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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **12.06.2019**

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.16140 of 2019
and
W.M.P.No.15882 of 2019

Amtex Software Solutions Pvt. Ltd
No.75, Century Centre
TTK Road, Alwarpet
Chennai - 600 018
AAFCA0638J .. Petitioner

vs.

1.Assistant Commissioner of Income Tax (OSD)
Corporate Range 1
Chennai - 34.

2.Deputy Commissioner of Income Tax
Corporate Circle 1(1)
Chennai - 600 034. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records 1st respondent in PAN No:AAFCA0638J for Assessment Year 2013-14 and quash the impugned notice No.NIL under Section 274 read with Section 27(1)(c) of the Income Tax Act, 1961 dated 23.12.2016 issued by the 1st respondent herein and pass such further or other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

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For Petitioner : Ms.Pushya Sitaraman, Senior Counsel for
Ms.G.Vardini Karthik

For Respondents : Mr.Naveen Durai Babu
Junior Standing Counsel

O R D E R

This writ petition has been filed, assailing a show cause notice dated 23.12.2016 issued to the writ petitioner calling upon the writ petitioner to show cause as to why an order imposing penalty under Section 271 of the 'Income Tax Act, 1961' ('IT Act' for brevity) should not be passed. To be noted, this pertains to assessment year 2013-14.

2. There is no disputation or disagreement before this Court that the aforesaid show cause notice being show cause notice dated 23.12.2016, bearing reference No.PAN:AAFCA0638J (hereinafter 'impugned SCN' for brevity, clarity and convenience) has been issued under Section 274 of IT Act obviously read with Section 271 of IT Act.

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3. 'Show Cause Notice' shall hereinafter be referred to as 'SCN' for the sake of brevity, clarity and convenience.

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4. This matter is listed under the caption 'FOR ADMISSION' today in the motion list.

5. Ms.Pushya Sitaraman, learned Senior Counsel on behalf of the counsel on record for the writ petitioner is before this Court. Mr.Naveen Durai Babu, learned Junior Standing Counsel for Income Tax accepts notice on behalf of both the respondents. To be noted, there are two respondents in the instant writ petition and both the respondents are official respondents.

6. In the aforesaid scenario, with the consent of learned counsel on both sides, the main writ petition itself is taken up. With the consent of both sides main writ petition is being heard out and the same is being disposed of.

7. Short facts shorn of unnecessary particulars and details or in other words facts that are imperative for appreciating this order are as follows:

(a) the petitioner is engaged in the business of export of software and 'Information Technology Enabling Services' ('ITES' for brevity) and is registered as a 'Software Technology Park of India' Unit ('STPI' for brevity) under what is described as Software Technology Park Scheme.

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(b) 'Assessment year 2013-14' to which impugned SCN pertains shall be referred to as 'said assessment year'.

(c) petitioner filed returns for said assessment year admitting a total income of Rs.1,60,50,200/-. Case of the petitioner was selected for scrutiny. After verification of income returned and details furnished by petitioner assessee, jurisidictional Assessing Officer completed the assessment under Section 143(3) read with Section 92CA of IT Act by assessing total income of the petitioner at Rs.2,19,30,080/-, obviously by making certain additions.

(d) aforesaid additions made by the Assessing Officer became subject matter of disputation. Be that as it may, addition of guest house rent and related expenses to the tune of Rs.47,97,932/- became the main bone of contention qua assessment for said assessment year.

(e) the above matter was carried in appeal by the writ petitioner assessee to the Commissioner of Income Tax (Appeals) by way of a statutory appeal and the Appellate Authority, confirmed the additions.

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(f) petitioner assessee carried it to 'Income Tax Appellate Tribunal' ('ITAT') by way of a further appeal and the ITAT dismissed the appeal of the petitioner assessee confirming the orders of the Assessing Officer and the Appellate Authority. This is vide order dated 02.01.2019 made by ITAT in I.T.A.No.399/Chny/2018.

(g) to be noted, as mentioned supra, the impugned show cause notice pertaining to said assessment year, proposes to levy penalty under Section 271 of the IT Act and the same is dated 23.12.2016. This Court is informed that this impugned SCN was kept in abeyance owing to aforesaid proceedings/Appeal before the Appellate Authority and ITAT.

(h) after dismissal of the writ petitioner's appeal before ITAT on 02.01.2019 in the aforesaid manner, second respondent issued a notice dated 28.05.2019 reviving the impugned SCN and calling upon the petitioner assessee to appear before the second respondent on 17.06.2019 at 11.45 a.m. This is the trigger for the instant writ petition. However, as mentioned supra what has been assailed is impugned SCN, which is dated 23.12.2016.

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8. Having set out short facts shorn of unnecessary particulars and details or in other words facts that are absolutely imperative for appreciating this order, this Court now proceeds to capture the submissions made by learned Senior Counsel for the writ petitioner.

9. Learned Senior Counsel for the writ petitioner assailed the impugned SCN on the grounds which can be summarised as below:

(a) impugned SCN is in a template and therefore, it is not clear as to whether the impugned SCN has been issued on the basis that the writ petitioner has 'concealed particulars of income' or 'furnished inaccurate particulars' of such income.

(b) in support of the proposition that 'concealing particulars of income' and 'furnishing of inaccurate particulars of income' are expressions which fall and operate in different realms ***Commissioner of Income Tax Vs. SSA's Emerald Meadows*** reported in ***(2015) 94 CCH 0334 KarHC***, ***Commissioner of Income Tax Vs. Samson Perinchery*** reported in ***(2017) 392 ITS 4 (Bom)***, ***Muninaga Reddy Vs. Assistant Commissioner of Income-TAx*** reported in ***(2017) 396 ITR 398 (Kar)***, ***Principal Commissioner of Income Tax***

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Vs. Baisetty Revathi reported in ***(2017) 398 ITR 88 (AP)*** and ***T.Ashok Pai Vs. Commissioner of Income Tax*** reported in ***(2007) 292 ITR 11W (SC)*** were pressed into service.

10. In response to the above submissions, learned Revenue counsel, who accepted notice on behalf of both the respondents drew the attention of this Court to Section 292B of IT Act and submitted that no notice, summons or other proceedings issued in pursuance of proceedings of IT Act shall become invalid merely by reason of any mistake, defect or omission in such notice or summons.

11. Therefore, Revenue Counsel submitted that it would be appropriate if an opportunity is given to the respondents, to clarify to the noticee i.e., writ petitioner assessee as to whether the impugned SCN is predicated on 'particulars being concealed' or 'inaccurate particulars are furnished' or both. Learned Revenue counsel submitted that the Department may be given an opportunity to clarify this position by way of an addendum or corrigendum to the impugned SCN and proceedings pursuant to the impugned SCN can be permitted to go on thereafter.

12. This Court has carefully considered the aforesaid rival submissions.

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Before this Court deals with the rival submissions, it is to be set out that at the hearing, learned Senior Counsel for writ petitioner submitted that ***Emerals Meadows case*** referred to supra rendered by a Division Bench of Karnataka High Court was carried to the Hon'ble Supreme Court, the Hon'ble Supreme Court refused to interfere and the Special Leave Petition was dismissed. The order dated 05.08.2016 in the Special Leave Petition against SSA's Emerald Meadows case reads as follows:

> *'Delay condoned*
>
> *We do not find any merit in this petition. The special leave petition is, accordingly, dismissed.*
>
> *Pending application, if any, stands disposed of.'*

13. Therefore, it follows that there is no Doctrine of Merger qua Emerald Meadows case. Besides this, learned Senior Counsel also pressed into service another judgment rendered by a Division Bench of Karnataka High Court in ***Commissioner of Income Tax Vs. Manjunatha Cotton and Ginning Factory*** reported in ***(2013) 359 ITR 565 (Karn).*** According to learned Senior Counsel, this Manjunatha Cotton and Ginning Factory is for the proposition that when a notice under Section 271(1)(c) of the IT Act is issued in printed form without specifically mentioning whether the ground is 'concealment of income' or 'furnishing of inaccurate particulars', such a notice does not satisfy the grounds which the noticee has to meet specifically and therefore should be construed

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to be vague. It was urged that no penalty can be imposed on the assessee on such a vague notice and that Karnataka High Court judgment i.e., in Manjunatha Cotton Principle buttress the submission.

14. This Court now proceeds to carefully consider the submissions made on both sides.

15. The proposition that the grounds of 'concealment of income' and 'furnishing of inaccurate particulars' qua Section 27(1)(c) of IT Act are clearly distinct expressions and that they fall under different realms admits of no exception and made two qualification. All the case laws referred to supra certainly lay down this proposition very clearly.

16. To be noted, I had the occasion to pen two judgments touching upon ingredients of Section 27(1)(c) and they are judgment dated 14.06.2018 in ***T.C.A.No.239/2017 [Principal Commissioner of Income Tax Vs. Trisha Krishnan]*** and a judgment dated 30.08.2017 in ***T.C.A.No.440 of 2017 [Principal Commissioner of Income Tax 2, Vs. M/s.F L Smidth Limited,]***. To be noted, these two judgments were penned by me, but for a Division Bench in Statutory Income Tax Appeals under Section 260A of IT Act. This is mentioned only for the purpose of emphasising that the distinction between the aforesaid

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two expressions is beyond any pale of doubt in the mind of this Court .

17. Therefore, there could be no two opinions or disputes about the fact that aforesaid two expressions are distinct and that they fall under different realms.

18. In Manjunatha Cotton and Ginning Factory case, it has been held that a SCN pertaining to penalty proceedings under Section 27(1)(c) was vague and no penalty can be imposed on the same, as it did not specifically state whether it is predicated on the ground of 'concealment of income' or 'furnishing of inaccurate particulars'. However, this judgment was rendered by Karnataka High Court in a regular tax case appeal after the SCN was carried to its logical end and post logical end of SCN matter was carried through a hierarchy of statutory appeals i.e., appellate authority, Tribunal and High Court. In complete contradiction, in the instant case, writ petitioner has assailed the impugned SCN itself.

19. Be that as it may, what is of utmost relevance is that none of the aforesaid case laws, including Manjunatha Cotton and Ginning Factory rendered by a Division Bench of Karnataka High Court were rendered in matters assailing SCNs. To be noted, matters assailing SCNs in writ jurisdiction fall in a different category and the principles in this regard shall be alluded to

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by this Court infra.

20. With regard to cases where SCNs were assailed, Hon'ble Supreme Court in a long line of authorities has categorically held that interference in writ jurisdiction though discretionary shall ordinary not to be exercised for quashing SCNs and judgment of Hon'ble Supreme Court in ***Union of India and others Vs. Kunisetty Satyanarayana*** reported in ***(2006) 12 SCC 28*** is significant in this regard. Most relevant paragraphs in Kunisetty Satyanarayan are paragraphs 15 and 16 and the same read as follows:

> *'15.Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.*
>
> *16. No Doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.'*

21. The rare and exceptional cases where a High Court will quash SCN has also been laid down in a long line of authorities and broadly they are cases (a) where SCN can be issued without jurisdiction by the authority B) where SCN reopens a well settled position of law c) where SCN has prejudged the issue and d) where SCN has been issued with malafides.

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22. It is nobody's case before this Court that impugned SCN falls under any one of the exceptions, an adumbration of which has been made supra. A perusal of template itself reveals that it is based on the well settled principle that 'concealment of income' and 'furnishing of inaccurate particulars' are distinct. Merely because there is an error of not scoring of one of the two or replacing 'or' with 'and' it cannot be gainsaid that settled legal principle of distinction between the two expressions has been disregarded. As the impugned SCN is in a template the error is secretarial in nature and petitioner's counsel says this is also owing to inadvertence.

23. To be noted, the aforesaid adumbration of exceptions are not exhaustive and it is only broad heads for the limited purpose of disposal of instant writ petition.

24. Furthering the discussion on writ jurisdiction and exercise of this discretionary jurisdiction to quash the SCN, it comes out clearly from a long line of case laws of Hon'ble Supreme Court, which have been adverted to in aforesaid ***Kunisetty Satyanarayana's case*** that it is not an absolute rule. It is no doubt a rule of discretion and not a rule of compulsion, but it shall be

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exercised only in rare and exceptional cases.

25. In this regard , this Court also deems it appropriate to refer to two judgments of Hon'ble Supreme Court viz., ***Satyawati Tandon*** Case [***United Bank of India Vs. Satyawati Tondon and others*** reported in ***(2010) 8 SCC 110]*** and ***K.C.Mathew*** *case* ***[Authorized Officer, State Bank of Travancore Vs. Mathew K.C.*** reported in ***(2018) 3 SCC 85].*** To be noted, Satyawati Tondon principle was reiterated in latter of the two i.e., K.C.Mathew. Though Satyawati Tondon case and K.C.Mathew case pertain to the rule of alternate remedy, the principle that such rules, though are rules of discretion and not a rules of compulsion, should be exercised only in rare and exceptional cases has been reiterated. More importantly, in Satyawati Tondon case, Hon'ble Supreme Court held that such a rule has to be applied with greater rigour when it comes to cases involving taxes, CESS, fees etc., In other words, when it comes to fiscal statues, these rules have to be applied with greater rigour and it is to be applied very strictly with regard to recovery of taxes, CESS, fess etc., Relevant paragraph in K.C.Mathew case is paragraph 10 and the same reads as follows:

> *'10. In* ***Satyawati Tondon*** *the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the*

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Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp.123 & 128, Paras 43 & 55)

> *"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.*
>
> *55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High*

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Courts will exercise their discretion in such matters with greater caution, care and circumspection.'

26. With regard to the submission of Revenue Counsel that the Revenue will clarify as to whether the impugned SCN is predicated on 'concealment of income' or 'furnishing of inaccurate particulars' and then proceed, it was submitted that the Revenue cannot be now permitted to rectify the error. In this regard, Section 292B of IT Act, which has been adverted to and which has been relied on by the Revenue counsel comes to the aid of the Revenue. There is no dispute that the impugned SCN qualifies as a notice within the meaning of Section 292B. If that be so, it cannot be held to be invalid merely by reason of mistake or defect i.e., mistake or defect of issuing it in a template and not scoring of the relevant ground and leaving out the applicable ground. If it is not a defect of scoring of the inapplicable ground it is a case of using the conjunction 'and' by scoring of 'or', if it is predicated on both grounds.

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27. If aforesaid position is clarified and thereafter the impugned SCN is carried to its logical end, it will satisfy all parameters and ingredients of NJP.

28. This Court is reminded of the observation of Hon'ble Supreme Court

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in Mumbai International Airport Private Limited Vs. Golden Chariot Airport and another reported in (2010) 10 SCC 422, where Hon'ble Supreme Court held that *'action of law is not a game of chess*". Merely because the Revenue has made a move and there is an error in the move, there is nothing to show that no opportunity should be given to the Revenue to correct the error by issuing a corrigendum or addendum and then proceeding with the matter. After all it is not an irreversible move in a game of chess.

29. In the light of the aforesaid discussion, this Court passes the following order:

a) the impugned SCN being SCN dated 23.12.2016 bearing reference No.PAN:AAFCA0638J shall be kept in abeyance for a period of three weeks from the date of receipt of a copy of this order.

b) within the aforesaid three weeks, second respondent shall issue a corrigendum/addendum/errata to the impugned SCN clearly setting out the ground/s on which impugned SCN was issued i.e., as to whether it has been issued on the ground that particulars have been concealed or on the ground that inaccurate particulars of income have been furnished or both.

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c) aforesaid addendum/corrigendum/errata to impugned SCN shall be duly served on the writ petitioner with due acknowledgement within the aforesaid three weeks period and from the date of service, writ petitioner shall be given another three weeks time to respond to the impugned SCN read with addendum/corrigendum/errata.

d) It is open to the writ petitioner to ask for the basis on which the impugned SCN is predicated and the basis on which the same has been issued and the same will be dealt with in a manner known to law.

e) after receipt of response from the writ petitioner and in the event of writ petitioner choosing to opt for availing the opportunity of being heard in person, i.e., personal hearing, the same shall also be granted and the impugned SCN along with addendum/corrigendum/errata shall be carried to its logical end in accordance with law after adhering to all natural justice principles.

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30. This Writ Petition is disposed of with the above directions. No costs. Consequently,connected miscellaneous petition is closed.

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Speaking Order: Yes

Index : Yes

M. SUNDAR.J.,

vsm

To

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Corporate Range 1
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