMED SHAFFIQ, J.

spp/shk

To:

1. The Assistant / Deputy Commissioner of Income Tax,
   Corporate Circle 3(2)
   Wanapathy Block, 4th Floor,
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