

IN HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.12.2019

DELIVERED ON : 18.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.29005 & 29006 of 2015

and

M.P.Nos.1 & 1 of 2015

T.Krishnamurthy

.. Petitioner in both W.Ps.

vs

The Income Tax Officer,
Non-Corporate Ward - 16(4),
142, MG Road, Chennai - 34.

.. Respondent in both W.Ps.

Prayer in W.P.No.29005 of 2015:Writ Petition filed under Article 226 of Constitution of India, to issue a writ of Certiorarified Mandamus, calling for the records of the respondent and quash the notice u/s.148 of the Act in PAN/GIR : AAAPK7442G dated 17.03.2015 and the consequential Order in PAN/GIR : AAAPK7442G/2015-16 dated 16.07.2015 and direct the respondent to drop the reassessment proceedings for the assessment year 2008-09.

Prayer in W.P.No.29006 of 2015:Writ Petition filed under Article 226 of Constitution of India, to issue a writ of Certiorarified Mandamus, calling for the records of the respondent and quash the notice u/s.148 of the Act in PAN/GIR : AAAPK7442G dated

17.03.2015 and the consequential Order in PAN/GIR : AAAPK7442G/2015-16 dated 16.07.2015 and direct the respondent to drop the reassessment proceedings for the assessment year 2009-10.

For Petitioner : Mr.Vikram Vijayaraghavan for
M/s.Subbaraya Aiyar Padmanabhan
(in both cases)

For Respondents : M/s.Hema Murali Krishnan
Senior Standing Counsel (in both Cases)

COMMON ORDER

Heard learned counsel for the petitioner Mr Vikram Vijayaraghavan and Mrs.HemaMurali Krishnan for the respondent.

2. By this common order, both the writ petitions are being disposed.

3. In these writ petitions, the petitioner has challenged both the impugned notices dated 17.3.2015 issued under section 148 of the Income Tax Act, 1961 for the assessment year 2008-09 and assessment year 2009-10 and the consequential orders dated 16.7.2015 rejecting the petitioner's objection to the impugned notices.

4. The petitioner had filed returns under section 139 of the Income Tax Act, 1961 for the respective assessment years. These returns were assessed under section 143 of the Act. Later, two separate notices dated 7.3.2011 were issued to the petitioner under section 148 of the Income Tax Act, 1961 based on data captured in Assets Information Report (AIR).

5. Thereafter, on 31.12.2011, two separate assessment orders were passed by the respondent under section 147 read with section 144 of the Income Tax Act, 1961 for the respective assessment years and accordingly intimations were also issued to the petitioner to pay the revised tax assessment.

6. The petitioner took up the issue before the Commissioner of Income Tax (Appeals). By two separate orders dated 12.11.2013, the Commissioner of Income Tax (Appeals) had set aside the respective assessment orders under section 250(6) of the Income Tax Act, 1961 on the ground that the respondent had failed to follow the mandatory requirement of section 143(2) of the Income Tax Act, 1961.

7. The Commissioner of Income Tax (Appeals) followed the decision of the Gujarat High Court in CIT versus K.M.Raviji vide order dated 18.7.2011 in Appeal No.

771 or 2010 and the decision of this court rendered in **Sapthagiri Finance and investment versus ITO** rendered on 17.7.2012 [2012] 25 Taxmann.com 341 (Mad) following the decision of the Honourable Supreme Court in **ACIT versus Hotel Blue Moon** [2012] 321 ITR 362.

8. In a purported compliance of these two orders of the Commissioner of Income Tax (Appeals), the respondent also passed two separate orders dated 27.11.2013 to give effect to the above orders dated 12.11.2013 of the Commissioner of Income Tax (Appeals) for the respective assessment years.

9. Further appeals by the revenue were also dismissed by a common order dated 26.9.2014 of the Income Tax Appellate Tribunal, Chennai. Under these circumstances, the respondent Assessing Officer/ITO issued the impugned notices dated 17.3.2013 which read identity.

Sample notice for the assessment year 2008-09 reads as under:-

To,

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17.3.2015

*Shri T Krishnamoorthy,
Flat No. A-3, "Temple Tree" RPAD
No. 37, Venkata Narayana Road,
Chennai-6000 17*

Sir,

Whereas I have reasons to believe that your income chargeable to tax for the assessment year 2008-09 has escaped assessment within the meaning of section 147 Of the Income Tax Act, 1961.

2. I, therefore, propose to assess the income for the said assessment year and I hereby require you to deliver to me within 30 days from the service of this notice, a return in the prescribed form of your income for the said assessment year.

3. This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax-5, Chennai-600034./The Central Board of Direct Taxes.

(B. Baladayutham)

Assessing Officer/Income Tax Officer

Non-Corporate Ward-16 (4), Chennai-600034.

10. The petitioner sent separate replies dated 16.4.2015 to the respective notice for the respective assessment years and requested the returns originally filed by the petitioner for the respective assessment years on 31.7. 2008 and on 29.7.2009 as returns filed in response to the impugned notices dated 17.3.2015.

11. The petitioner further submitted that he had disclosed all these facts, fully

and truly which were considered while passing the 1st assessment order under section 147 read with section 144 of the Act and therefore requested the respondent to furnish the reasons recorded for reopening the assessment for the respective assessment years for the second time.

12. The respondent later furnished the reasons recorded for reopening of the respective assessment years vide two separate communications dated 15.5.2015 which more or less reiterated the reasons given for reopening of the assessment years earlier vide a communication dated 13.6.2011.

13. Under these circumstances, the petitioner filed both his objections dated 19.6.2015 against reopening of the assessment for the 2nd time. After setting out the entire history, it was submitted that the assessment having been reopened on an earlier occasion based on AIR information relating to investment in the shares and immovable property and the issue having attained finality on an earlier occasion, it was not open for the respondent to reopen the assessment for the second time in absence of any tangible material and it would amount to change of opinion which was impermissible. It was submitted that for invocation of section 148 to assess the income escaping assessment under section 147, there has to be reason to believe that the income had escaped assessment and the jurisdiction is conferred on the assessing

officer. However, reassessment has to be based on fulfillment of certain precondition and Assessing Officer cannot reopen the assessment for mere change of opinion. It is submitted that there was no tangible material for invoking Section 148 for the 2nd time.

14. It was further submitted that the assessment having been originally completed, the 1st proviso to section 147 was attracted. The petitioner submits that where the assessment has been completed under section 143(3) or under section 147, no notice under section 148 can be issued beyond the period of 4 years from the end of the assessment year unless there was a failure on the part of the assessee to disclose fully and truly all material facts for making the assessment.

15. Since the assessment was reopened on 17.3.2015, reopening of the assessment once again was barred as per well settled principles of law. The petitioner further submits that two impugned orders dated 16.7.2015 rejecting the objections of the petitioner against reopening of the assessment under the two impugned notices dated 17.3.2015 under Section 148 of the Act were liable to be quashed.

16. The learned counsel for the petitioner primarily argued that there were no new materials available for invoking Section 148 of the Income Tax Act, 1961 for the

2nd time and therefore the impugned notices and the consequential orders rejecting the objections of the petitioner against invocation of Section 148 were bad and were liable to be set aside and quashed.

17. He further submits that the earlier round of proceedings culminated in two separate re-assessment orders dated 31.12.2011 which were eventually set aside by the Commissioner of Income Tax (Appeals) vide two separate orders dated 12.11.2013 and were given effect to by two separate orders dated 27.11.2013.

18. In this connection, the learned counsel for the petitioner relied on the decision of the Punjab and Haryana in **Smt Anchi Devi Vs Commissioner of Income Tax (2008)218 CT 011**. There the court held that though the proceedings were initiated by the officer within the prescribed period of limitation, yet the same was initiated only to circumvent the earlier order of the Tribunal which held that the invocation of Section 148 was time barred. It was held that an Assessing Officer cannot be allowed to initiate fresh proceedings on identical facts as the 1st assessment proceeding had failed to result in a valid re-assessment due to lapse on the part of the IT authority.

19. The learned counsel for the petitioner further relied on the decision of the

Delhi High Court in **Commissioner of Income Tax versus Vishal Gupta (2012) 210 Taxmann 65** wherein it was held that Section 148 of the Income Tax Act, 1961 can be invoked only where there is fresh materials available and that such notice should stand on its own legs. The learned counsel for the petitioner further submits that as per the decision of the Honourable Supreme Court in **Commissioner of Income Tax versus Rao Thakur Narayan Singh (1965) 65 ITR 234**, even if the Tribunal had erroneously set aside the assessment order, such order would be binding unless it is set aside by an appellate authority in the hierarchy. The learned counsel for the petitioner submits that rightly or wrongly the orders dated 12.11.2013 of the Appellate Commissioner had been complied by the respondent by giving effect to it on 27.11.2013 and therefore as long as that order giving effect to the said order of the Appellate Commissioner had remained unchallenged, it was not open for the revenue to reopen the assessment once again.

20. Per contra, the learned counsel for the Income Tax Department submits that the impugned notices in the consequential orders were in accordance with law and these two writ petitions were liable to be dismissed.

21. The learned counsel for the Income Tax Department relies on the decision of the Punjab and Haryana High Court in **R. Kakkar Glass And Crochery House versus**

CIT (2002) 254 ITR 0273. She submits that unless the notice itself is set aside or quashed mere setting aside of the re-assessment order is not sufficient to bar invocation of section 148 for the 2nd time.

22. She submits that in the said case it was observed that when the notices quashed on some technical ground, and no findings were recorded on merits of the additional income assessed as a stable income, it would be in order to issue a fresh notice under section 148 of the Income Tax Act, 1961 provided all the other legal requirements of law have been complied. In the above case the court observed that, *“ For instance, if notice under section 148 is quashed on the ground that no reasons had been recorded, 2nd notice shall be in order after recording the reasons. Similarly, if a notice is quashed on the ground that it has been issued without requisite sanction of the higher authority, fresh notice can be issued after obtaining necessary sanction. Such instance can be multiplied. However, if a notice under section 148 is quashed after examination of material relied on by the AO and after recording of finding that the basis of such material the additional income cannot be said to have escaped assessment, then it shall not be permissible for the AO to issue a fresh notice on the basis of material in respect of the same item of income.”*

23. She further submits that that the invocation of Section 148 read with Section 147 of the Income Tax Act, 1961 was in any event within the period of limitation inasmuch as there was a material failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment for the respective assessment years.

24. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the Income Tax Department.

25. This is a case where details of investment in shares and immovable property were not originally disclosed by the petitioner at the time of filing of the original returns under Section 139 of the Income Tax Act, 1961 for the respective assessment years. Therefore, two notices under Section 148 of the Income Tax Act, 1961 were issued on 7.3.2011 for the respective assessment years.

26. Reassessment were thereafter completed however without complying with the mandatory requirement of Section 143 (2) of the Income Tax Act, 1961 by invoking Section 144 of the Income Tax Act, 1961. Thus, The Commissioner of Income Tax (Appeals) allowed two appeals filed by the petitioner and set aside the respective

orders of re-assessment made by the respondent on 31.12.2011 vide orders dated 12.11.2013. Re-assessments made on 31.12.2011 were set aside on a technical ground of failure to comply with the mandatory requirement of Section 143 (2) of the Act in terms of the decision of the Hon'ble Supreme Court in **A CIT versus Hotel Blue Moon** (2012) 321 ITR 362 and that of the decision of this court rendered in **Sapathagiri Finance and Investment versus ITO** (2012) 25 Taxmann.com 341. The assessment was not set aside on merits.

27. Notices dated 07.03.2011 issued under Section 148 of the Income Tax Act for the respective assessment years were not set aside. For invoking Section 148 of the Income Tax Act, 1961, the Limitation is prescribed under Section 149 of the Income Tax Act. It reads as under :-

Section 149 : Time Limit for notice :-

(1) No notice under section 148 shall be issued for the relevant assessment year,-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub- clause (a) or clause (c);

(ii) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more (for that year)

(iii) if seven years, but not more than sixteen years, have elapsed from the end of the relevant assessment year, unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax has escaped assessment)

Explanation - In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section)

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151.

(3) If the person on whom a notice under Section 148 is to be served is a person treated as the agent of a non-resident under Section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of (six) years from the end of the relevant assessment year.

28. Last date for invoking Section 148 for the Assessment Year 2008-09 express only on 31/03.2015 and for the Assessment Year 2009-10 on 31.03.2016 since the impugned notice are dated 17.03.2013, they are well within time.

29. Had there been a finding given on merits that there was no case for escaped assessment for the respective assessment years in response to Section 148 notice issued for the 1st time on 7.3.2011, it can be said that the 2nd notice dated 17.5.2015 under Section 148 would have been barred and therefore there were no

reasons for invoking Section 148 again.

30. Therefore, the respondents are not precluded from invoking Section 148 of the Income Tax Act, 1961 for the 2nd time as the issue as to whether income had escaped assessment or not was decided by the Commissioner of Income Tax (Appeals) on merits. It was pointed out that there a mandatory failure by the and further re-assessment orders dated 31.12.2011 were set aside.

31. Therefore, the impugned notices were not only in time but also in accordance with law. Therefore, the consequential impugned orders passed by the respondent are sustainable and cannot be quashed. Therefore these writ petitions are liable to be dismissed.

32. It is noticed that the dispute pertains to the assessment year 2008-09 and assessment year 2009-10. The re-assessment proceedings have been considerably delayed partly due to the lapse on the part of the respondents on an earlier occasion which resulted in the orders of the Commissioner of Income Tax (Appeals) on 12.11.2013 and partly on account of the petitioner due to pendency of the present writ petitions.

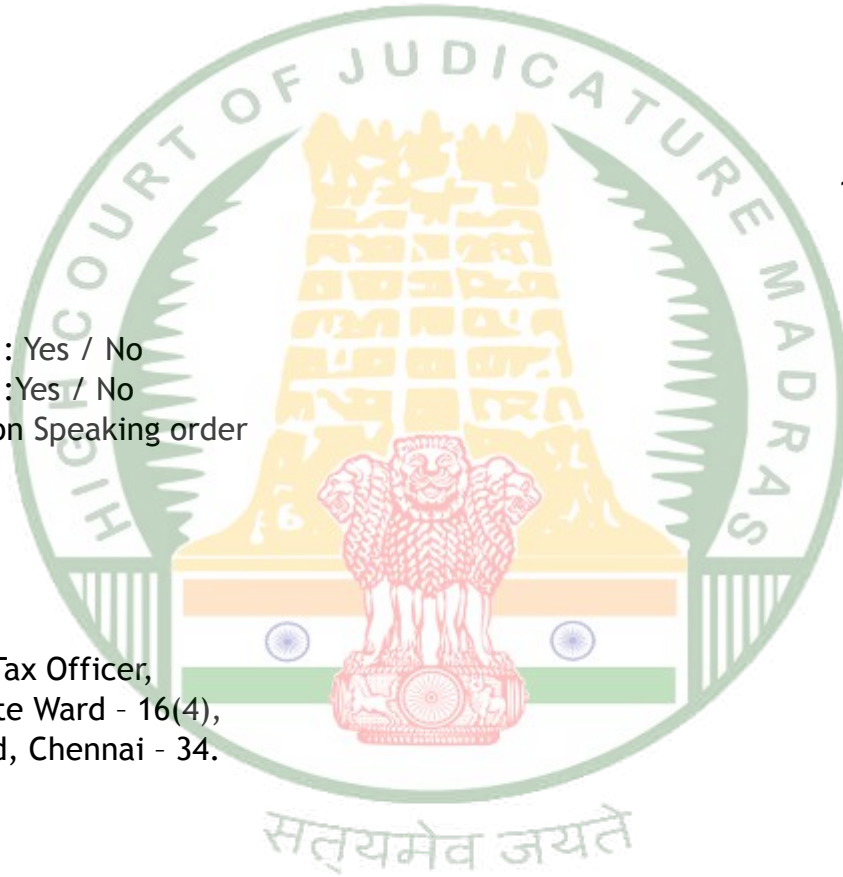
33. In view of the above, the respondent is directed to complete the proceedings within a period of 3 months from the date of receipt of a copy of this order in accordance with law. The writ petition stands dismissed with the above observation. No costs. Consequently connected miscellaneous petitions are closed.

18.12.2019

Internet : Yes / No
Index : Yes / No
Speaking : Non Speaking order
kkd

To

The Income Tax Officer,
Non-Corporate Ward - 16(4),
142, MG Road, Chennai - 34.



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C.SARAVANAN, J.

kkd



Pre-Delivery Common Order in
W.P.Nos.29005 & 29006 of 2015
and
M.P.Nos.1 & 1 of 2015

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18.12.2019