BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.09.2023

CORAM

THE HONOURABLE MRS.JUSTICE **S.SRIMATHY**

W.P.(MD)Nos. 15715 & 15716 of 2023
and
WMP(MD)Nos.13167 & 13172 of 2023

Karthick V.R.Thondaiman ...Petitioner in both the Petitions

Vs.

1. The Assessment Unit National Faceless Assessment Centre,
Income Tax Department,
North Block,
New Delhi.

2. The Income Tax Officer,
Ward 1(1), 2nd Floor,
Trichy Main Building,
Williams Road, Contonment,
Trichy 620015. ...Respondents in both the petitions

COMMON PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of ***Writ of Certiorari***, calling for the records pertaining to the impugned Assessment Order, dated 26.05.2023, 12.05.2023 respectively; in ITBA/AST/S/147/2023-24/1053207530(1) and

ITBA/AST/S/147/2023-24/1052787779(1) issued by the 1st respondent and quash the same.

In Both the Writ Petitions:

For Petitioner : Mr.M.Mahaboob Athiff

For Respondents : Mr.N.Dilip Kumar

COMMON ORDER

Since the issue involved in these Writ Petitions are similar in nature both the writ petitions are taken up together and disposed of by a Common order.

2. These writ petitions are filed challenging impugned Assessment Orders, dated 26.05.2023 and 12.05.2023.

3. Heard Mr.M.Mahaboob Athiff, the Learned Counsel appearing for the Petitioner, Mr.N.Dilip Kumar, the Learned Counsel appearing for the Respondents and perused the material documents available on record.

4. In W.P.(MD)No.15715 of 2023 the petitioner had filed Returns of Income on 11.06.2016 for the Assessment Year 2015-2016 declaring the total income of Rs.2,97,000/-. The reassessment proceeding for the said Assessment Years was initiated, vide notice, dated 23.04.2021 under Section 148 of the Income Tax Act, 1961 *[herein after referred as 'the Act']* informing the petitioner that the 2nd respondent has reason to believe that there is an escaped assessment. The 2nd respondent has issued notice dated 30.07.2021 directing to file return of income and in response the petitioner had filed reply on 04.08.2021 stating that return filed under section 139 may be treated as return in response to the notice under section 148 and further communicated the return could not be filed in the portal vide response dated 25.12.2021.

5. The 2nd respondent issued notice, dated 25.07.2022 under amended section 148 proposing to reassessment in the light of the decision of the Hon'ble Supreme Court in the case of ***Union of India Vs. Ashish Agarwal in Civil Appeal No.3005 of 2022.*** The petitioner had filed objections on 23.08.2022. The 1st respondent issued another notice dated 23.01.2023 under section 142(1) to produce supporting documents such as business activities, details of purchaser / seller, sale documents, bank statements etc. The petitioner clarified vide letter dated 11.01.2023 that no consideration was received and the possession of the property still remains with the petitioner. Also, the petitioner had filed income computation and acknowledgment of return filed under section 139. The petitioner is taking consistent stand that the transactions are not complete and therefore they are not subject to capital gains tax and also produced the order of the High Court indicating that the subject sale transaction is in dispute. Inspite of explanation and supporting documents that the entire sale consideration of Rs.8 crores cannot be assessed since the alleged sale is not complete and sale proceeds not accrued, the 1st respondent issued Show Cause Notice dated 12.05.2023 proposing variation in the assessment and consequent demand. But the 1st respondent without appreciating the facts and evidence furnished, proceeded to confirm the variation proposed in notice dated 12.05.2023 vide the impugned assessment order dated 26.05.2023. The impugned order is bad in law since the explanation of the petitioner was not considered and is a non-speaking order. It is violation of principles of natural justice, since before passing the impugned order no personal hearing was granted.

6. Further the assessment order had assessed the sale consideration on notional basis when the actual money had not been received by the assessee, hence the assessment cannot be legally sustained as there could be no effective sale under section 54 of Transfer of Property Tax. Consequently, treating the sale consideration in the deed as capital gains is in violation of section 45 and 46 of the Act and the pronouncement of law by Hon'ble Supreme Court in K.P. Varghese Vs. ITO 131 ITR 597 (SC) and prayed to allow the writ petition.

7. In W.P.(MD)No.15716 of 2023 the petitioner had filed Returns of Income on 28.02.2018 for the Assessment Year 2016-2017 declaring the total income of Rs.4,98,990/-. The reassessment proceeding for the said Assessment Years was initiated, vide notice, dated 19.04.2021 under Section 148 informing the petitioner that the 2nd respondent has reason to believe that there is an escaped assessment. The 2nd respondent issued notice dated 19.07.2021 under Section 143(2) read with 147 of the Income Tax *Act* stating the reasons to reopen. In response to the same, the petitioner had filed detailed objections dated 03.08.2021 stating that no capital gain was accrued during the relevant assessment years and requested to drop the proceedings. Thereafter the 2nd respondent had issued notice dated 26.07.2022 under amended Section 148 of the Act, proposing to re-assessment in the light of the decision of the Hon'ble Supreme Court in the case of ***Union of India Vs. Ashish Agarwal in Civil Appeal No.3005 of 2022.***The petitioner had filed objections on 23.08.2022. Thereafter notice, dated 09.12.2022 was issued under Section 143(2) read with 147 of the Act, calling upon the petitioner to produce supporting documents pertaining to the Returns filed by the Petitioner and further, sought clarification regarding the sale transactions. The petitioner filed objections vide letter dated 11.01.2023, reiterating that no consideration has flown to the petitioner during the relevant assessment year. The 1st respondent has issued another notice, dated 26.12.2022 under Section 142(1) of the Act, directing the petitioner to produce supporting documents such as High Court order referred in the petitioner's objection, bank statement reflecting return of advance and other related documents.

8. Again, another notice, dated 09.01.2023 was issued seeking for documents as sought in notice, dated 26.12.2022. The petitioner clarified, vide response dated 11.01.2023, the petitioner was taking consistent stand that the transactions are not completed and therefore, they are not subject to capital gains tax. The petitioner further produced the order of High Court, dated 12.01.2023. Despite, providing the documents in support of the contentions of the petitioner, the 1st respondent has issued a show cause notice, dated 11.04.2023 proposing variation in the assessment and consequent demand and in response to Show Cause Notice the petitioner had filed reply dated 26.04.2023, reiterating the same facts and requested to drop the proceedings. However, without appreciating the facts and evidence, the 1st respondent has confirmed the variation proposed in SCN dated 11.04.2023 in the impugned assessment order, dated 12.05.2023. Even though, the petitioner is having alternative remedy of appeal to the Appellate authority, since the impugned order is passed without jurisdiction and without any reasonable opportunity of personal hearing the present writ petition is filed.

9. The contention of the petitioner is that the petitioner had executed a sale agreement, dated 26.05.2014 with M/s.Kalati Agencies Pvt. Ltd., which agreement failed and the advance amount received for the said transaction was returned. Since the transfer failed with M/s.Kalati Agencies Private Limited, the petitioner had executed a sale deed, dated 27.11.2015 in favour of M/s.Shanthi Guru Infra with respect to the very same property. However, M/s.Kalati Agencies Pvt. Ltd. proceeded to file a suit bearing O.S.No.142 of 2015 before the III Additional District Judge, Trichy for specific performance of sale agreement dated 26.05.2014 and the said suit is pending and since there exists a dispute with respect to the subject property, the petitioner returned the sale consideration of Rs.6 crores to M/s. Shanthi Guru Infra.

10. The contention of the petitioner is that since the sale has failed between the parties, resulting in no income accrued by way of transfer of capital asset and hence the petitioner is not liable to pay the capital gains tax. The further contention of the petitioner is that the impugned orders are non-speaking order since there is no finding regarding the transfer of assets and the profits or gains arising from the said transactions. The petitioner further relied upon the decision of the Income Tax Appellate Tribunal, Jaipur Bench in the case of ***ACTT Vs. Sh.Liyaraj Singh in ITA No.152/JB/2019*** contending that the petitioner is not liable to pay capital gains tax since no real income has accrued in the hands of the petitioner. Further the Hon'ble Supreme Court in the case of ***Siemens***

Engineering & Mfg. Co. Ltd Vs. Union of India, reported in AIR 1976 SC 1783, held that *'the rule requiring reasons to be given in support of an order is like the principle of audi alteram partem a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in letter and spirit and mere pretence of compliance with it would not satisfy the requirement of law*' Since the impugned order is non-speaking order and the is liable to be quashed. But in the present case, the impugned orders have recorded that the disputed properties are still in litigation and no final outcome has come. Having recorded so, the respondents ought not to have confirmed the variation. But the 1st respondent has passed an order determining variation at Rs. 8,91,00,000/- and Rs.8,93,01,990/- which is erroneous. When there are litigations, determination of variation in capital gains does not arise.

11. The Learned Counsel appearing for the respondents by referring to the counter submitted that as on date the sale deed executed in favour of M/s. Shanthi Guru Infra is still in existence and it has not been cancelled as per Law. Further the Learned Counsel stated that the claim of the petitioner that he had returned the sale consideration of Rs.6 crores cannot be relied on, since the petitioner had returned but the said M/s. Shanthi Guru Infra has not encashed the said amount and had filed suit and the same is pending. In such circumstances the claim of the petitioner cannot be entertained. Hence, the sale consideration is still in the hands of the petitioner and the petitioner is liable to pay capital gains.

12. After hearing the rival claims this Court had given its anxious consideration. The petitioner has entered into sale agreement with M/s.Kalati Agencies Private Limited, since the said Agency has not paid further sale consideration the sale agreement has not culminated into sale deed. In the meanwhile, M/s.Shanthi Guru Infra had executed a sale deed, dated 27.11.2015. As on date, the sale deed is in existence and it is not cancelled as known to law. The petitioner has relied on the Bank statement, where the petitioner has admittedly returned the sale consideration, which the petitioner has received from the M/s. Shanthi Guru Infra. But it is an admitted fact that the said M/s. Shanthi Guru Infra has not encashed the amount. When there is sale deed and when the M/s. Shanthi Guru Infra had not encashed the amount then the petitioner is liable for capital gains. In such circumstances, the claim of the petitioner cannot be considered. Therefore, the Assessment order passed by the respondents cannot be termed as illegal. The petitioner is directed to file an appeal before the Appellate Authority by furnishing all the documents and the appellate authority shall consider the same without insisting on limitation.

13. Further the suit filed by the M/s.Kalati Agencies Private Limited is still pending. The rights of the parties can be determined based on the final verdict in the suit. The petitioner is also at liberty to file a suit impleading the Income Tax Department also as a party to declare the sale as null and void, so that the petitioner can come out of the clutches of capital gains. The petitioner shall file a suit within a period of Four weeks from the date of receipt of a copy of the Order. Until then the respondents shall not take any coercive steps based on the assessment order.

14. With these observations and directions, these Writ Petitions are disposed of. No Costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes / No **08.09.2023**

Internet : Yes
KSA

To

1. The Assessment Unit National Faceless Assessment Centre,
   Income Tax Department,
   North Block,
   New Delhi.

2. The Income Tax Officer,
   Ward 1(1), 2nd Floor,
   Trichy Main Building,
   Williams Road, Contonment,
   Trichy 620015.

<u>S.SRIMATHY. J</u>

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Common Order made in W.P.(MD)No. 15715 & 15716 of 2023

08.09.2023