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WP No.30083 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.03.2025

CORAM:

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

WP. No.30083 of 2019
and
WMP No.30023 of 2019

M/s.Ponni Sugars (Erode) Ltd.,
Represented by its Deputy General Manager Accounts,
Mr.G.Lakshmi Narayanan

... Petitioner

versus

The Deputy Commissioner of Income Tax
Corporate Circle 5(2)
4th Floor, Aayakkar Bhawan,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai -600 034.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of a writ of Certiorari, calling for the records in C.C.5(2)/2019-20 dated 04.10.2019 on the file of the respondent relating to the assessment year 2012-13 and quash the same and pass orders.

For the Petitioner

:Mr.G.Baskar

For the Respondent

:Mr.V.Mahalingam
Senior Standing Counsel



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ORDER

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The present writ petition is filed challenging the impugned order dated 04.10.2019 whereby, the petitioner's objection against issuance of notice under Section 148 of the Income Tax Act, 1961 (in short, 'the Act') was rejected.

2. Petitioner is a company registered under the Companies Act, 1956 . Petitioner carries on business of manufacture and sale of sugar and its by-products. For the assessment year 2013-14, petitioner filed its return and paid appropriate taxes. Petitioner's return was taken up for scrutiny by issuance of notice dated 06.08.2013 under Section 143(2) of the Act. During the course of scrutiny, a number of issues *inter alia* including the following were examined viz.,

- a) Dividend Distribution Tax;
- b) Performance Incentive; and
- c) Power Evacuation Arrangement Expenses

3. After the scrutiny assessment order dated 18.03.2015 was passed, a



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notice came to be issued dated 20.03.2019 under Section 148 of the Act,

wherein the following three issues were raised viz.,

- i) Delay in payment of dividend distribution tax;
- ii) Allowability of performance incentive as an expenditure; and
- iii) Allowability of power evacuation charges as expenditure.

4. The petitioner sought reasons for reopening assessment. Reasons were furnished by the Assessing Officer vide communication dated 10.05.2019 and the same reads as under:

"With reference to the above, the reasons as recorded by the Assessing Officer for reopening the assessment u/s 147 of the Income Tax Act, 1961 for the A.Y.2012-13 is furnished as under:

1.In the income computation statement assessee claimed deduction of Rs.15,17,878/- with the narration "Performance incentive paid relating to previous year but not debited to P&L A/c". However, it had qualified this incentive as bonus payable to staff for their performance in the F.Y.2011-12 and hence claimed the same as deduction. It is seen from the details that bonus/incentives was declared only on 01/06/2012 i.e. after close of the accounting year. This shows that the liability to pay such bonus accrued only after close of the accounting year though it pertains to the accounting



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year. Since payment of bonus/incentive is a contractual liability, it crystallizes only when it is settled or adjudicated. Therefore, such liability had not accrued in the assessee's case during the year and hence is not allowed as a legitimate expenditure. In view of the same, the excess deduction claimed by the assessee to the tune of Rs.15,17,878/- ought to come under the ambit of taxation.

The assessee company declared dividend on 27/05/2011 in the Annual General Meeting. The tax on dividend was paid on 27.05.2011 Rs.27,89,756/-. As per the provisions u/s 1150 the tax on the dividend had to be paid within 14 days of deduction, distribution or payment of dividend, by whichever is earliest. In this case the same had to be credited to Government Account by 10/06/2011. Since the tax was paid belatedly i.e. 27/07/2011 the assessee had failed to remit interest u/s 115P amounting Rs.55795/- being 2% of the dividend tax.

The assessee had claimed Rs.2,21,30,153/- exceptional item towards power evacuation arrangement expenses. It is seen that this expenditure would benefit the assessee in its long run of the business and therefore cannot fit into the scheme of revenue expenditure. The same is a capital expenditure and accordingly is not an expenditure which can be allowed to be deducted from its income. It is further noted that the assessee has not commenced the business and not brought any revenue i.e. the sale of power in its P & L, where it has credited only the sale of sugar bagasse, molasses, scrap and sugar. Since the entire expenditure of Rs.2.12 Crores relates to the sale of



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power and no sales was done, thus on matching concept expenditure has to be disallowed.

Based on the discussion above, I have reason to believe that income over and above Rs.1 lakh has escaped assessment and that it is a fit case for issuing notice u/s 148 of the Income Tax Act."

You are requested to file objections, if any, to the reopening proceedings latest by 17/05/2019."

5. In response, the petitioner submitted its objection dated 20.05.2019, *inter alia* highlighting that the above issues were the subject matter of scrutiny assessment. The petitioner made a full and true disclosure of all the material particulars called for by issue of notice under Section 142(1) of the Act during scrutiny assessment proceedings. The relevant portion of the reply reads as under:

"13. It is submitted that the details in respect performance incentive pay relating to previous year but not debited to P & L Rs. 15,17,878 was filed during the course of hearing on 20.02.2015. The note on the same gives full details and the basis on which the deduction is allowable. The note is self-explanatory and therefore, the deduction allowed in the original assessment proceedings is in order and need not be disturbed.



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14. With respect to the dividend and the tax thereon, it is submitted that dividend declaration and the consequent payment of dividend distribution tax within the due date are not part of assessment of income or escapement of income. It is also submitted that while the accounts are approved by the Board of Directors on 27.05.2011 and is subject to the approval of the shareholders in a General Body Meeting. The power to approve the dividend vests with the General Body and accordingly, the same was approved by the Members at the General Body Meeting held on 15.07.2011. These details are available in the Annual Report for 2010-11 which was submitted on 21.04.2014 in response to the notice under Section 142(1) dated 15.04.2014. The dividend was approved and declared on 15.07.2011 and the tax on dividend under Section 115(0) has been paid on 27.07.2011 i.e. within 15 days from the date of declaration of dividend. Thus, there is no delay as assumed by you.

15. In respect of the power evacuation expenses, it was disclosed as an exceptional item in the Profit and Loss Account. A detailed note was filed on 02.03.2015 along with various decisions of High Court and the amendments to the Tamil Nadu Electricity Regulatory Commission. After examining those details, the AO was satisfied and after forming an opinion passed the order allowing deduction.

16. It may be seen from the facts on record and brought to your attention that in respect of the 3 items which are the reasons for issuing the notice under Section 148, the details were called for by



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the AO specifically, full and particulars of details were furnished, examined by the AO and after forming an opinion, the order under Section 143(3) was passed.

17. No new material had come to your possession justifying re-opening of the assessment. The self same materials which were placed by us in the course of the assessment proceedings finds a mention in the reasons recorded. It is, therefore, submitted that the present proceedings are merely on the basis of 'change of opinion' and re-assessment proceeding based on change of opinion is not permissible. We rely on the decision of the Supreme Court in CIT Vs. Kelvinator of India Limited 320 ITR 561. Therefore, the re-assessment proceedings are not valid and lack jurisdiction.

18. The proviso to Section 147 reads as under.

"Provided that where an assessment under sub-section (3) of Section 143 of this Section has been made for the relevant assessment year; no action shall be taken under this Section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."



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19. *In our case we had filed our return under Section 139(1) before the due date disclosing fully and truly all the materials necessary for assessment.*

20. *We had also filed full and true particulars of the details called for by issue of notice under Section 142(1) during assessment proceedings. The assessment has been completed under Section 143(3) by order dated 18.03.2015. Four years from the end of the relevant assessment year ended by 31.03.2017. Even in the reasons recorded, there is no averment or allegation about our failure to disclose any material required for completion of assessment. The issue of notice dated 29.03.2019 is after the time said in the proviso to Section 147 and therefore time barred.*

21. *It is, therefore, prayed that the proposed proceedings u/s 148 may please be dropped as the same lacks jurisdiction as well as barred by time limitation."*

5.1. However, the objections were rejected vide impugned order dated 04.10.2019, by stating that reasons warranting re-assessment have been recorded after taking into account all relevant factors. The relevant portion is extracted hereunder:

"3.1. Firstly, the bonus/incentive was declared after the closure of the accounting year F.Y. 2011-12 (i.e.) 01.06.2012 thereby,



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the liability has accrued only after the closure of accounting year though it pertains to the accounting year. Moreover, bonus / incentive are a contractual liability, it crystallizes only when it is settled or adjudicated. Hence, your objection is not acceptable.

3.2. The second reason recorded for reassessment proceedings pertains to late payment of tax on the dividend declared/ distributed as per the provisions u/s 1150 and the corresponding interest charges u/s 115P as per the submissions made by the assessee and materials available on record. Thus, there is no assumption in this regard and the reasons recorded for reopening the assessment is based on the facts on the records available.

3.3. With respect to power evacuation expenses, whether the sufficiency/correctness of the detailed note submitted by the assessee is not a thing to be considered at this stage. During the course of reassessment proceedings you will be afforded adequate opportunity to explain your case and the resultant order will be passed based on an objective appraisal of the evidences available.

3.4. Further, it has been stated in the objections that the assessment proceedings are based merely on the change of opinion and that lacks jurisdiction as well as barred by time limitation. In this aspect, it is clarified that reasons have been recorded only after taking into account all the relevant factors and information.

4. To conclude, I am emphasizing the fact that reopening in the case of the assessee is valid in light of the facts and established



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law. The procedural requirements such as proper recording of reasons, service of notices and Forwarding of reasons have been met. Having said this, the matters raised by the assessee having been dealt in the elaborate manner.”

6. The challenge to the impugned proceedings is on the premise that it is without jurisdiction primarily for two reasons viz.,

- a) Re-assessment is made on the basis of mere change of opinion.
- b) No finding that there was a failure on the part of the assessee to fully and truly disclose material particulars.

7. This Court posed two questions to the learned counsel for the Respondent viz.,

a) Whether the above three issues were raised during the course of scrutiny assessment and thus re assessment proceeding is only a change of opinion which may not constitute a valid ground for exercise of power of re assessment.

b) Is there any finding either in the notice or in the impugned order under Section 148 A (d) rejecting the objections, of failure on the part of the

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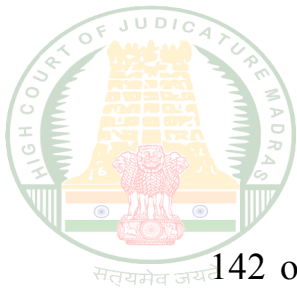
assessee to fully and truly disclose the material particulars which is a condition precedent to invoke power of re-assessment inasmuch as the assessment proceedings is admittedly initiated after expiry of 4 years from the end of the relevant assessment year.

8. In response the learned Senior Standing Counsel does not respond nor contest the above issues except to state that the issue on jurisdiction can always be adjudicated by the assessing officer and thus no interference is warranted under Article 226 of Constitution at this stage.

9. This Court finds from perusal of records that the above three issues raised in the re assessment viz., a) Delay in payment of dividend distribution tax, b) Performance Incentive and c) Power Evacuation arrangement expenses, was considered even while framing the scrutiny assessment, as would be evident from the following:

a) Dividend Distribution Tax:

9.1. The respondent issued a notice under sub Section (1) to Section



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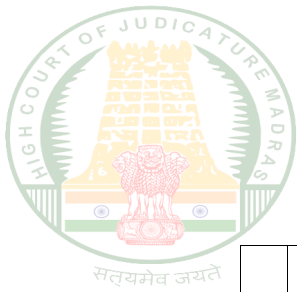
142 of the Act wherein the issue of Divident Distribution Tax was raised,
evident from the following:

“7. Details of investent made by the cmpany and expenditures incurred directly in relation to such investments. Details of income (dividend) earned from the investment.

8. Copy of the Wealth tax Return. If not applicable substantiate the same.”

9.2. In response the petitioner vide letter dated 27.10.2014 had submitted the following :

		ANNEXURE VII	
PONNI SUGARS ERODE LIMITED			
PREVIOUS YEAR ENDED 31.03.2012			
INCOME TAX ASSESSMENT 2012-2013			
<i>Details for Dividend Distribution Tax paid during the year</i>			
		<i>FY 2011-12</i>	
		<i>Amount(Rs)</i>	
	<i>Share Capital as on 31.03.2011</i>	8598418 0	
	<i>Rate of Dividend</i>	20%	
	<i>Dividend @ 20%</i>		17196836
	<i>Dividend Distribution Tax @15%</i>	2579525	
	<i>Surcharge @5.0%</i>	128976	
	<i>Edu. Cess & S&H Cess @3%</i>	81255	



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		ANNEXURE VII	
	Total Dividend Distribution Tax Rs.	2789756	

9.3. Importantly, the 16th Annual Report and Director's Report which was submitted contains the following:

“NOTICE OF ANNUAL GENERAL MEETING

...

2. Dividend declaration

To declare dividend on Equity Shares.”

.....

“DIRECTOR' REPORT

....

Dividend

Your Directors recommend a dividend of Rs.2.50 per Equity Share of Rs.10 each for the Financial year ended 31st March 2012.”

.....

“Dividend for 2011-12

(a) Dividend entitlement

Dividend, if declared at the annual General Meeting, will be paid on 6th August 2012 to the members whose names appear on the Register of Members on 20th July 2012 or to their mandates. In respect of shares held in electronic form, dividend will be paid to the beneficial owners of shares recorded with the depositories as of 20th July 2012 as per details to be furnished by NSDL / CDSL for the purpose.”



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b) Performance Incentive:

9.4. During the course of the scrutiny assessment, , the chartered accountant of the petitioner vide his letter dated 20.02.2015, stated that Performance Incentive had been reduced from Income Computation as could be seen from the following:

"A sum of Rs.1517878/- has been reduced from income computation under Performance incentive paid relating to the previous year but not debited to profit and loss account- please clarify why this should be allowed as an expenditure when it is not debited in the profit and loss account especially when you are following mercantile system of accounting."

9.5. A circular dated 01.06.2012 has also been kept in the typed set of papers, which indicates that the performance incentive was sanctioned for the financial year 2011-12. The above documents was sought to be relied upon by the petitioner in support of their contention that performance incentive was also considered during the course of scrutiny assessment, which this Court finds merit.



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c) Power Evacuation Arrangement Expenses:

9.6. In response to a notice dated 15.10.2014, the Chartered Accountant of the petitioner submitted a letter dated 02.03.2015, which contained a detailed report on Power Evacuation Arrangement expenses running to about three pages. The relevant portion of the letter wherein submission of the detailed note on Power Evacuation Arrangement expenses is referred is extracted hereunder:

"Under the instructions from the above referred Assessee and further to the hearing attended by us, we are pleased to file the following as required by you in the enclosed annexure.

1. Detailed note on Power evacuation arrangement expenses"

10. From the above it is clear that the above three issues were raised during the course of scrutiny assessment, the impugned proceedings of re-assessment in the absence of new and tangible material would only constitute change of opinion and thus without jurisdiction. Importantly, as stated above the respondent were not in a position to place before this Court any new material for a valid exercise of power of re assessment under



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Section 147 read with 148 of the Act. It is trite law that power of re-assessment cannot be exercised on the basis of mere change of opinion. In this regard it may be relevant to refer to the judgment of the Supreme Court in *Mobis India Ltd. v. Dy. CIT*, reported in (2023) 450 ITR 60, wherein it was held as under:

*“12. It is trite law that the power to assess the escaped income under section 147 though stands broadened/expanded over the years through periodical amendments, one feature which has remained constant/unchanged and prevailed during the relevant assessment year is the limitation on the power to reassess on a mere change of opinion. In this regard, it may be relevant to refer to the judgment of the Supreme Court in *CIT v. Kelvinator of India Ltd.* reported in [2010] 320 ITR 561 (SC), wherein, after setting out the legislative history and capturing the changes brought out periodically to section 147 of the Income-tax Act, 1961, found that the powers are much wider under section 147 in view of the amendments. However, it was made clear that the power of reassessment is not meant to be a power of review nor can assessments be reopened on mere change of opinion lest section 147 become vulnerable to challenge as conferring arbitrary power to the Assessing Officer.”*



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10.1. The above view of the Supreme Court has been reiterated repeatedly and it has been held consistently that reassessment cannot be made on mere change of opinion. In this regard it may be relevant to refer to the judgment of the Supreme Court in ITO v. Techspan India (P.) Ltd., reported in (2018) 6 SCC 685, wherein it was held as under:

“19. Hence, initiation of the reassessment proceedings under section 147 by issuing a notice under section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings.”

10.2. It may also be relevant to note that once a query is raised during the assessment proceedings and an assessee submits its reply/responds to it and assessments are completed thereafter. It follows that the said issue has been considered by the Assessing Officer and the mere fact that the assessment order may not contain reference/discussion with regard to the same would not dilute or take away the fact that the issue was in fact examined and decided upon by the Assessing Officer, thus a



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revisit/reassessment on such issues would constitute change of opinion which is impermissible. In this regard, it may be relevant to refer to the judgment of the Bombay High Court in the case of Aroni Commercials Ltd. v. Dy. CIT reported in (2014) 362 ITR 403 (Bom) wherein it was held as under:

“14. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Therefore, the entire proceeding for reopening the assessment had emanated only on account of change of opinion on the part of the Assessing Officer.”

11. Secondly, there is no finding of failure on the part of the petitioner to fully and truly disclose material particulars necessary for assessment. The above is a jurisdictional fact and a condition precedent for invoking power of reassessment under Section 148 of the Act after expiry of four years from the end of relevant assessment year which is admittedly the case. Absence of finding of failure to fully and truly disclose material particulars necessary for assessment would vitiate the impugned proceedings for reassessment. In this regard it may be relevant to refer to the following



i) Durr India Pvt. Ltd. v. Asst. CIT, reported in (2023) 455 ITR 460:

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

(a) Duli Chand Singhania v. Asst. CIT [2004] 269 ITR 192 (P&H) (headnote) :

".. . that the reasons recorded for issue of notice showed that the satisfaction recorded therein was merely about the escapement of



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income. There was not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment. Absence of this finding which is a 'sine qua non' for assuming jurisdiction under section 147 of the Act in a case falling under the proviso thereto, made the action taken by the Assessing Officer wholly without jurisdiction. The notice was not valid and was liable to be quashed."

(b) CIT v. Elgi Ultra Industries Ltd. [2008] 296 ITR 573 (Mad) (page 577 of 296 ITR) : "... the reopening of the assessment under section 148 beyond the period of four years at the end of the relevant assessment year can be sustained only if it is established that there is a failure on the part of the assessee to disclose fully and truly all material facts. In this case there is no finding that there is failure on the part of the assessee to disclose fully and truly all material facts."

12. This Court is conscious that while remedy by way of judicial review the power under Article 226 of Constitution is discretionary and Courts would exercise restraint when there are statutory remedies, more so when adjudication is yet to be concluded. However, the above rule is not without exceptions, one such exception is where the proceedings are without jurisdiction. In this case this Court has already found that the

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invocation of power of re assessment under Section 147 read with Section 148 of the Act is bad for want of jurisdiction for 2 reasons viz.,

a) The re assessment proceedings is made on the basis of mere cange of opinion,

b) Absence of finding of failure on the part of the petitioner to fully and truly disclose material particulars necessary for assessment either in the notice nor in impugned order under Section 148 A (d) of the Act.

12.1. In this regard it may be relevant to refer to the judgment of the Supreme Court in the case of Raza Textiles Ltd. v. ITO, reported in (1973) 1 SCC 633, wherein it was held as under:

“3. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the Jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned Single Judge has done in this case, that the Income Tax Officer had clutched at the Jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and



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thereafter proceed to impose a levy on a citizen. In our opinion, the Appellate Bench is wholly wrong in opining that the Income Tax Officer can “decide either way”.

13. In view of the above this Court is inclined to set aside the impugned order. The writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

18.03.2025

Index : Yes/No
Neutral Citation : Yes/No
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To:

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