

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 5.12.2016

CORAM

**THE HONOURABLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HONOURABLE Dr.JUSTICE ANITA SUMANTH**

**W.A.No.150 of 2012
and
M.P.No.1 of 2012**

Assistant Commissioner of Income Tax,
Company Circle I (I)
121, Mahatma Gandhi Road,
Chennai 34.

Appellant

Versus

Apollo Hospital Enterprises Ltd.,
rep. by its Managing Director
Preetha Reddy
Ali towers, 4th Floor,
Chennai 6.

Respondent

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 15.9.2011 passed in W.P.No.7459 of 2006 on the file of this court.

For appellant : Mr.T.Ravikumar,
Senior Standing Counsel

For Respondent : Mr.Vijay Narayan, Senior Counsel
assisted by Mr.S.Arun Prasath

JUDGMENT

(Judgment of the court was made by HULUVADI G.RAMESH, J.)

This appeal is filed by the Department challenging the order of the learned Single Judge dated 15.9.2011 passed in W.P.No.7459 of 2006.

2. The writ petition was filed by the assessee seeking for a writ of certiorarified mandamus to call for the records on the file of the respondent therein in G.I.No.AX1-015/1997-1998 dated 13.3.2006 and quash the said proceedings of the respondent seeking to proceed further pursuant to the notice under section 148 of the Income Tax Act 1961, while directing the respondent not to proceed any further pursuant to his notice issued under section 148 of the Income Tax Act, 1961, for the assessment year 1997-1998 as proposed in his impugned proceedings.

3. The petitioner is said be a Company registered under the Companies Act, 1956, having its registered office at 19, Bishop Garden, Raja Annamalaipuram, Chennai and running a hospital for diagnosis, mitigation and treatment of ailments and diseases in different parts of the country. In the course of assessment for the assessment year 1997-98, they claimed a sum of Rs.1,25,54,244/- as revenue expenditure under section 37 of the Act being software procured for MRI and Cardio Vascular System Cathlab machines. They filed Returns for the said year. A Scrutiny assessment was passed basing on the Returns filed by the writ petitioner. By order dated 31.3.2000, accepting the Returns filed by the writ petitioner, orders have been passed showing balance tax payable as 'nil'. However, subsequent to the said order, a notice dated 31.3.2004 under section 148 of the Act was issued, which according to the writ petitioner, was served on them only on 10.2.2005 and that too, without assigning any reason for re-opening the assessment. Therefore, the writ

petitioner, by their letter dated 1.3.2005, sought for reasons subsequently, it is furnished by a proceedings dated 19.12.2005, noting that it is due to excess carry forward of MAT credit under section 115JA to the tune of Rs.38.55 lakhs. Subsequently, notice was issued on 13.3.2006 hence, the writ petition was filed.

4. The main contention raised by the petitioner is that though, in the notice, the date '31.3.2004' is mentioned, it was served only after six years and the same was issued without assigning any reason. The learned counsel for the writ petitioner also relied on Section 27 of the General Clauses Act, 1897, in this regard, to contend that unless contrary is proved, notice said to have been effected at the time at which it would be delivered in the ordinary course of post and sought to contend that the Department, despite repeated requests, has not produced any proof with regard to putting on motion the notice in question on 31.3.2004 and therefore, it has to be construed that the notice had been served only on 10.2.2005.

5. Based on such interpretation, the learned Single Judge allowed the writ petition and quashed the impugned notice of the Department dated 31.3.2004.

6. Heard the learned counsel appearing for the Department/ appellant and the learned Senior Counsel appearing for the respondent, on the point of show cause notice is concerned.

7. As per section 148 of the Act, the despatch ought to have taken place on 31.3.2004,. Then necessarily what is to be considered with

reference to the show cause notice is date of despatch for the purpose of reckoning the period of limitation in the service of notice. Further, it appears that even with regard to extending of the benefit of section 27 of the General Clauses Act, with regard to deemed service of notice, on reading clause 27 of the General Clause Act, the learned Single Judge proceeded on the premises that notice shown to have been served only on 10.2.2015 and not on 31.3.2004.

8. In this regard, the Department sought to produce the despatch register maintain by them to contend that there is an endorsement on 31.3.2004, but, it is not authenticated with any signature therein. Further, the other pages of the despatch register contain signature. In such circumstances, although the learned Single Judge proceeded on the basis that date of service of notice would be the date of determination, but even otherwise, though it is mentioned as 31.3.2004, it does not carry any authenticity for having despatched the notice on that date insofar as it does not contain any signature. In such circumstances, it has to be construed that the service of notice had taken place only on 10.2.2005.

9. An inference could be drawn that only a few days prior or on 10.2.2005, itself, the notice could have been served on the writ petitioner, but, only to cover up the laches on the part of the Department the despatch register is produced without there being any signature below the relevant entry. In the circumstances, the notice should have been served only after lapse of six years. Therefore, the learned Single Judge has rightly passed

an order quashing the impugned notice, referring to the judgment in FENNER (INDI) LIMITED v. DEPUTY COMMISSIONER OF INCOME TAX ((2000) 241 ITR 672) wherein it has been held that whenever a notice is issued by the Assessing Officer beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. Unless the said condition is satisfied, the assessing officer does not acquire the jurisdiction to initiate proceedings under section 148 of the Act after expiry of four years from the end of assessment year. In case where it is beyond four years from the end of assessment year, the assessing officer must necessarily record not only the reasons to believe that the income has escaped assessment, but, also it is on account of failure on the part of the assessee to disclose the material facts fully and truly and failure on the part of the assessing officer to do so would vitiate the entire proceedings.

10. What has been contemplated is mere escapement of assessment which is insufficient for initiating of action after expiry of four years from the end of assessment year and such escapement is also on account of the failure on the part of the assessee in filing returns with full and true material facts. Therefore, the learned Single Judge has come to the conclusion relying upon the settled position of law that the proceedings

initiated is bad by limitation as per section 147 of the Act.

11. In the case on hand, it appears that the original assessment is shown to have been made for the year 1997-98. Thereafter, a notice under section 148 of the Act was issued after four years that too without assigning any reason for re-opening the assessment and when it was sought for by the assessee, it was furnished by the Department only by their communication dated 19.12.2005. It appears that the reason for re-opening the assessment was not shown to be the failure on the part of the assessee in disclosing the returns with full and true material facts. Such being the case, no care has been taken to issue the notice within four years from the end of the assessment.

12. Even in the penultimate para of the impugned order of the learned Single Judge, it has been observed that no proof had been brought to the notice of the court that the notice has been served before the expiry of six years period and it has been accepted that the same has been served on the writ petitioner on 10.2.2005, however, a stand has been taken by the Department that the notice must have been sent by registered post but, since the proof for the same has not been filed before the court, the court cannot accept the stand of the learned counsel for the Department. Further, it has been observed by the learned Single Judge that though the wordings used in the section concerned is issue of notice, that does not mean affixing the signature itself will amount to issue of notice, but, the

said notice has to be set in motion to get the meaning of the term 'issue of notice' and as far as the case in hand is concerned, since the notice has been served on the petitioner by hand delivery only in February 2005, in the absence of contention to the contrary, the stand of the assessee has to be accepted. It has been observed further that though the Department had relied on explanation (1) to Section 147 of the Act and contended that mere furnishing of the account book is not sufficient and particulars should have been given, this should have been disclosed in the notice concerned in detail, but, in the absence of the same, this court cannot accept the stand of the Department.

13. Considering the above facts and circumstances, this court is of the view that there is no scope for interference in the appeal filed by the Department. Therefore, while confirming the order of the learned Single Judge, we dismiss the writ appeal. No costs. The connected miscellaneous petition is closed.

(H.G.R.,J.)(A.S.M.,J)

5.12.2016

Index:Yes/No
Internet:Yes/No
ssk.

**HULUVADI G. RAMESH, J.
AND
DR.ANITA SUMANTH, J.,**

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