IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.12.2016

Date of Reserving the Order	*Date of Pronouncing the Order*
02.12.2016	**07.12.2016**

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

W.P.No.42341 of 2016
and W.M.P.No.36245 of 2016

M/s.Trans Corporate Advisory Services Pvt. Ltd.,
A Private Limited Company
Represented by its Director
M.Jagadeesh, Having its office at
T-2, 3rd Floor, Old No.15, New No.31
Rajamannar Street, T.Nagar,
Chennai – 600 017. .. Petitioner

vs

The Assistant Commissioner of Income Tax,
Corporate Circle 3(1),
4th Floor, Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai – 600 034. .. Respondent

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari, to call for the records on the file of the respondent and quash the impugned notice u/s. 148 of the Act AABCT2813Q/2015-16/A.Y.2009-10 dated 30.03.2016 issued by the respondent and consequentially quash the proceedings in AABCT2813Q/ACIT/Cor.Cir.3(1)/2016-17 dated 16.11.2016

For Petitioner : Mr.R.Sivaraman

For Respondent : Mr.M.Swaminathan
and M/s.V.Pushpa

ORDER

The petitioner has filed this writ petition challenging the notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) dated 30.03.2016 reopening the assessment for the year 2009-2010 and the order dated 16.11.2016 rejecting the objections filed by the petitioner on the reasons for reopening.

2.The petitioner is a Private Limited Company stated to be engaged in the business of Corporate Advisory, Commission and Real Estate. The return of income for the assessment year 2009-2010 was filed on 26.09.2009 disclosing a loss of Rs.25,81,247/-. The petitioner during the said assessment year had issued 1,40,000 shares which according to the petitioner were compulsory convertible cumulative preference shares at a premium of Rs.240/- per share. The return of income was processed under Section 143(1) of the Act and an intimation was issued to the petitioner on 29.03.2011. Subsequently, the intimation under Section 143(1) of the Act was rectified and an order under Section 154 of the Act was passed on 16.09.2015.

3.Mr.R.Sivaraman, learned counsel for the petitioner vehemently contended that the respondent without any tangible material on hand issued notice under Section 148 of he Act reopening the assessment for the relevant year, the Assessee requested the reasons for reopening to be communicated and on receipt of the reasons for reopening, the petitioner had submitted their objections to drop the proceedings as there is no reason to believe that income liable to tax has escaped assessment. Further it is submitted that the petitioner in their objections have referred to several decisions including the decision of the Hon'ble Supreme Court and requested the respondent to consider the same, however, the respondent without going into the details in a prefuntory manner passed the impugned order dated 16.11.2016.

4.The learned counsel prefaced his submission by stating that when no assessment order has been passed and the assessment is completed by a mere intimation under Section 143(1) of the Act, unless there is reason to believe that income chargeable to tax has escaped assessment, notice for reopening cannot be issued, hence the petitioner is entitled to challenge the notice as being without jurisdiction. In this regard, the learned counsel placed reliance on the following decisions:

(i) ***Khubchandani Healthparks (P) Ltd. vs. Income Tax Officer-6(3)(4), Mumbai*** reported in ***(2016) 68 taxmann.com 91 (Bombay)***

(ii) ***PR.Commissioner of Income Tax vs. Tupperware India (P) Ltd.*** reported in ***(2016) 65 taxmann.com 17 (Delhi)***

(iii) ***Prakriya Pharmacem vs. Income Tax Officer, Ward-7*** reported in ***(2016) 66 taxmann.com 149 (Gujarat)***

5.It is further submitted that in the reasons for reopening, the respondent had stated that the transaction in question is not genuine and such introduction of share premium needs to be taxed under Section 68 of the Act. It is submitted that Section 68 of the Act can have no application as such amendment was introduced only on 01.04.2013 and the relevant assessment year is 2009-10. Further it is pointed out that in the objections, the petitioner has specifically stated that the premium received could be brought to tax under Section 56(2)(viib) of the Act and this sub-clause was introduced with effect from 01.04.2013 i.e. assessment year 2013-14 and therefore the premium received in excess of fair market value cannot be taxed under Section 56(2)(viib) of the Act. It is submitted that though the petitioner has taken such a stand, the respondent while passing the impugned order has not even dealt with. Further it is submitted that in the impugned order in paragraph

No.2, a factually wrong statement has been made stating that the petitioner Company has issued 1,20,000 equity shares when they had issued only compulsory convertible cumulative preference shares. It is further submitted that if in the original assessment proceedings all facts had been stated an assessment made the same cannot be reopened without fresh facts coming to light. Further it is submitted that the compulsory convertible cumulative preference shares which have been issued cannot be treated as an income for the relevant assessment year much less the income escaping assessment. Therefore, there is no reason to believe that income has escaped assessment for issued notice under Section 148 of the Act.

6.Mr.M.Swaminathan, learned Senior Panel Counsel for the revenue assisted by Ms.Pushpa, learned Junior Counsel for the revenue submitted that the petitioner has an effective alternative remedy under the provisions of the Act and there is no justification for the petitioner to bypass such remedy and the impugned order may not be interfered. Further, it is submitted that the respondent cannot take a decision on merits at this point of time and all that the respondent is required to do is to pass a speaking order after considering the objections. This requirement has been complied with and the impugned order has been passed and necessarily the petitioner has to avail the remedy under the provisions of the Act.

7.Heard the learned counsels appearing for the parties and perused the materials placed on record.

8.The respondent has issued the impugned notice under Section 148 of the Act as he had reason to believe that the income in respect of which the petitioner was chargeable to tax for the relevant assessment year has escaped assessment within the meaning of Section 147 of the Act. The expression 'reason to believe' has been explained to mean a cause or justification and cannot be read to mean that the Assessing Officer should have finally ascertain the fact by evidence or conclusion. Therefore conclusive proof of escapement of income is not required at the stage of issuance of a notice under Section 147 of the Act. When the petitioner sought for communicating the reasons for reopening the respondent stated that it is seen from the information available on record, during the financial year 2008-09 the petitioner Company had issued 1,20,000 equity shares raising fresh capital. On a comparison of the financials of the petitioner shows that though the net worth of the Company is low, a very high value of share premium has been introduced during the financial year 2008-09. Therefore, the respondent had reason to believe that such transaction is not genuine and such introduction of share premium needs to be taxed under Section 68 of the Act. The valuation of shares issued at high premium was prima facie found to be not in order and the source of money which was brought in a share premium requires deeper scrutiny. Further the respondent doubted the genuineness of the transaction and the justification for issuing shares at premium and this had to be examined to ascertain whether any unaccounted money was brought as share capital into the books of the Company.

9.While submitting the objections to the reasons for reopening, the first and foremost issue to be addressed is on facts. However, in the instant case, the focus was more on the judicial precedence rather than on facts. While the assessee cannot be faulted for referring to judicial precedence, in the considered view of this Court the assessee was bound to first put forth the factual position and then say as to how the judicial precedence could be applied to the facts. By adopting a reverse procedure would amount to putting the "cart before the horse". Though the learned counsel during the course of argument submitted that the respondent committed a serious error in stating that equity shares were issued whereas the petitioner had issued only compulsory convertible cumulative preference shares. This was not raised by the petitioner while submitting their objections for reopening. In any event this is a factual issue which has to be gone into by the Assessing Officer. The other contention raised is that the transaction cannot be taxed under Section

68 of the Act but liable to be taxed under Section 56(2)(viib) of the Act and if so the said provision cannot be made applicable, as it was introduced with effect from 01.04.2013. After receipt of the objections, the respondent is required to pass a speaking order on the objections given by the petitioner and he is not expected to come to a conclusion and if done so, it would be faulted for the reason that the respondent has per-decided the matter.

10.As has been held the reason to believe must have a link with the formation of belief. This is present in the instant case. The respondent while considering the objections has in seriatim referred to the same and pointed out that the reopening of the assessment is to verify the nature of receipts as seen from the records available with the Department, the Assessee can produce all evidence to show that it is a claim of receipts during re-assessment proceedings. Further, the respondent has taken a stand by referring to the decision of ***Sri Sakthi Textiles Ltd. vs. Jt. CIT*** reported in (***2012) 340 ITR 144 (Mad.)*** stating that there is no legal necessity that material referred to in Section 147 of the Act should be fresh materials collected subsequent to the original assessment orders and even based on materials available on record if the Officer finds reason to believe that there is an escapement of assessment, he is entitled to issue notice under Section 148 of the Act. Further it is submitted that even where there is a complete failure on the part of the

Assessing Officer to apply his mind during the original assessment proceedings it can be said that there is a tangible material and reasons to believe that the income has escaped assessment.

11.In the light of the reasons assigned by the respondent in the impugned order dated 16.11.2016, the case on hand cannot be stated to be one where the respondent has not considered the petitioner's objections and in the process of consideration, the respondent has taken a stand to the extent permissible at this point of time as if any further findings are rendered by him it would amount to pre-deciding the matter. Therefore, the respondent has satisfied the directions issued by the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd vs. Income Tax Officer and others*** reported in ***(2003) 1 SCC 72*** and has disposed of the objections filed by the Assessee by passing a speaking order which does not call for any interference at this stage. Accordingly, the writ petition is dismissed leaving it open to the petitioner to work out their remedies available under the Act. No costs. Consequently, connected miscellaneous petition is closed.

07.12.2016

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Index :Yes/No
Internet:Yes/No

T.S.SIVAGNANAM, J.

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To

The Assistant Commissioner of Income Tax,
Corporate Circle 3(1),
4th Floor, Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai – 600 034.

Pre-Delivery Order in

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