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W.P.Nos.349 of 2022 & 25984 of 2022

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2024

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THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.Nos.349 & 25984 of 2022

&

WMP Nos.388, 389, 25079 & 25080 of 2022

Swapna Manuel,
20/26, Perumal Kovil Street,
Taramani, Chennai-600 113.

... Petitioner in both
WPs

vs

Assistant Commissioner of Income Tax
Central Circle 2(3), Room No.B-5, 'B' Wing,
Investigation Building, No.46, Mahatma Gandhi
Road, Nungambakam, Chennai-600 034.

.. Respondent in
WP.No.349 of 2022

Assistant Commissioner of Income Tax
Central Circle 2(3), 1st Floor, Investigation Building,
No.46 (Old No.108), Mahatma Gandhi
Road, Nungambakam, Chennai-600 034.

.. Respondent in
WP.No.25984 of 2022

PRAYER in W.P.No.349 of 2022: This Writ Petition is filed under Article 226 of the Constitution of India to issue a writ of Certiorari, calling for the records of the Respondent in the Assessment Order



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passed under Section 147 of the Income Tax Act, 1961, bearing Identification No.ITBA/AST/M/1472021-22/1037862509(1), dated 16.12.2021, for the Assessment Year 2016-17, and the consequential Notice of Demand issued under Section 156 of the Income Tax Act, 1961, dated 16.12.2021, for the Assessment Year 2016-17, and to quash the same.

PRAYER in W.P.No.25984 of 2022: This Writ Petition is filed under Article 226 of the Constitution of India to issue a writ of Certiorari, calling for the records of the Impugned Order under Section 271(1)(c) of the Income Tax Act, 1961, dated 28.06.2022, bearing DN ITBA/PNL/F/271(1)(c)/2022-23/1043642384(1), passed by the Respondent for Assessment Year 2016-17 and the consequential Notice of Demand under Section 156 of the Income Tax Act, 1961, dated 28.06.2022, bearing DIN ITBA/PNL/S/156/2022-23/1043643802(1), issued by the Respondent for Assessment Year 2016-17, and quash the same.

In both WPs.

For Petitioner : Mr.M.V.Swaroop

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



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COMMON ORDER

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Both these writ petitions pertain to assessment year 2016-17. In W.P.No.349 of 2022, the assessment order dated 16.12.2021 and the consequential notice of demand dated 16.12.2021 are assailed. In W.P.No.25984 of 2022, the order dated 28.06.2022 imposing penalty is impugned.

2. The common petitioner is an individual engaged in the business of running a ladies hostel in the name of M/s. Olive Castles. The petitioner asserts that she also carries on real estate-related business in collaboration with her husband. For assessment year 2016-17, the petitioner filed the return of income on 17.10.2016 and declared a total income of Rs.97,08,580/-. Pursuant to a survey, a notice under Section 148 (as it stood then) of the Income-tax Act, 1961 (the Income-tax Act) was issued to the petitioner on 31.03.2021. The petitioner did not file a revised return in response to the said notice. Instead, upon receipt of a notice under Section 142(1) on 24.09.2021, the petitioner submitted the original return as an enclosure to reply dated 27.09.2021.



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WEB COPY 3. The assessment order dated 29.09.2021 came to be issued in those circumstances, and such assessment order was challenged in W.P.No.23071 of 2021. By order dated 27.10.2021, this Court quashed the assessment order primarily on the ground that the petitioner was not provided a reasonable opportunity to respond to the show cause notice. Therefore, the matter was remanded for re-assessment. After the said order was issued, the petitioner submitted a letter to the respondent requesting for reasons for re-opening the assessment and also forwarded various documents to the respondent. Eventually, the impugned assessment order dated 16.12.2021 came to be issued.

4. Mr.M.V.Swaroop, learned counsel for the petitioner, assailed the assessment order on multiple grounds. The first ground of challenge was that reasons for re-opening the assessment were not provided and that not doing so violates the order of the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd v. Income Tax Officer and others*(*GKN Driveshafts*), (2003) 1 SCC 72. The second ground of



challenge is that statements relied upon by the assessing officer were not provided to the petitioner. In particular, the statement made by M/s.Meenakshi Timber & Plywood is referred to and learned counsel contends that the said statement was relied upon at paragraphs 21 and 26 of the impugned assessment order. The third ground of challenge is that the petitioner's husband, Mr.Manuel Joseph, was examined and that the petitioner was not provided an opportunity to cross-examine Mr.Manuel Joseph. The fourth ground of challenge is that the notice under Section 142(1) was not followed by a notice under Section 143(2). The last contention was that the assessment order was quashed in the first round of litigation and the matter was remanded to the assessing officer. The assessing officer issued the assessment order on 16.12.2021, which is merely five days before the deadline fixed by this Court. In those circumstances, it is contended that the matter should not be remanded for a second time because it is no longer possible for the assessing officer to complete re-assessment within the limited time available. It is also submitted that a second remand was frowned on by the Hon'ble Supreme



Court. In support of these submissions, learned counsel referred to and relied upon the following judgments:

(i) *Tiwari Kanhaiya Lal v. Commissioner of Income Tax (Tiwari Kanhaiya Lal)*, MANU/RH/0071/1984, particularly paragraph 8 thereof, for the principle that the previous return of income may be treated as the return under Section 148.

(ii) *Principal Commissioner of Income-tax v. S.G.Portfolio (P) Ltd (S.G.Portfolio)*, [2023] 151 taxmann.com 307 (Delhi), particularly paragraphs 10,11,22 and 23, for the principle that the return filed earlier should be treated as a return in response to notice issued under Section 148, if the assessee had so informed the assessing officer.

(iii) *Sapthagiri Finance and Investments v. ITO*, MNU/TN/2713/2012, particularly paragraphs 8, 9, 11 and 12, for the proposition that the procedure prescribed under Section 143(2) is applicable to proceedings pursuant to notice under Section 148.

(iv) *Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II*, [2015] 62 taxmann.com 3(SC), for the principle that the



assessee should be provided an opportunity to cross-examine and that such opportunity should not be denied on the ground that such cross-examination would not be of use to the assessee. The said judgment was also relied upon to contend that a second remand should not be made.

(v) *The Commissioner of Income tax, Chennai v. Janak Shantilal Mehta*, MANU/TN/6864/2020, particularly paragraphs 10, 12 and 16, for the proposition that the participation by the assessee in proceedings does not obviate the need for providing reasons for re-opening the assessment.

(vi) *Sona Buildings v. Union of India*, [2001] 119 Taxman 430 (SC), paragraphs 6 and 7 thereof, with regard to the necessity to act within the statutory time limit.

(vii) *North Eastern Electric Power Corporation v. Principal Commissioner of Income-tax*, [2019] 104 taxmann.com 268 (Meghalaya), for the proposition that the return of income submitted in response to a notice under Section 142(1) should be treated as a return filed in response to a notice under Section 148.



WEB COPY 5. These contentions were countered by Mr.A.P.Srinivas, learned senior standing counsel. As regards the contention that reasons for re-opening the assessment were not provided, he referred to the notice under Section 148 and pointed out that the assessee was directed to submit the revised return of income within 30 days from the date of receipt of the notice. Since the return was not filed in response to the said notice, learned counsel submitted that the proposition laid down in *Tiwari Kanhaiya Lal* will not apply. Similarly, as regards the contention that Section 143(2) should have been complied with, he submitted that the said provision is not applicable in the factual context of the petitioner not filing the return of income in response to the notice under Section 148. As regards the contention that the petitioner was not provided an opportunity to cross-examine her husband, by referring to paragraph 14 of the impugned order, learned counsel submitted that the petitioner's husband stated that he had no experience in mass excavation and sand filling. In view thereof, learned counsel submitted that the



request for cross-examination of Mr.Manuel Joseph was not accepted

because no prejudice would be caused to the petitioner if he was not cross-examined. Learned counsel further submitted, in this regard, that the Evidence Act, 1872, is not applicable to these proceedings and that the assessee cannot demand a right of cross-examination in all circumstances. Turning to the statement of M/s.Meenakshi Timber & Plywood, by referring to paragraph 21 of the impugned order, learned counsel submitted that the statement of the said entity was that M/s.Olive Castles, which is the proprietary concern of the petitioner, front-ended the execution of the project. Therefore, he submitted that no prejudice was caused to the petitioner by not being provided the statement of M/s.Meenakshi Timber & Plywood. The next contention of learned senior standing counsel was that the petitioner did not raise any grounds, other than not providing reasons for re-opening assessment and breach of principles of natural justice by not providing sufficient time limit to reply to the show cause notice, in the earlier writ petition. He submits that all other grounds were raised for the first time in the second round of



litigation. He concluded his submissions by stating that the petitioner should avail of the statutory appeal since the case turns on disputed questions of fact.

6. In light of the above contentions, the question that falls for consideration is whether the impugned assessment order should be interfered with in exercise of discretionary jurisdiction. The first ground on which the petitioner urged that interference is warranted is that reasons for re-opening the assessment were not provided. In *GKN Driveshaft*, the Hon'ble Supreme Court interpreted Section 148, as it stood then, and held that upon receipt of the return of income, reasons should be provided for re-opening the assessment if the assessee makes a request for such reasons. Section 148(1), as it stood then, is as under:

*“148. Issue of notice where income has escaped assessment-
(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which*



he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139;”

7. From the above provision, it is evident that re-assessment proceedings commence with a notice calling upon the assessee concerned to file the return of income. Upon receipt of said notice, the petitioner/assessee had two options. The first option was to file a revised return of income and request for reasons for re-opening the assessment. The second option was to inform the assessing officer that the original return of income may be treated as the return in response to the notice under Section 148. If the second option had been availed of, it would still have been open to the petitioner to request for reasons for re-opening the assessment as per principles laid down in *Tiwari Kanhaiya Lal* and *S.G.Portfolio*. The petitioner did not, however, resort to either option.



WEB COPY 8. Thereafter, the assessing officer issued notice under Section 142(1) calling upon the assessee to produce the documents specified in such notice. The annexure to the notice indicates that the petitioner did not comply with the notice under Section 148. Upon receipt of this notice, the petitioner replied asking for reasons for re-opening the assessment and attached certain documents, while requesting for further time to submit other documents. This communication was issued more than six months after receipt of notice under Section 148. As contended by learned senior standing counsel, if the petitioner had provided a revised return of income or called upon the assessing officer to treat the original return of income as the return in response to notice under Section 148, the petitioner would have been entitled to challenge the proceedings on the ground that reasons for re-assessment were not provided, but not otherwise. This is evident from paragraph 5 of the SCC report in *GKN Driveshafts*, which is set out below:

“5.We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice



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under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

In these facts and circumstances, I am of the view that the impugned order does not warrant interference on the ground that principles laid down in *GKN Driveshafts* were not complied with. For the same reason, i.e. non-filing of return, and the consequential assessment on best judgment basis under Section 144, the impugned order does not call for interference in exercise of discretionary jurisdiction on the ground of non-issuance of notice under Section 143(2).

9. The next ground of challenge was by referring to the statements on which reliance was placed in the impugned order. In



particular, learned counsel for the petitioner referred to the statement of M/s.Meenakshi Timber & Plywood. The statement of the said entity is referred to in paragraph 21 of the impugned order. On examining the said statement, it appears that M/s.Meenakshi Timber & Plywood stated that they were unable to undertake work expeditiously and that, therefore, M/s.Olive Castle (the petitioner's proprietary concern) decided to mobilize labourers and resources. Thus, with regard to the execution of civil work, the petitioner stated that she did not have the experience in mass excavation and sand-filling. Her husband said that he too did not possess the requisite experience and that the sub-contractors had the experience. One of the sub-contractors, M/s.Meenakshi Timber & Plywood, issued a statement that the work was executed by the proprietary concern of the petitioner, thereby completing a circle leading back to the petitioner.

10. The impugned order was also assailed on the ground that no opportunity to cross-examine Mr. Manuel Joseph was provided.



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As stated earlier, Mr.Manuel Joseph stated that he did not have experience in mass excavation and sand filling. In those circumstances, the denial of the request for cross-examination does not warrant interference under Article 226. Undoubtedly, in cases where the assessee concerned is able to provide some indication of real prejudice, not providing the opportunity to cross-examine would justify interference while exercising discretionary jurisdiction, but not otherwise.

11. The last ground on which the petitioner assailed the impugned order was that a remand should not be made for a second time and that the time limit for issuing the assessment order was close to expiring when the assessment order was issued. The broad proposition that there should be no remand for a second time is not supported by statute or precedent and, in any event, on account of conclusions recorded earlier, the petitioner cannot succeed on this basis.



12. The petitioner was provided a reasonable opportunity to place on record evidence of execution of civil work (mass excavation and sand-filling), such as contracts for hiring excavation and other equipment, running account and final bill, proof of payment by the employer, contracts with sub-contractors, running account and final bills of sub-contractors, proof of payment to sub-contractors, and the like. Apart from producing work orders, photographs and the offer letter of employment of Mantri Developers Private Limited, the petitioner did not place any other evidence on record leading to the inference in the impugned order that no proof of carrying out work was submitted by the assessee. In these facts and circumstances, I conclude that there is no justification for exercising discretionary jurisdiction.

13. For reasons set out above, the impugned assessment order dated 16.12.2021 does not warrant interference under Article 226 of the Constitution of India. It is, however, open to the petitioner to assail such order by filing a statutory appeal. In view of the rejection



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of the challenge to the assessment order, the challenge to the penalty order, which is consequential, also suffers the same fate. Hence, W.P.Nos.349 & 25984 of 2022 are dismissed on the terms indicated above. Consequently, connected miscellaneous petitions are closed.

05.02.2024

Index : Yes / No

Internet : Yes / No

Neutral Citation : Yes / No

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To

Assistant Commissioner of Income Tax
Central Circle 2(3), 1st Floor, Investigation Building,
No.46 (Old No.108), Mahatma Gandhi
Road, Nungambakam, Chennai-600 034



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SENTHILKUMAR RAMAMOORTHY J.

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