IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 12.09.2023	Pronounced on: 01.11.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.15854 of 2021
and
W.M.P.Nos.16738 & 16739 of 2021

R.Revathy (PAN: AAAPR527R) .. Petitioner

Vs.

1.The Assistant Commissioner of Income Tax,
Central Circle 1 (2),
Room No.121, New Building,
No.46, (Old No.108),
Mahatma Gandhi Road,
Chennai – 600 034.

2.The Pr. Commissioner of Income Tax,
Central – 1,
Room No.301, New Building, III Floor,
Investigation Building,
No.46, (Old No.108), Mahatma Gandhi Road,
Chennai – 600 034. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for the records on the file of the 2nd respondent in his impugned proceedings made in PAN/TAN:AAAPR5272R/2012-13 dated 23.03.2021 and to quash the same.

For Petitioner : Mrs.G.Vardini Karthik
for Mr.Mahasree Thangaraj

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel
and Mr.A.N.R.Jayaprathap
Junior Standing Counsel

ORDER

The Petitioner is aggrieved by the Impugned Order dated 23.03.2021 passed by the 2nd Respondent – Principal Commissioner of Income Tax.

2.Relevant portion of the Impugned Order dated 23.03.2021 reads as under:

> *"19. Further, Explanation 2 to Section 263 was inserted by Finance Act 2015 with effect from 01.04.2015 which is reproduced as under :*
>
> *"Explanation 2- For the purposes of this Section, it is hereby declared that an order passed by the Assessing shall be deemed to be erroneous insofar as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,-*
>
> *1. The order is passed without making inquiries or verification which*

should have been made;

2. *The order is passed without allowing any relief without inquiring into the claim;*
3. *The order has not been made in accordance with any order, direction or instruction issued by the Board under Section 19; or*
4. *The order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person"*

Clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification,which should have been made. Hence, what is relevant for clause (a) of Explanation 2 to Section 263 is whether the Assessing Officer has passed the order after carrying out enquiries or verification, which a reasonable and prudent officer would have carried out or not. Therefore, the order passed by the Assessing Officer is not only erroneous but also prejudicial to the interest of Revenue. Hence, in my considered view, it is a fit case for invoking provisions of Section 263 of Income tax Act 1961.

20. In view of the foregoing discussion, the consequential order passed on 29.10.2019 for the AY"2012-13 is thus held to be erroneous and prejudicial to the interest of revenue and the same is set-aside u/s 263 of the Act to the Assessing Officer to make the order afresh, after conducting necessary verification/enquiries in accordance with law and to carry out the reconciliation on the

> *quantum of jewellery, keeping in view my observations made in the preceding paras and after giving due opportunity to the assessee. For this purpose, the Assessing Officer is directed to get necessary reconciliation from the assessee with respect of the jewellery declared under VDIS, jewellery seized and that offered in the revised return of wealth. There is a huge difference in the quantum of jewellery wealth offered under VDIS and-the quantum admitted in the revised return of wealth. If the assessee is unable to reconcile or if the quantum of jewellery exceeds that is disclosed by the assessee, the Assessing Officer may bring the difference to tax accordingly which may result in an order of enhancement, in the consequential order to be passed as a consequence of this revision proceedings. The Assessing Officer may further decide on initiating Penalty, based on the outcome of the order."*

3.The petitioner had suffered an adverse Assessment Order dated 25.03.2014 at the hands of the Assessing Officer under Section 143(3) of the Income Tax Act, 1961 for the assessment year 2012-2013. The said Assessment Order has attained finality, as no further appeal was preferred by the petitioner. Thereafter, an order dated 23.09.2014 was passed by the 1st respondent under Section 274 r/w 271(1)(c) of the Income Tax Act, 1961, whereby penalty was imposed on the petitioner.

4.By the aforesaid order, the 1st respondent herein proceeded to impose penalty of Rs.14,51,713/- on the petitioner under Section

271(1)(c) of the Income Tax Act, 1962. The aforesaid order was passed with the approval of the Joint Commissioner of Income Tax vide the proceedings dated 25.09.2014 as per Section 274 of the Income Tax Act, 1961.

5.The petitioner had preferred an appeal before the Appellate Commissioner in ITA No.268/14-15. The Appellate Commissioner had passed an order dated 22.02.2016 under Section 250(6) of the Income Tax Act, 1961. The Appellate Commissioner dropped the penalty.

6.By the aforesaid order, the Appellate Commissioner dropped the proceedings holding that the gold jewellery was received by the petitioner during her marriage cannot be ruled out and therefore no concealment was established beyond doubt and simply because the petitioner failed to file an appeal before the quantum addition, question of imposing penalty automatically did not arise.

7.Relevant portion of the order of the Appellate Commissioner reads as under:

> *“"Giving streedhan property during marriage to the girl child is a practice in South India and also recognized under the Hindu Marriages Act. Therefore the claim of the appellant that the gold jewellery was received as streedhan during their marriage cannot be totally ruled out. In the circumstances, I am of the view that concealment is not established beyond doubt. Simply because the appellant failed to file appeal against the quantum addition, penalty cannot be automatic. Hence the penalty order cannot be sustained."*

8.The Department preferred an appeal before the Income Tax Appellate Tribunal in I.T.A.No.1450/Mds/2016. The petitioner also filed Cross Objection in C.O.No.150/Mds/2016. The Tribunal allowed the Revenue's Appeal and dismissed the Cross Objection filed by the petitioner with the following observations:

> *“7.1.The assessee relied on the decision of Sir Shadilal Sugar and General Vs CIT 168 AR 705 regarding mens rea this aspect has been considered by the Hon'ble Supreme Court in the case of Union of India vs. Dharmendra Textiles Processors 306 ITR 277 held that penalty under section 271(1)(c) is civil liability and for attracting such civil liability, wilful concealment is not an essential ingredient as is case in matter of prosecution under section. The assessee also relied on the judgment of Hon'ble Supreme Court in the case of CIT Vs. Suresh*

Chandra Mittal [251 ITR 9]. In the case relied up on by the assessee, the assessee has revised return of income under section 148 of the Act showing more income. Thereafter orders of the reassessment were passed without raising any objection. Therefore the facts of the case are clearly distinguishable In the case of the assessee the Revenue has clearly shifted the burden on the assessee and the assessee has not discharged her burden of explaining the source with plausible evidence. The facts of the assessee's case are squarely covered by Hon'ble Supreme Court judgement in the case of MAK Data (P)Ltd. Vs. CIT-II (38 Taxmann.com448) and this is a clear case for penalty under section 271(1)(c) of the Act. Accordingly we set aside the order of the Ld.CIT(A)and confirm the penalty levied by the Assessing Officer and dismiss the cross objections filed by the assessee.

8.In the result, the appeal of the Revenue is allowed and the cross objections filed by the assesse are dismissed.”

9.The aforesaid order was challenged by the petitioner by way of an appeal before the Hon'ble Division Bench of this Court in TCA.Nos.954 of 2018 & 82 of 2019. There, the petitioner had cited the decision of the Tribunal in the case of the petitioner's co-sister namely Shanmugapriya in the case of **DCIT Vs. Shanmugapriya**, [ITA.No.357 of 2016] for the same assessment order.

10.The Hon'ble Division Bench of this Court considering the above order of the Tribunal by its common judgment dated 03.07.2019, held that one more opportunity can be given to the petitioner to go before the Assessing Officer to re-do the reconciliation by affording an explanation which has been stated in the appeal as well as in the miscellaneous petition before the Tribunal. Relevant portion of the common judgment of this Court dated 03.07.2019 reads as under:

> *"11. It appears that the decision in the case of Shanmugapriya was not placed before the Tribunal when the impugned order was passed. Nevertheless, this Court does not propose to foreclose the rights of the assessee on the said ground since it is pleaded that the facts are identical and the assessee ? Shanmugapriya is also a member of the very same family, which was the subject matter of the same search operations. Therefore, we are of the considered view that one more opportunity should be granted to the assessee to go before the Assessing Officer to do the reconciliation by offering an explanation, which has been stated in these appeals as well as in the said miscellaneous petition before the Tribunal.*
>
> *12. For the above reasons, TCA.No.82 of 2019 is allowed, the order passed by the Tribunal is set aside and the matter is remanded to the Assessing Officer to afford an opportunity to the assessee to reconcile the quantum of jewelry.* ***The Assessing Officer shall also take note of the decision in the case of Shanmugapriya and pass fresh orders on***

> ***merits and in accordance with law uninfluenced by any of his observations made in the earlier order dated 23.9.2014.*** *Consequently, the substantial questions of law are left open. No costs.*
>
> *13. So far as TCA.No.954 of 2018 is concerned, this appeal is directed against the order dated 07.9.2018 in the miscellaneous petition rejecting the same as being barred by limitation. Now that we allowed TCA.No.82 of 2019 and remanded the matter to the Assessing Officer for a fresh decision, no adjudication is required in TCA.No.954 of 2018. Accordingly, TCA.No.954 of 2018 is closed and the substantial questions of law are left open. No costs."*

11.Pursuant to the above, a consequential order dated 29.10.2019 was passed by the 1st respondent dropping the penalty with the following observations:

> *"In view of the directions of Honble High court, the case was posted for hearing and the assessee was asked to submit the details to substantiate her claim that the jewellery was declared under VDIS. The A.R. of the assessee Sri Reddi Praksah, CA appeared and filed written submissions stating that the case does not attract penalty since the additional income towards investment in jewellery was offered only to purchase peace with the Department though the assessee declared huge quantity of jewellery at the time of VDIS. The AR also filed Certificate issued by The Commissioner of Incometax,-1, Chennai, as per which the assessee had declared*

> *jewellery weighing 101442.5 grams. Since the assessee had declared huge quantity of jewellery at 101442.5 grams under VDIS, the jewellery found at the time of search operations at 2034.1 grams, can be treated as part of the jewellery declared under VDIS. Following the decision of the Tribunal in the case of Shanmugapriya, and the directions of Honble High Court, no penalty is to be charged on the assesse."*

12.Meanwhile Show Cause Notice dated 10.03.2021 was issued to the petitioner by the 2nd respondent under Section 263 of the Income Tax Act, 1961 to show cause as to why the order dated 29.10.2019 of the 1st respondent should not be revised. The petitioner replied to the same which has culminated in the Impugned Order dated 23.03.2021 directing the 1st respondent to initiate proceeding to impose penalty.

13.The learned counsel for the petitioner would submit that there is a merger of the order passed by the 1st respondent Assistant Commissioner on 29.10.2019 and therefore, there is no scope for invoking Section 263 of the Income Tax Act, 1961 to revise the assessment.

14.The learned counsel for the petitioner has placed reliance on the following decisions:

(i) **Principal Commissioner of Income-tax, Assam Vs. Oil India Ltd.**, [2019] 103 taxmann.com 339 (Gauhati);

(ii) **Commissioner of Income Tax (Exemption), Mumbai Vs. Slum Rehabilitation Authority**, [2019] 107 taxman.com 18 (Bombay) and

(iii) **Commissioner of Income-tax-III Vs. Sanvijay Rolling & Engg. Ltd.**, [2022] 137 taxmann.com 123 (Bombay).

15.The learned counsel for the petitioner has drawn attention to the explanation 1(c) to Section 263(1) of the Income Tax Act, 1961 and submits that the orders that were passed earlier on 23.09.2014 merged with the order of the Commissioner of Income Tax (Appeals) as also with the order dated 03.07.2019 of this High Court and therefore, there is no scope for invoking Section 263(1) of the Income Tax Act, 1961.

16.It is submitted that the 2nd respondent failed to note that the 1st respondent had acted reasonably in accordance with the directions of this Court's order dated 03.07.2019 and dropped the penalty after enquiry.

17.It is submitted that in respect of penalty, the issue has been already dealt before CIT (Appeals), Income Tax Tribunal and this Court and the assessment attained finality. Hence, the 2nd respondent has no jurisdiction to give direction to revise the assessment under Section 263 of the Income Tax Act, 1961.

18.It is submitted that the 2nd respondent exceeded his jurisdiction by directing the 1st respondent to act according to his direction for levy of difference of tax after making reconciliation on the quantum of jewellery declared under the VDIS Scheme.

19.It is therefore submitted that the 2nd respondent without proper appreciation of facts and in exercise of excess jurisdiction has passed the impugned order dated 23.03.2021, which is unsustainable and prayed for setting aside the impugned order and allowing the appeal.

20.The Impugned Order dated 23.03.2021 is defended by the learned counsel for the Revenue. It is submitted that there is no scope for setting aside the Impugned Order dated 23.03.2021, as the Impugned Order is well reasoned and requires no interference.

21.It is submitted that no finality can be said to have been attained.

The Order dropping the penalty has been re-opened and it is always open for the petitioner to participate in the fresh proceedings pursuant to the Impugned Order. It is submitted that, even if an adverse order is passed on merits, the petitioner is not without remedy.

22.The learned Senior Standing Counsel for the respondents would submit that the respondents are required to comply with the requirements of sub-section (2) to Section 263 of the Income Tax Act, 1961.

23.It is further submitted that the order in revision under the said Section may be passed at any time in the case of an order which has been passed in consequence of the order to give effect to any findings or directions contained in the order of the Appellate Tribunal, High Court or Hon'ble Supreme Court.

24.It is submitted that there is no question of any merger. It is submitted that the High Court has merely remitted the case back to the respondent while passing its judgment in TCA.Nos.954 of 2018 & 82 of 2019 on 03.07.2019 and therefore, the question of merger is an irrelevant factor and therefore prays for dismissal of the Writ Petition.

25.I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents.

26.The petitioner declared a huge quantity of 101442.5 gms of gold jewellery at the time of VDI Scheme, 1997. The jewellery that was found during search operation on 18.08.2011 was at the petitioner's son's residence, viz., R.Sabapathy's residence.

27.The issue that arises for consideration is whether there was a merger of facts and whether merger is a relevant factor for not invoking the power under Section 263 of the Income Tax Act, 1961.

28.Sub-Clause (c) to explanation (1) to Section 263 of the Income Tax Act, 1961 reads as under:

> "**263. Revision of orders prejudicial to revenue.**
> [Explanation 1.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,
>
> (c) where any order referred to in this sub-section and passed by the Assessing

> Officer had been the subject matter of any appeal 5 [filed on or before or after the 1st day of June, 1988], the powers of the 1 [Principal Commissioner or Commissioner] under this sub-section shall extend 11[and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal."

29.The Hon'ble Supreme Court in **Malabar Industrial Co. Ltd,. Vs. CIT**, [2000] 243 ITR 83 (SC) has considered the scope of Section 263 of the Income Tax Act, 1961. In paragraph No.10, it has held as follows:

> *"10.The phrase "**prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer.** Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See Rampyari Devi Saraogi v. CIT [(1968) 67 ITR 84 (SC)] and in Tara*

Devi Aggarwal v. CIT [(1973) 3 SCC 482 : 1973 SCC (Tax) 318 : (1973) 88 ITR 323] .)"

30.It further observed as follows:

> *"9.The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue."*

31.This view was reiterated by the Hon'ble Supreme Court recently in **Commissioner of Income Tax Vs. Paville Projects, (P.) Ltd.**, [2023] 453 ITR 447. The Hon'ble Supreme Court in paragraph Nos.7.2 & 7.3 held as under:

> *"7.2 Thus, even as observed in paragraph 9 by this Court in the case of Malabar Industrial Co. Ltd. (supra) that the scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. It is further observed that if due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. However, only in a case where two views are possible and the Assessing Officer has adopted one view, such a decision, which might be plausible and it has resulted in loss of Revenue, such an order is not revisable under Section 263.*
>
> *7.3 Applying the law laid down by this Court in the case*

> *of Malabar Industrial Co. Ltd. (supra) to the facts of the case on hand and even as observed by the Commissioner, the order passed by the Assessing Officer is erroneous as well as prejudicial to the interest of the Revenue. Having gone through the assessment order as well as the order passed by the Commissioner of Income Tax, we are also of the opinion that the assessment order was not only erroneous but prejudicial to the interest of the Revenue also. In the facts and circumstances of the case, it cannot be said that the Commissioner exercised the jurisdiction under Section 263 not vested in it. The erroneous assessment order has resulted into loss of the Revenue in the form of tax. Under the Circumstances and in the facts and circumstances of the case narrated hereinabove, the High Court has committed a very serious error in setting aside the order passed by the Commissioner passed in exercise of powers under Section 263 of the Income Tax Act."*

32.In **Principal Commissioner of Income-tax, Assam Vs. Oil India Ltd.**, [2019] 103 taxmann.com 339 (Gauhati), it was held that the power to invoke the jurisdiction under Section 263 of the Income Tax Act, 1961 is only in respect of erroneous portion of the order of the Assessing Officer causing prejudicial interest to the Revenue and such portion of the order not being a part of the consideration in any appeal.

33.In **Commissioner of Income-tax-III Vs. Sanvijay Rolling & Engg. Ltd.**, [2022] 137 taxmann.com 123 (Bombay), a finding was recorded that the deduction as claimed by the assessee under Section

80IA/80IB of the Income Tax Act, 1961 was in accordance with law and was hence granted by the Commissioner of Income Tax (Appeals) in the appeal filed by the assesee, an Assessment Order passed under Section 143(3) of the Income Tax Act, 1961. The Tribunal dismissed the Revenue's appeal by its order dated 29.10.2007.

34.It was in this background, the Court held that the order passed by the Commissioner of Income Tax (Appeals) dated 31.01.2007 merged with the order passed by the Tribunal on 29.10.2007 and attained finality. In fact, the Court also recognized the principle that powers of the Commissioner under Section 263 of the Income Tax Act, 1961 would extend and shall be deemed to have been always extended to matters that have not been considered and decided in appeal filed by the assessee follows the order in **Commissioner of Income Tax Vs. Arbuda Mills Ltd.**, [1998] 98 Taxman 457 / 231 ITR 50 (SC). In **Commissioner of Income Tax (Exemption), Mumbai Vs. Slum Rehabilitation Authority**, [2019] 107 taxman.com 18 (Bombay), reiterates the above principle.

35.It is noticed that prior to the consequential order dated 29.10.2019, the petitioner had made statement on 23.10.2019 to the effect that 1194.60 gms of gold out of 2034.1 gms of gold formed part of 101442.5 gms of gold declared under VDI Scheme, 1997. The consequential order dated 29.10.2019 that was passed pursuant to judgment dated 03.07.2019 of this Court in TCA.Nos.954 of 2018 & 82 of 2019 has not made any proper enquiry.

36.There is no merger. The order of the Tribunal allows the Revenue's appeal. The High Court had merely remitted the case back to the respondent. Therefore, the decisions cited by the learned counsel for the petitioner are not relevant for allowing this Writ Petition. In the facts of the case, it cannot be said there is no merger as has been argued.

37.*Prima facie,* the consequential order indicates that the said order dated 29.10.2019 is erroneous and is prejudicial to the interest with the Revenue warranting invocation of Section 263 of the Income Tax Act, 1961 as there is no proper reasoning and proper application of mind.

38.Thus, there is no comparison between the case of the petitioner and petitioner's co-sister Shanmugapriya's case, who succeeded before the Tribunal in I.T.A.No.357/Mds/2016 for the same assessment year. There, the Tribunal vide its final order dated 15.07.2016 was of the view that when the assessee's mother-in-law late Smt.Prema had declared 3650 grams of gold jewellery under VDI Scheme, the Assessing Officer was expected to give credit to the extent of 3605 grams of gold in the hands of the petitioner's co-sister out of 6136.90 gms of unaccounted gold found in the hands of petitioner's co-sister.

39.There, during the search operation 6136.90 gms of unaccounted gold was found in the hands of petitioner's co-sister. Out of 6136.90 gms of gold, 3650 gms was set off as that of the gold of her mother-in-law late Smt.Prema, who had declared the aforesaid grams of gold under VDI Scheme, 1997. In the present case, 2034.1 gms of gold was found at the residence of petitioner's son R.Sabapathy on 18.08.2011.

40.Whereas, in the present case, the petitioner has declared 101442.5 gms under the same VDI Scheme, 1997. During the search operation in the petitioner's son's residence viz., R.Sabapathy's residence, where 2034.1 gms of gold was found is claimed to be 101442.5 gms declared by the petitioner in VDI Scheme, 1997.

41.The High Court by its order dated 03.07.2019 in TCA.Nos.954 of 2018 & 82 of 2019 merely gave a fresh opportunity to the petitioner to explain the case afresh. The Assessing Officer has passed a consequential order on 29.10.2019 by stating that the case does not attract penalty since the additional income towards investment in jewellery was offered only to purchase peace with the Department.

42.In my view, no case is made out for interfering with the Impugned Order dated 23.03.2021.

43.In the result, the Writ Petition stands dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

01.11.2023

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Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No

C.SARAVANAN, J.

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To

1.The Assistant Commissioner of Income Tax,
Central Circle 1 (2), Room No.121, New Building,
No.46, (Old No.108), Mahatma Gandhi Road,
Chennai – 600 034.

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