



W.P.(MD) No.10161 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	26.06.2024
Pronounced on	25.07.2024

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.(MD) No.10161 of 2021

and

W.M.P.(MD) Nos.7881 & 7882 of 2021

K.P.S.Enterprises a partnership firm,
represented by its Partner
Shri K.P.Alagarsamy,
184/2, Bye Pass Road,
Madurai 625016.

... Petitioner

Vs.

1.Principal Commissioner of Income-tax,
Madurai-1, Madurai 625002.

2.Income-tax Officer,
Non Corporate Ward I(1),
Madurai 625002.

... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records in the matter of assessment of the petitioner in file PAN No.AAKFK1539J and Revision Petition in File C.No.407/01/PCIT-MDU (2020-21) and, set aside the order dated 23.03.2021 of the Principal Commissioner under Section 264 and consequently quash the assessment order for the



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assessment year 2013-2014 dated 30.12.2010 in PAN No.AAKFK1539J
which is *ab initio void* and without jurisdiction.

For Petitioner : Mr.N.V.Balaji
for Mr.J.Naresh Kumar

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

ORDER

In this Writ Petition, the petitioner has challenged the impugned order dated 23.03.2021 bearing reference C.No.407/01/PCIT-MDU (2020-21) passed by the first respondent under Section 264 of the Income Tax Act, 1961 and the consequential impugned Assessment Order dated 30.12.2010 passed by the second respondent for the Assessment Year 2013-2014.

2. The impugned order dated 23.03.2021 has been passed by the first respondent pursuant to the order of this Court dated 18.06.2019 in W.P.(MD) No.4208 of 2013. Operative portion of the impugned order dated 23.03.2021 reads as under:-



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“4. I have considered the submissions of the assessee, reports submitted by the Assessing Officer and the Joint Commissioner of Income Tax, Non-Corporate Range-2, Madurai and the relevant records were perused and carefully considered. The directions of Hon'ble High Court are also followed. A multistory building at Door no.184/2, Bye-Pass Road, Madurai is registered in the name of partners of the firm. Shri K.P. Alagarsamy, Shri K.P. Gopalakrishnan, Shri K.P. Ramachandran, Shri K.P. Esakkimuthukumar and Shri K.P. Srinivasan from Shri V. Muthukrishnan S/o (Late) Shri M. Venkatachala Reddiar and Smt. M. Renganayaki, wife of Shri V. Muthukrishnan for a consideration of Rs. 1,81,00,000/- as per the purchase Deed of the property dated 03.04.2006. As the assessee firm did not file its Return of Income for assessment year 2007-08, a notice u/s 148 dated 23.03.2010 was issued to and served upon the assessee on 26.03.2010. In response, the assessee firm filed its Return of Income for the assessment year 2007-08 on 31.03.2010 admitting taxable income of Rs.2,05,160/. Subsequently, a notice u/s 143(2) dated 08.11.2010 was served upon the assessee on 09.11.2010 posting the case for hearing on 12.11.2010. In response to the notice, the Authorized Representative Shri M.Subramani, F.C.A., of Madurai appeared on behalf of the firm and filed Power of Attorney. The Authorized Representative was asked to produce books of accounts, documents and other relevant details /evidences based on which the return of income was prepared and filed. The case was posted for hearing from time to time. Summon u/s 131 dated 20.12.2010 was served to the partners and statement were recorded. Based on the facts and details, the assessment u/s 143(3) r.w.s.147 was passed for A.Y. 2007-08 on 30.12.2010 by making addition towards unexplained investment u/s 69, unexplained capital



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expenditure u/s 69C and unexplained credit u/s 68. Thus, the total income was assessed as Rs. 2,01,85,040/-. The assessee firm's claim that the notice under section 143(2) has not been served to the assessee in time, is not acceptable as the assessee has appeared in the reassessment proceedings and co-operated in conduct of the assessment and has not raised the above issue during the assessment proceedings. Hence as per section 292BB of the Act the assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was "not served upon him in time".

4.1 This issue was not a matter before the Hon'ble High Court nor at any stage till now. I agree with the report of the assessing officer and the JCIT that in view of substantial compliance to the proceedings at various stages, the assessee now cannot question validity in view of section 292BB. Hence, this issue cannot be a subject matter of 264 now. Reliance is placed on 165 Taxmann. 123 Madras High Court.

4.2 The next issue is the direction of Hon'ble High Court to give a finding on ownership of the property, whether the same had been purchased using the funds of the firm or the funds of the individuals and whether the ownership is in the name of firm or the joint name of the partners. Hon'ble High Court directed the Commissioner, to revisit and examine this issue after taking into account the submissions of the assessee and any supporting evidences that may be produced in this regard. Accordingly, the issue was examined as eminent from the assessment order at the time of assessment. The assessing officer asked for production of books of accounts, documents and other relevant details/evidences. The partners of the above firm were summoned and statements were recorded. They produced only memo of total income.



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None of them has filed their capital accounts and balance sheets for any of the assessment years involved for which they have already filed returns of income. They were asked to explain sources for the purchase of the property for which it was replied that the vendor has taken loan from their father and the partners in cash on various dates and a mortgage deed was entered on 31.08.2005. Shri V. Muthukrishnan had mortgaged the property in favour of all the five partners and Shri K. Paramasivam for a sum of Rs.101 lakhs, the same was purchased at Rs. 181 lakhs. The loan was raised from ING Vysya Bank for Rs. 100 lakhs in the name of the firm. Out of this loan only Rs.8,68,923/- was shown as outstanding and the balance Rs.91,31,978/- was repaid during the previous year itself. When questioned about the sources for mortgage loan and the loan for repayment they could not give any valid explanation before the assessing officer. It was categorically stated by them they do not have any books of accounts and no bank statements were furnished. Even during current proceedings, the assessee could not furnish any further details or evidences. Under these circumstances, since the major source is from bank loan which is raised in the name of the firm and since firm can register the property in the partners name and since individual partners returns are not showing any such fund flow for purchase of property, I hold that the property belongs to the firm since the rental income is also admitted in the hands of the firm.

4.3 The next contention of the assessee is about the addition of Rs.90 lakhs appearing as sundry creditor under the caption "loan from friends and relatives" as on 31.03.2007. When questioned about this, it is explained to assessing officer that the same is from Shri K. Paramasivam father of the partners. However, in the sworn statement Shri K.



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Paramasivam denied to have any transaction with the assessee or the partners who are his natural children. The partners were also summoned and where asked to explain the sources which they could not. The assessee now pleads that since the statement of father was not furnished to the partners, the addition could not be made for lack of natural justice. The moot issue here is that in the return the credit was never in the name of the father. It was the claim of the partners that it belongs to their father which he denied. The onus of proving the source lies with the assessee firm and its partners which they have not discharged. Though the identity is stated as their father the other two parameters i.e. creditworthiness and genuineness of the transaction are also not proved. Hence, the addition of this credit appearing in the books of the assessee as loan from friends and relatives is rightly added by the A.O and needs no interference.

4.4 It is pertinent to mention here that the loan repayment of Rs.91 lakhs to the bank is also not explained. However, since the above credit of Rs.90 lakhs is already added, it appears no further addition is considered necessary by the assessing officer.

5. Unexplained investment in purchase of property of Rs.89,86,394/-

5.1 This amount is the difference between the loan amount and the value of the property. This amount also the assessee or its partners could not explain with any credible evidence. The argument of the assessee is that since the property was purchased in the joint names of the partners and not in the name of the assessee firm, the difference cannot be added in the hands of the firm. As held above in this order, the property is in the hands of the firm and there is not an iota of evidence to show that the partners have



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invested in this property and no source could be explained by the firm or the partners. Under these circumstances, I find no reason to interfere with the findings of the assessing officer that this takes the character of unexplained investment in purchase of property in the hands of the firm.

6. Unexplained capital expenditure u/s 69C of Rs. 21,98,650/-

6.1. The assessing officer added this amount towards being cost of the lift, furniture and fittings, deposits and loan to K.P. Alagarsamy. There is no dispute that these new assets were acquired however the dispute is about the source. For the detailed reasons discussed above and in the absence of any evidence and after verifying the returns of the partners as well no credible source is forthcoming in any of the return and hence I am convinced about the addition and accordingly the same is confirmed. However, I find strength in the argument of the assessee that in the balance sheet they have shown advances for letting out of property to the tune of Rs. 9 lakhs. The credit for the same can be given towards the additions to assets and the balance is confirmed.

The petition u/s 264 is disposed of accordingly.”

3. This is the second round of litigation before this Court. The petitioner, a partnership firm, consists of 5 brothers who are partners of the petitioner under a Partnership Deed dated 27.03.2006.



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4. The records that are available before this Court seem to indicate that 5 brothers/5 partners namely, K.P.Alagarsamy, K.P.Gopalakrishnan, K.P.Ramachandran, K.P.Isaki Muthu Kumar and K.P.Srinivasan along with their father K.Paramasiva Konar, had lent a sum of Rs.1,01,00,000/- to one V.Muthukrishnan. As a security, for the aforesaid loan, the said V.Muthukrishnan had executed a Mortgage Deed dated 31.08.2005 in favour of the 5 partners of the petitioner partnership firm in their individual capacities and their father K.Paramasiva Konar. It appears that the said borrower V.Muthukrishnan was however unable to repay the said amount and therefore executed a registered Sale Deed dated 03.04.2006 in favour of the 5 brothers who are incidentally partners of the petitioner firm.

5. After business commenced during Financial Year 2006-2007, the petitioner partnership firm had failed to file regular return under Section 139 of the Income Tax Act, 1961. Under these circumstances, a notice under Section 148 of the Income Tax Act, 1961 was issued on 23.03.2010, as it stood during the relevant period, which culminated in an Assessment Order dated 30.12.2010.



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WEB COPY 6. By the aforesaid Assessment Order, the following additions were made to the income declared by the petitioner in the return filed on 31.03.2010 pursuant to the notice dated 23.03.2010 issued under Section 148 of the Income Tax Act, 1961:-

Taxable Income admitted	: Rs.2,05,160/-
ADD: Unexplained investment in purchase of property u/s 69 of the I.T. Act, 1961. (Rs.1,81,00,000/- plus Rs.5,00,014/- being stamp Duty plus Rs.1,81,220/- being Registration Charges paid)	: Rs.1,87,81,234/- ----- : Rs.1,89,86,394/-
LESS: Bank loan obtained from ING Vysya Bank, Madurai	: Rs.1,00,00,000/- ----- : Rs. 89,86,394/- *
ADD: Disallowance of loan credit as not proved.	Rs.90,00,000/-
ADD: Unexplained capital Expenditure u/s. 69C of the I.T. Act, 1961 : #	
New Lift erected	Rs. 5,18,500/-
Purchase of Furniture and Fittings	Rs. 1,44,000/-
Deposits	Rs. 2,50,000/-



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Loan to K.P.
Alagarsamy

Rs.12,86,150/-

: Rs.1,11,98,650/-

TAXABLE INCOME ASSESSED

: Rs.2,01,85,044/-

Total Income assessed

: Rs.2,01,85,044/-

Income Tax @ 30% on T.I.

: Rs. 60,55,512/-

ADD: Surcharge @ 10% on I.T.

: Rs. 6,05,551/-

I.T. as increased by SC

: Rs. 66,61,063/-

ADD: Education Cess @ 2% on
Rs.66,61,063/- only.

:Rs. 1,33,221/-

TAX PAYABLE

: Rs. 67,94,284/-

ADD: Interest u/s.

234A Rs.21,74,144/-

234C Rs. 2,319/-

234B Rs.30,57,390/-

: Rs. 52,33,853/-

TOTAL TAX PAYABLE

: Rs.1,20,28,137/-

LESS: Self-asst. tax u/s 140A
paid on 31.03.2010

: Rs. 1,08,848/-

BALANCE TAX PAYABLE

: Rs.1,19,19,289/-

* Unexplained investment in property

Rs.21,98,650/- [Rs.1,11,98,650 – Rs.90,00,00]



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7. Under these circumstances, the petitioner approached the first respondent under Section 264 of the Income Tax Act, 1961 for the first time. The first respondent rejected the application filed by the petitioner vide order dated 22.02.2012 with the following observations:-

“2. I find the revision petition revolves round certain issues pertaining to (1) the property at Door No.184/2, Bye pass Road, Madurai-16 purchased by the petitioner for Rs.1,81,00,000/- from Shri V. Muthukrishnan and his wife Smt. M. Renganayaki, (2) the addition of Rs. 90,00,000/- being loan said to have been borrowed by the petitioner from Shri K. Paramasivam, father of the partners of the petitioner firm, (3) the addition of Rs. 21,98,650/- being unexplained capital expenditure, (4) pre-sale mortgage of the property mentioned in Sl.No.1 above by Shri V. Muthukrishnan for Rs.1,01,00,000/- to all the five partners of the petitioner.

3. I could also notice a very important fact, that the petitioner did not produce books of accounts to the Assessing Officer in respect of the Asst. Year in question. Before me also the petitioner failed to produce the books of accounts. It is the duty of any assessee when called for to produce books of accounts, documents, bills, vouchers, documents, journal entries with vouchers, evidences, other relevant details, etc., for verifying the correctness and accuracy of the information furnished in the return of Income; Whereas the petitioner has totally failed in this regard. The petitioner expects the authorities to be satisfied with the Balance sheet and Profit & Loss account alone. This cannot be permitted in the absence of relevant books of accounts. Balance sheet is only a summary, the correctness of which could not be established in the absence of connected books of accounts, bills, vouchers, etc. Hence, the averments and arguments of the petitioner



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In respect of each item of its contention do not have the requisite supporting background and confirming foundation. It is certainly a deplorable weakness of petitioner's case which cannot be pooh-poohed while dealing with the aggrieved points of the petitioner.

4 Regarding the property at Door No.184/2, Bye Pass Road, Madurai-16 purchased for Rs.1,81,00,000/-, the petitioner contends that the said property belongs to the partners and hence the same should not be treated as its asset, whereas the purchase deed, other documents, relevant details, the verbal submissions of the petitioner, partnership deed, etc., which I examined testify to the fact that the said property has been jointly purchased by all the five partners for the firm. Hence, the arguments of the petitioner in this regard is not acceptable.

5. The purchase transaction of the above said property has subjected the petitioner to incur further expenditure of Rs.5,00,014/- and Rs.1,81,220/- towards stamp duty and registration charges respectively and thus raising the total cost to Rs.1,87,81,234/-. The petitioner has claimed that the seller of the above said property Shri V. Muthukrishnan had already owed Rs.1,01,00,000/- through mortgage of the same property in favour of the firm vide mortgage deed dated 31.08.2005. The petitioner further claims that its partners jointly had sources to the tune of Rs.1,01,00,000/- as detailed below for lending Rs. 1,01,00,000/- to Shri V. Muthukrishnan which ultimately resulted in the mortgage of the said property vide deed dated 31.08.2005 to the petitioner:

- | | |
|--|----------------|
| <i>1. Amount realized on closure of
M/s. Senthil Murugai Finance</i> | <i>40 lacs</i> |
| <i>2. Amount realized on closure of
M/s. Vasan Wines</i> | <i>10 lacs</i> |
| <i>3. Amount realized on closure</i> | |



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<i>of M/s. KPS Wines</i>	<i>10 lacs</i>
<i>4. Amount realized on closure of M/s. Royal Wines</i>	<i>10 lacs</i>
<i>5. Amount realized on closure of M/s. Mano Wines</i>	<i>10 lacs</i>
<i>6. Agricultural income of the five partners and their father from 1998-99 to 2004-05</i>	<i>15 lacs</i>
<i>7. Past savings of the five partners and their father</i>	<i>6 lacs</i>
	<i>-----</i>
<i>TOTAL</i>	<i>101 lacs</i>
	<i>-----</i>

Whereas the petitioner did not produce any documentary evidence and accounting details to show as to when, how, in what mode and manner, etc. the above said amounts percolated to the hands of Shri V. Muthukrishnan, seller of the said property. As the petitioner could not successfully clear the log even during the proceedings before me with the support of books of accounts and returns of income of all concerned, I do not have any other go but to agree with the findings of the Assessing Officer. Regarding the bank loan of Rs.100 lacs, I observe that the loan was availed by the petitioner on 04.08.2006; whereas the property in question has been purchased on 03.04.2006 i.e., much before the loan was sanctioned. In this juncture it has not been explained why the bank gave loan for a property which was already purchased much earlier. I also find that the bank loan amount had not been credited to the account of the seller of the property. Further the loan has been repaid hurriedly during the same Financial Year to the extent of Rs.91,31,077/-. The source for the repayment of the said bank loan is said to have been given by Shri K. Paramasivam father of all the partners through a loan of



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Rs.90,00,000/-. This also did not reflect through bonafide accounting channels of all concerned, supported by books of accounts, vouchers, etc. Moreover, I also found a statement in Tamil given by Shri K. Paramasivam before the Assessing Officer on 24.12.2010 wherein he has beyond doubt clarified that neither the petitioner nor the partners owed any money to him as debt already advanced by him and he also denied any financial transaction between him and the petitioner or the partners. The argument of the petitioner that Shri K. Paramasivam is not that literate to understand and answer the questions put to him by the Assessing Officer cannot be accepted as the proceedings and statements had been conducted and taken in simple Tamil language only which is his Mother-tongue. Similarly, each partner has averred before the Assessing Officer that except ING Vysya Bank loan, no other loan has been borrowed from anybody else. Under these circumstances, I do not have any hesitation to concur with the opinion and findings of the Assessing Officer in this regard that all the five partners have invested their unaccounted money to purchase the said property at Door No.184/2, Bye Pass Road, Madurai-16.

6. As regards the addition of Rs.21,98,650/- being unexplained capital expenditure, the petitioner contends that by allowing the depreciation claimed, the Assessing Officer has accepted the existence of assets. It is true that the Assessing Officer has accepted the existence of new assets acquired as per the statement of depreciation filed by the petitioner with the return of income. But it does not mean that the Assessing Officer has accepted the source for purchase of the said assets as the petitioner did not show or explain the source. The fact remains the same that the capital expenses furnished by the petitioner had not been explained with appropriate source. In view of this position, I found from the depreciation statement that the new lift has been commissioned at a cost of Rs.6,10,000/- and furniture and fittings have been made for Rs.1,60,000/- instead of Rs.5,18,500/- and Rs.1,44,000/-



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respectively. Thus the total additions u/s 69C of the I.T. Act amount to Rs.23,06,150/- instead of Rs.21,98,650/- as mentioned in the Assessing Officer's order dated 30.12.2010. Therefore, an amount of Rs.1,07,500/- needs to be added to the addition of Rs.21,98,650/- and taxed as per Rules. But I feel it to be proper not to order the enhancement of additions. At the same time I am inclined to endorse the decision of the Assessing Officer in this regard.

7. In view of the above discussions and delineations, I do not find any reason to interfere with the Assessing Officer's order dated 30.12.2010. I, therefore, order that the revision petition dated 12.04.2011 preferred before me is rejected.”

8. Aggrieved by the same, the petitioner filed W.P.(MD) No.4208 of 2013 which came to be disposed of on 18.06.2019 by setting aside the aforesaid order dated 22.02.2012 passed by the first respondent under Section 264 of the Income Tax Act, 1961. Paragraph 8 of the order dated 18.06.2019 in W.P.(MD) No.4208 of 2013 reads as under:-

“8.The impugned order is thus set aside and the matter is remanded to the file of the Commissioner of Income Tax, who will hear the petitioner de novo and pass a speaking order. This Writ Petition is disposed of, in the aforesaid terms. Seeing as the matter relates to an order of assessment of the year 2011-12, this exercise shall be completed within six weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.”



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WEB COPY 9. The above conclusion was based on the observations contained

in paragraphs 6 & 7 of the order which read as under:-

“6.I am of the view that the issue of ownership of the property has not been appreciated by the respondent in proper perspective. The Commissioner himself states at paragraph 4 (internal page 3) of the impugned order that the property has been jointly purchased by all five partners of the firm. How he arrives at this conclusion is unclear. No doubt, the property could have been jointly purchased. However, that by itself does not make it a partnership asset. The transaction thus ought to have been examined especially in the context of ownership, that is, whether, the same had been purchased using the funds of the firm or the funds of the individuals and whether the ownership vests in the name of the firm or the joint name of the partners.

7.In the light of the fact that the impugned order is bereft of any proper reasoning for confirmation of the order of assessment dated 22.02.2012, I am of the view that this issue be re-visted and examined by the Commissioner, after taking into account the submissions of the assessee and any supporting evidences that may be produced before him in this regard.”

10. The petitioner thereafter filed a fresh statement before the first respondent which has now culminated in the impugned order.



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11. Arguing on behalf of the petitioner, the learned counsel would submit that in respect of the very same property, an Assessment Order came to be passed by accepting the contention that one of the partners of the petitioner firm namely, K.P.Srinivasan had given two cheques drawn on ICICI Bank for a sum of Rs.16 Lakhs to the seller and that those cheques were not presented for payment and were later cancelled and therefore, in lieu of the same, loan from ING Vysya Bank Ltd., Madurai was arranged for Rs.80,00,000/- and the amount was given to the seller namely, V.Muthukrishnan.

12. It is further submitted that assets which are held by the each of the partners in their individual capacities cannot be brought into the books of the petitioner partnership firm. The learned counsel for the petitioner would also submit that notice as is contemplated under Section 143(2) of the Income Tax Act, 1961 was not issued in time. It is submitted that the same should have been issued within 6 months from the date on which the Return that was filed on 31.03.2010. The learned counsel for the petitioner would place reliance on the observations of this Court in paragraphs 6 & 7 of the order dated 18.06.2019 in W.P.(MD) No.4208 of 2013, content of which has been extracted above.



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WEB COPY 13. Adding further, the learned counsel for the petitioner would submit that the notice that was issued under **Section 143(2)** of the **Income Tax Act, 1961** was barred by limitation in terms of proviso to Section 143(2) of the Act with effect from 08.11.2010.

14. It is submitted that such notice would have been issued within six months from the end of the Financial Year, for which, the Return was furnished. The learned counsel for the petitioner would submit that after the Notice under Section 148 of the Income Tax Act, 1961 was issued on **23.03.2010**, the petitioner firm had, promptly, filed a Return on **31.03.2010** and therefore the Notice under **Section 143(2)** of the Act ought to have been issued to the petitioner on or before **30.09.2010**. Instead, the Notice was issued only on **08.11.2010**.

15. It is further submitted that the reliance on the document, that was subsequently furnished by the petitioner, cannot be placed. The reliance that was placed on the documents filed by the petitioner, could not have been relied upon by the Assessing Officer, while passing the Assessment Order on **30.12.2010**.



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WEB COPY 16. In this connection, the learned counsel for the petitioner has placed reliance on the following decisions of the Hon'ble Supreme Court and this High Court:-

- i. **Assistant Commissioner of Income Tax Vs. Hotel Blue Moon**, [2010] 188 taxman 113 (SC);
- ii. **Commissioner of Income Tax Vs. Alstom T&D India Ltd.**, [2014] 45 taxmann.com 424 (Madras);
- iii. **Commissioner of Income Tax Vs. P.L.Gandhi**, [2009] 315 ITR 110 (Chennai); and
- iv. **Sapthagiri Finance & Investments Vs. Income Tax officer, Ward I(4), Kanchipuram**, [2012] 5 taxmann.com 341 (Madras).

17. That apart, the learned counsel for the petitioner would draw the attention to **Section 292BB** of the Income Tax Act, 1961 with effect from 01.04.2008 *vide* Finance Act, 2008. It is submitted that the issue stands covered in favour of the petitioner in terms of the decision of the Hon'ble Supreme Court in **Commissioner of Income Tax Vs. Laxman Das Khandelwal**, [2019] 417 ITR 325 (SC).



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18. That apart, the learned counsel for the petitioner would also draw a reference to the Explanatory Notes to the Provisions of the Finance Act, 2008. A specific reference was made to para 42 *vis-a-vis* Notice under Section 143(2) of the Income Tax Act, 1961 in the light of the insertion of Section 299BB of the Income Tax Act, 1961.

19. A specific reference was made to para 42.2, 42.4 and 42.5 of the Explanatory Notes to Provisions of the Finance Act, 2008, which reads as under:

“42.2 Instances have come to the notice of the department, where notices under sub-section (2) of section 143, though issued by registered post within twelve months from the end of the month in which the return was furnished, have been held ‘invalid’ on the ground that the notice was actually received by the assessee after the limitation date and there was no ‘service’ as postulated under the section. This is notwithstanding the fact that the assessee has attended the assessment proceedings in response to the notice served on him. Instances have also come to notice where the orders of the assessing officer is being quashed on the consideration that there is no evidence of issue or service of notice, even though the assessee and his authorized representative have attended the hearing before the Assessing Officer during the assessment proceedings. Further, the design of the limitation period with reference to the end of the month leads to administrative inconvenience in as much as the last day of every month becomes a time barring date.



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42.4. New Section 292BB provides that where an assessee has appeared in any proceeding or cooperated in any inquiry related to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act has been duly served upon him in time and in accordance with the relevant provision of the Act. Further, such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was:

- (a) not served upon him; or*
- (b) not served upon him in time; or*
- (c) served upon him in an improper manner.*

42.5. However, the provision of this section shall not apply where the assessee has raised such objection before the completion of the assessment or reassessment. Similar amendment has also been carried out in the Wealth-tax Act."

20. That apart, the learned counsel for the petitioner has placed reliance on the Assessment Order passed in the case of one of the partners namely, P.Srinivasan, wherein, it has been accepted that one Muthukrishnan had obtained loan from the partners and their father for a sum of Rs.1,01,00,000/- which is covered by the Mortgage Deed dated 31.08.2005 and since the amount was not paid, for purchase of the mortgaged property, one of the partners viz., P.Srinivasan had paid a sum of Rs.16,00,000/- vide two bank cheques drawn on ICICI Bank Ltd and



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these two cheques were not presented by the said seller Muthukrishnan and were cancelled in lieu of the loan from ING Vysya Bank Ltd, Madurai for a sum of Rs.80,00,000/- which was paid to the seller Muthukrishnan.

21. It is further submitted that these aspects have not been considered by the respondent, while passing impugned order dated 23.03.2021. It is further submitted that the order has been passed by ignoring the remand order dated 18.06.2019 passed by this Court in the earlier round of litigation in W.P(MD)No.4208 of 2013.

22. The learned counsel for the respondent, on the other hand, would submit that there is no merits in the present Writ Petition. It is submitted that the petitioner had not filed regular Returns under Section 139 of the Income Tax Act, 1961. It is further submitted that there are also no records to substantiate as to how much amounts were borrowed in the name of individuals.

23. That apart, it is submitted that the provisions of the Income Tax Act, 1961, especially Section 143(2) r/w Section 292BB of the Income Tax Act, 1961, make it clear that once Notice has been issued, it is not



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open for the assessee to raise an objection later. A reference was drawn to proviso to Section 292BB of the Income Tax Act, 1961, as per which, Section 292BB of the Income Tax Act, 1961 shall not apply where the assessee has raised such objection before the completion of the assessment or reassessment.

24. The learned counsel for the respondent would further submit that the decision of the Hon'ble Supreme Court in **Commissioner of Income Tax Vs. Laxman Das Khandelwal**, [2019] 417 ITR 325 (SC) referred by the learned counsel for the petitioner itself has answered to issue in favour of the Income Tax Department in paragraph 9.

25. That apart, it is submitted that after the Assessment Order was passed on **30.12.2010**, the petitioner had filed an Appeal before Commissioner of Income Tax and later gave a Letter on **11.04.2011** to withdraw the same. It is submitted that subsequently, the said appeal was also dismissed as withdrawn on **02.05.2011**.

26. The learned counsel for the respondent would further submit that it is in this background the petitioner had filed a petition under



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Section 264 of Income Tax, 1961 before the first respondent on **12.04.2014**. It is submitted that even before the first respondent in the first round, the plea regarding Section 292BB of Income Tax Act, 1961 was not taken.

27. It is submitted that in the first round of litigation before this Court in W.P.(MD) No.4208 of 2013, which was disposed of on 18.06.2019, the petitioner raised for the first time a plea regarding limitation under Section 143(2) of the Income Tax Act, 1961.

28. It is further submitted that there is no merits in the present Writ Petition. That apart, it is submitted that none of the partners were able to produce any records to substantiate that they had huge amount of money to lend to the said Muthukrishnan.

29. That apart, it is submitted that the loan itself was obtained for purchasing the property in the name of the firm and that the income from the property has been shown in the income tax of the firm and therefore, there is no merits in the present Writ Petition.



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30. Finally, the learned counsel for the respondent has also placed reliance on the decision of the Punjab and Haryana High Court in **Aravali Engineerings Pvt. Ltd. Vs. Commissioner of Income Tax**, [2011] 11 taxmann.com 291. A reference was made to para 4, wherein, the decisions of the Hon'ble Supreme Court in **National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax**, [1998] 229 ITR 383 and **June Corporation of India Vs. Commissioner of Income Tax**, [1991] 187 ITR 688/53 taxmann 85 were referred.

31. By way of rejoinder, the learned counsel for the petitioner would submit that the earlier round of litigation before this Court in W.P. (MD)No.4208 of 2013 was for *de nova* consideration and therefore, the petitioner was entitled to raise objection regarding limitation under Section 143(2) r/w Section 292BB of the Income Tax Act, 1961.

32. On merits, it is submitted that already during the course of assessment, there is an amount of Rs.21,98,650/- disclosed in the profit and loss account and balance sheet which has once again been disallowed and thus, the petition is to be double *jeo parde*.



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

34. The impugned order, content of which has been extracted above, does not call for any interference. Onus was on the petitioner partnership firm to show that the amount which was sought to be treated as unexplained investment and unexplained expenditure of the petitioner partnership firm, was that of the other partners and that of the individuals namely, 5 brothers.

35. That apart, there are no records to show that any of the partners of the petitioner partnership firm was having substantial income to lend a sum of Rs.1,01,00,000/- to the Muthukrishnan who has purportedly executed a Mortgage Deed dated 31.08.2005.

36. The fact remains that the petitioner partnership firm has income from the rental property. The profit and loss account for the year ended on 31.03.2007 filed in Page No.62 of the typed set of papers indicates that the petitioner partnership firm had rental income of Rs.21,75,250/- and the



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amounts were used for maintenance of buildings of the petitioner partnership firm. Therefore, I do not find any infirmity in the impugned order rejecting the petition filed by the petitioner under Section 264 before the respondent in the remand proceedings.

37. That apart, the objections, that has been raised for the first time, as far as the non-issuance of the Notice under Section 143(2) of the Income Tax Act, 1961 within the period of 6 months is concerned, cannot be countenanced, as this was not the ground taken by the petitioner before the respondent before the impugned order was passed.

38. Section 292BB of the Income Tax Act, 1961 makes it clear that if an assessee had participated in the proceedings, the notice issued would be deemed to be valid even if there were infractions by way of legal fiction. This is what the Hon'ble Supreme Court has clarified in its decision in **Commissioner of Income Tax Vs. Laxman Das Khandelwal**, [2019] 417 ITR 325 (SC). Only if no notice was issued, the defects cannot be cured. In this connection, a specific reference is drawn to para 9 from the above decision. It reads as under:



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*“9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, **by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee.** It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.”*

39. That apart, Explanatory Note to the provisions of the Finance Act, 2008, content of which has been extracted above also makes it clear that legal fiction shall not apply where the assessee had not raised such objection before the completion of the assessment or reassessment.

40. Therefore, this Writ Petition is liable to be dismissed and is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

25.07.2024

Index: Yes / No
Neutral Citation: Yes / No
Speaking Order / Non-Speaking Order
APD/JEN



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Copy To:

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- 1.The Principal Commissioner of Income-tax,
Madurai-1, Madurai 625002.
- 2.The Income-tax Officer,
Non Corporate Ward I(1),
Madurai 625002.



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C.SARAVANAN, J.

JEN

Pre-Delivery Order made
in
W.P.(MD) No.10161 of 2021
and W.M.P.(MD) Nos.7881 & 7882 of 2021

25.07.2024