BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 25.01.2019

Pronounced on : 18.11.2019

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD) No.24160 of 2018
and
WMP(MD)No.21853 of 2018

City Union Bank Limited,
No.148-149, T.S.R. Big Street,
Kumbakonam – 612 001. ... Petitioner

Vs.

1.The Assistant Commissioner of
Income Tax,
Circle 1, Kumbakonam Income Tax Office,
1st Floor, No.321, Krishnaswamy Road,
Gandhi Nagar, Kumbakonam,
Tamil Nadu – 612 001.

2.Chief Commissioner of Income Tax,
New No.44, Old No.4, Williams Road,
Cantonment, Tiruchirappalli – 620 001. ... Respondents

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, to call for records relating to the impugned order dated 08.11.2018 passed by the first respondent and the impugned notice dated 09.03.2018 issued by the first respondent under Section 148 read with Section 147 of the Income Tax Act for the assessment year 2011-12 (PAN No.AAACC1287E) and quash both the order and notice.

For Petitioner : Mr.T.Suriyanarayanan
for M/s.King & Partridge

For Respondents : Mr.N.Dilipkumar, Standing Counsel

ORDER

The petitioner-assessee is a banking company. It filed its return of income on 30.09.2011 for the assessment year 2011-12 admitting a total income of Rs.190,30,75,570/-. The return was processed under Section 143(1) of the Income Tax Act, 1961 on 08.02.2012. The case was taken up for scrutiny and notice under Section 143(2) was issued on 02.08.2012. In response to the said notice, the assessee filed the necessary documents. Thereafter, the order dated 14.03.2014 was passed under Section 143(3) of the Act assessing the total income at Rs. 268,45,50,527/-. Certain additions were made. The assessment order is now under challenge before the appellate authority.

2.The Deputy Commissioner of Income Tax issued notice dated 26.03.2015 under Section 148 of the Act proposing to reassess the petitioner for the assessment year 2011-12. The assessee/petitioner after addressing a letter dated 09.04.2015 calling upon the authority to furnish a copy of the reasons recorded for initiating proceedings under

Section 147 of the Act, filed its return of income on 01.05.2015. The petitioner also submitted a letter dated 06.01.2016 objecting to the initiation of the proceedings and requesting the Assessing Officer to drop the same. According to the petitioner, without responding to the requests made earlier, the authority passed an order dated 22.03.2016 under Section 143(3) r/w. Section 147 of the Act reassessing the petitioner for the assessment year 2011-12. Questioning the same, the petitioner has filed an appeal.

3.While so, the petitioner received another notice dated 09.03.2018 from the first respondent under Section 148 of the Act proposing to initiate proceedings under Section 147 and calling upon the petitioner to file its return of income in response to the said notice. The petitioner submitted a letter dated 11.07.2018 raising their objections for reopening of assessment under Section 147 of the Act. It was contended by the petitioner that the notice was issued beyond four years from the end of the assessment year ie., 31.03.2012. The petitioner also pointed out that there has been no failure on the part of the bank in submitting the material facts for assessment. The petitioner had orally gathered information that the reasons for initiating the proceedings under Section 147 was that the disallowance made under Section 14 A of the Act was

not computed as per the method prescribed under the Income Tax Rules, 1962. Therefore, in their letter dated 11.07.2018, the petitioner pointed out that even in the order of original assessment, the issue of disallowance has been discussed and disallowance was made as per the method adopted in the previous year. An issue once decided in the regular assignment cannot be reopened by way of reassessing. The petitioner, however submitted the return of income in response to the notice dated 09.03.2018. They also sought information on the reasons for reopening the assessment for the said year.

4.The first respondent by order dated 08.11.2018, rejected the objections of the assessee and informed them that the case stood reopened for proper disallowance under Section 14 A of the Act. Vide letter dated 12.11.2018, the first respondent also furnished a copy of the reasons recorded for initiating proceedings under Section 147 of the Act. Aggrieved by these developments, the petitioner has moved this Court by invoking its jurisdiction under Article 226 of the Constitution of India for quashing the impugned notice dated 09.03.2018 and the order dated 08.11.2018 passed by the first respondent.

5.The respondents filed a detailed counter affidavit opposing the prayer made in the writ petition. The learned counsel appearing for the petitioner and the learned Standing counsel have filed elaborate written submissions. They also placed reliance on a host of case-laws to buttress their respective positions.

6.The learned Standing Counsel for the respondents questions the very maintainability of this writ petition. He points out that after the furnishing of reasons by the Revenue on 12.11.2018, the assessee raised objections to the reopening in respect of all the reasons adduced and that the same was rejected vide order dated 29.11.2018. But, the petitioner has not chosen to challenge the same in this writ petition. The challenge is confined only to the notice dated 09.03.2018 and the order dated 08.11.2018. In as much as the order dated 29.11.2018 has not been put to challenge, this writ petition is not maintainable. He also wanted this Court to non suit the petitioner for straightaway availing the writ remedy. Placing reliance on the decision of the Hon'ble Supreme Court reported in ***(2008) 14 SCC 218 (Raymond Woollen Mills vs. ITO)***, he contended that sufficiency or insufficiency of the reasons assigned in the notice of reopening of assessment cannot be the subject matter of an adjudication in a writ petition.

7.The pointed contention of the learned standing counsel for the respondents is that the assessee did not disclose fully and truly all material facts in respect of the expenditure towards earning the income which does not form part of the total income. Disallowance under Section 14 A of the Act could not be correctly computed as a result. Even though the statutory provision clearly states that the method for determining the amount of expenditure in relation to income not includable in total income must be done in accordance with Rule 8 D of the Income Tax Rules, 1962, in the assessment order dated 14.03.2014, the disallowance was calculated at 2% of the exempted income. Likewise, disallowance under Section 36 could not be properly computed in the original order of assessment due to non furnishing of full and true particulars concerning the bad debt provisioning for Rural Branches vis-a-vis Urban Branches. The action taken by the Revenue are based on facts and not on "change of opinion". Drawing the court's attention to Explanation 1 to Section 147 of the Act, the learned standing counsel submitted that mere production of account books before the assessing officer will not necessarily amount to disclosure. He would also refute the stand of the petitioner that the time limit for notice to be issued under Section 148 is 4 years. According to him, the limitation is 6 years in this case.

8.The learned standing counsel for the respondents drew my attention to a number of decisions including the ones reported in ***(2010) 15 SCC 215 (Coca Cola India Inc. vs. Additional Commissioner of Income Tax and others***), (***2012) 12 SCC 762 (Honda Siel Power Products Limited vs. Deputy Commissioner of Income Tax***) and ***(2014) 50 taxmann.com 319 (Karnataka) (Jeans Knit (P) Ltd vs Deputy Commissioner of Income Tax, Circle 11(5), Bangalore***).

9.The point for consideration is whether the first respondent is justified in reopening the assessment in respect of the assessment year 2011-12 vide notice dated 09.03.2018 r/w. order dated 08.11.2018. It is not in dispute that the reasons for reopening the subject assessment are two fold. During the scrutiny assessment, disallowance to the tune of Rs.1,57,674/- being 2% of exemption income was made under Section 14 A instead of determining under clause (ii) of Rule 8 D. Secondly, the assessee did not follow the 2011 census figure to determine the status of rural branches to work out 10% of aggregate average advances made by the rural branches to arrive at the provision for bad and doubtful debts.

10.The assessing authority has invoked the power available under Section 147 of the Income Tax Act, 1961. The said provision reads as under :

> "147.**Income escaping assessment.**
>
> If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> **Provided** that where an assessment under sub-section (3) of section 143 or 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 14 or section 148 or to

disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1 ...

Explanation 2 ...

Explanation 3 ...

Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

Hon'ble Mr.Justice Rajiv Shakdher during his brief but beautiful sojourn at the Madras High Court dealt with the scope of the above provision in the decision reported in (***2017) 5 MLJ 4 (Martech Peripherals Pvt. Ltd vs. Deputy Commissioner of Income-tax)*** and held as follows :

"18.A perusal of the aforesaid extract of Section

147 of the Act would show that, if, the Revenue makes an attempt to reopen the assessment, within a period of four (4) years from the date, when, the relevant assessment year ends, then, all that the Assessing Officer has to show is that, he has reason to believe that any income chargeable to tax has escaped assessment for the concerned assessment year and while doing so, he is also empowered to assess any other income, which has escaped assessment and, which comes to his notice, subsequently, albeit, during the course of the assessment proceedings.

18.1.It is, only if, the original assessment is made under Section 143(3) or under Section 147 and, an attempt to reopen the assessment is made after the expiry of the four (4) years from the end of the relevant assessment year, the first proviso to Section 147 of the Act kicks in, which mandates, that no reassessment proceedings can be initiated, unless the escapement of income is occasioned by either the reason of failure on the part of the assessee to file a return under Section 139 or, in response to notice issued under Section 142(1) or Section 148 or, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for carrying out the assessment for the relevant assessment year."

It is not in dispute that the original assessment was made under Section

143(3) of the Act. The impugned notice under Section 148 of the Act was issued on 09.03.2018. It is thus obviously beyond 4 years from the end of the assessment year i.e., 31.03.2012. Since an attempt to reopen the assessment is made after the expiry of 4 years from the end of the relevant assessment year, the first Proviso to Section 147 of the Act kicks in. It must therefore be seen whether the escapement of income was occasioned by failure on the part of the assessee to disclose fully and truly all material facts necessary for carrying out the assessment.

11.In my view, the key to the problem lies in a proper reading of Section 14 A (2) of the Act. Section 14 A of the Income Tax Act, 1961 reads as under :

> "**Expenditure incurred in relation to income not includible in total income.**
>
> **14A.**(1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
>
> (2)The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the

assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

(3)The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act."

If sub-section (2) is parsed, it can be divided into two component parts. Let me put the second part first. The provision will then read as under :

"If the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act,

the Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed".

Therefore, the duty to appropriately determine the amount of expenditure lies on the Assessing Officer. In this case, the assessee had made available all the relevant account books, materials and documents. Nothing more can be expected from the assessee. He had placed on the

table all the primary materials. The assessee can make any claim, even wrong or fanciful, regarding disallowance. If the assessing officer is not satisfied, it is for him to apply Rule 8 D of the Income Tax Rules, 1962 and appropriately determine the amount of expenditure filed for the purpose of disallowance. If the assessing officer failed to properly determine the amount of expenditure, it cannot furnish a reason for reopening the concluded assessment.

12.The Hon'ble Supreme Court in the decision reported in ***(2018) 6 SCC 685 (Income Tax Officer Ward No. 16 Vs. TechSpan India Private Ltd.,)*** held as follows :

> "14.The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his

change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

15.Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.

16.To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

17.It is well settled and held by this Court in a catena of judgments and it would be sufficient to refer Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC) wherein this Court has held as under:

5....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".....

Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open.

6.We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7.One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has

power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.

18.Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings."

In a recent decision pertaining to land acquisition proceedings, the Hon'ble Supreme Court held that the power of review must be expressly conferred ***(2019) 9 SCC 416 (Naresh Kumar vs. State***).

13.In this case, there is no failure on the part of the assessee. On the other hand, there appears to be a failure on the part of the assessing officer to make an appropriate determination of the amount of expenditure in terms of Section 14 A of the Income Tax Act. In such a case, the remedy for the Revenue is elsewhere and not in assuming jurisdiction under Section 147 of the Act. That would amount to exercising the power of review which the statute has not conferred on the authority. This is particularly because the attempt to reopen is made after the expiry of 4 years from the end of the assessment year and the original assessment was made under Section 143(3). The authority cannot take advantage of their own wrong. If they failed to perform their statutory duty, the consequence of default cannot fall on the assessee.

14.The other reason cited by the authority is also not sufficient. It is beyond dispute that the census figures for the year 2011 were made available only a few years later. The assessee could not have peeped into the future while submitting its return of income. One can have the benefit of hindsight but nature has not endowed the assessees with prophetic abilities. *Lex non cogit ad impossibilia* (Law does not compel a man to do that which he cannot possibly perform) is a well known legal maxim.

15.There is also no substance in the contention that writ remedy under Article 226 of the Constitution of India is not available for the petitioner. The petitioner has demonstrated that the conditions precedent to the exercise of jurisdiction under Section 147 of the Act did not exist and the first respondent had therefore no jurisdiction to issue the impugned notice in respect of the assessment year 2011-12 after the expiry of 4 years. When the issue touches on the jurisdiction of the authority, the existence of alternative remedy is no ground to deny relief to the petitioner.

16.I cannot help remarking on one other aspect occurring in this case. The divergent stand of the parties revolves around Section 14 A of the Act. The true object, scope and meaning of Section 14 A of the Income Tax Act has been authoritatively laid down by the Hon'ble Supreme Court in the decision reported in ***2018 (15) SCC 523 (Maxopp Investment Limited vs. Commissioner of Income Tax)***. This judgment also deals with the decision reported in ***(2017) 391 ITR 218 (P&H) (Principal Commissioner of Income Tax Vs. State Bank of Patiala***). The decision of the Punjab and Haryana High Court was affirmed but for different reasons. The judgement of the Hon'ble Supreme Court was

rendered on 12.02.2018. The order impugned in this writ petition was passed on 08.11.2018, ie., after a gap of more than nine months. The assessee was placing reliance on the ruling of the Punjab & Haryana High Court in their letter dated 11.07.2018. The first respondent has labored to distinguish the same in the impugned order. It is obvious that the first respondent was not aware of the authoritative ruling of the Hon'ble Supreme Court made in Maxopp Investment Limited case.

17.I can hardly blame the first respondent. There is an explosion in the matter of law reporting. There are too many law journals. We have web editions and e-libraries. In the deluge of decisions, pearls get lost in the heap of pebbles. Lord Neuberger in his talk while commemorating the ICLR's 150th Anniversary remarked that in the legal world, just as in most other fields, a significant present day problem is information overload. As early as in 1863, Lindley identified the four criteria for reporting a case. They are 1.it must introduce a new principle, 2.modify an existing principle, 3.settle a disputed or uncertain issue, 4.or particularly instructive.

18.T.S.Eliot asked “where is the knowledge we have lost in information?”. This pitfall can be avoided if the law officers of the various

departments bring it to the notice of their respective heads of the departments the rulings that meet the aforesaid criteria laid down by Lindley. The same could then percolate down the line. Such a sharing of knowledge will definitely go a long way in improving the quality of adjudication.

19.For the foregoing reasons, the impugned proceedings are liable to be quashed. They are accordingly quashed. This writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

18.11.2019

Index : Yes / No
Internet : Yes / No
Skm

G.R.SWAMINATHAN, J.

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Pre-delivery Order made in

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