

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 08.11.2016

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
01.11.2016	08.11.2016

Coram

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

W.P.No.29643 of 2015 &
M.P.No.1 of 2015 & WMP.No.2477 of 2016

M/s.Abab Offshore Ltd.,
Rep., by its Vice President-Finance,
Mr.Vijay Saheta,
Son of Udhawdas Saheta,
113, Janpriya Crest,
Pantheon Road, Egmore,
Chennai – 600 008.

... Petitioner

Vs

The Deputy Commissioner of Income Tax,
Corporate Circle I (1),
VI Floor, New Block,
No.121, Mahatma Gandhi Road,
Nungambakkam,
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 in PAN:AAACA3012H/DC-Co.C-I (1), dated 09.09.2015, relating to the Assessment Year 2008-09, read with notice under Section 148 of the Income Tax Act in PAN:AAACA3012H, dated 31.03.2015, relating to

the assessment year 2008-09 both on the file of the respondent above, and quash the same.

For petitioner .. Mr.G.Baskar for
Ms.S.Sriniranjani

For Respondents .. Mrs.Hema Muralikrishnan
Senior Panel counsel

ORDER

The petitioner is a company incorporated under the Indian Companies Act, engaged in the business of providing oil field services to various offshore exploration and production companies in India and abroad.

2. In this Writ Petition, the petitioner seeks for issuance of a Writ of Certiorari, to quash the notice issued by the respondent under Section 148 of the Income Tax Act, 1961, (Act), dated 31.03.2015, relating to the assessment year 2008-09.

3. Mr.G.Baskar learned counsel for Ms.S.Sriniranjani, learned counsel appearing for the petitioner challenges the impugned proceedings on two grounds, firstly on the ground that the impugned

proceedings is beyond the period of limitation and therefore, is without jurisdiction. Secondly, it is contended that in the absence of any allegation of suppression, the question of reopening the assessment does not arise, nor the extended period of limitation could be invoked. In this regard, the learned counsel referred to the first proviso under Section 147 of the Act. It was further submitted that the respondent, while communicating the reasons for reopening vide communication dated 09.09.2015, has simultaneously issued notice under Section 143(2) of the Act and the same is illegal.

4. With regard to the plea of limitation, it is submitted that though the impugned notice under Section 148 is dated 31.03.2015, the postal franking has been done on 01.04.2015 and it was booked on 02.04.2015, and received by the petitioner on 06.04.2015. On receipt of the notice, the petitioner submitted an objection on 06.05.2015, stating that the period of six years having lapsed on 31.03.2015, the impugned notice is not sustainable and therefore, requested the respondent to withdraw the reassessment proceedings. Without prejudice to the said submission, the petitioner sought for furnishing the reasons for reopening. The learned counsel for the petitioner submitted that in the counter affidavit filed by the

respondent in paragraph 6, the respondent refers to a letter from the Department of Posts dated 25.09.2015, which is much after the impugned order and relying on it, the earlier proceedings cannot be validated. With regard to the issue pertaining to limitation, the learned counsel placed reliance on the decision of the High Court of Gujarat in the case of ***Kanubhai M.Patel (HUF) vs. Hiren Bhatt or His Successors to Office & Ors.***, reported in ***(2011) 334 ITR 0025***, more particularly, the observations contained in the findings rendered by the Division Bench in paragraphs 14 to 16 of the judgment. It is submitted that in the case of ***Kanubhai M.Patel (HUF)*** (supra), the Division Bench held that till the point of time, the envelopes are properly stamped with adequate postal stamps, it cannot be stated that the process of issue is complete. Referring to the facts of the present case, it is submitted that though the notice is dated 31.03.2015, the postal franking endorsement shows that it was made on 01.04.2015, and the tracking information available in the postal department's website shows that the cover was booked on 02.04.2015 and received by the petitioner on 06.04.2015. Therefore, the entire proceedings are wholly barred by limitation.

5. On the other aspect with regard to reopening of the assessment, reference was made to the order of assessment dated 30.12.2011, (2008-09), and in particular to paragraph 16 of the order, which dealt with dis-allowance under Section 40(a)(i) of the Act, on payments of amounts to non-residents. It is submitted that this contention was considered by the Assessing Officer and the assessment has been completed by order dated 30.12.2011 and this is sought to be reopened based upon certain statements recorded in 2011, which were admittedly prior to the finalisation of the assessment by the Assessing Officer and therefore, there is no ground for reopening the assessment. Further, it is submitted that Section 90(4) of the Act, was introduced only on 01.04.2013 and in the instant case, the assessment pertains to 2008-09 and the said provision has no application. Further, it is submitted that on a bare reading of the impugned order shows that there is no allegation of suppression and therefore, it is a case of change of opinion without valid material and the proceedings for reopening is not sustainable. The assessment could be reopened under Section 147, only if, the assessee had failed to make full and true disclosure and in this regard, reference was made to the first proviso to Section 147, and it is submitted that in the instant case, there is no allegation that the petitioner had suppressed

information or that there was no full and true disclosure. Further, it is submitted that while communicating the reasons to the petitioner, time was granted till 21.09.2015 for submitting the objections, but simultaneously, the respondent has issued notice under Section 143(2) of the Act, dated 09.09.2015 and the same is illegal. In support of his contentions, learned counsel placed reliance on the decision in the case of ***Fenner (India) Ltd., vs. DCIT*** reported in ***241 ITR 672; Commissioner of Income Tax vs. Kelvinator of India Ltd*** reported in ***[2010] 320 ITR 561 (SC); ACIT vs. ICICI Securities Primary Dealership Ltd.,*** reported in ***[2012] 348 ITR 299 (SC).***

6. Mrs. Hema Muralikrishnan, learned Senior Panel counsel appearing for the respondent referring to the counter affidavit filed by the respondent, submitted that the impugned notice dated 31.03.2015, was despatched from the office of the respondent on the same day to the Department of Posts, as evidenced by the Despatch Register maintained by the department and also duly confirmed by the Department of Posts vide letter dated 25.09.2015. This fact would go to prove that the notice under Section 148 was despatched on 31.03.2015, well within the prescribed statutory period. In this regard, photostat copies of pages 165 to 172 of a Register were

produced which contain the seal of the Despatcher in the office of the Additional Commissioner of Income-tax Corporate Range-1 as well as a letter received from the Department of Posts, dated 25.09.2015. It is further submitted that as per the "business post arrangement", designated personnel of the Department of Posts collects in person, physically, the documents/communications to be mailed from each of the designated Ranges/Commissionerates and acknowledged in the despatch register maintained in the Ranges/Commissionerates, after which the said personnel carry the documents to the Post Office for onward transmission. Therefore, the procedure of physical handing over of the document by the office of the respondent in the Post Office as given in the "Speed Post Operation Manual" does not arise. Therefore, it is submitted that issuance of notice is within the time period prescribed under Section 149 of the Act. Further, it is submitted that the decision of the Gujarat High Court in the case of **Kanubhai M.Patel (HUF)** (supra), is not applicable to the facts of the present case and it is clearly distinguishable. Therefore, it is submitted that the plea of limitation is wholly misplaced and not borne out by facts on record. Further, it is submitted that in the light of the decision of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd., vs. Income tax Officer & Ors.**, reported in **(259 ITR**

19), the Writ Petition is premature and the petitioner has to follow the procedure as mandated by the Hon'ble Supreme Court.

7. It is submitted that the assessment is reopened not on the ground of dis-allowance under Section 40(a)(1), but it is pursuant to an enquiry under Section 131 of the Act, conducted by the DDIT Investigation Unit on 05.07.2011. The materials collected from the assessee and the copies of the statements and enquiry report was received by the respondent during 2013 and it is on that basis, the notice for reopening has been issued. In this regard, the learned counsel elaborately referred to the reasons assigned in the impugned order dated 09.09.2015 and also pointed out as to the answers given by the persons, from whom statements have been recorded and submitted that the assessee failed to prove the genuineness of the transaction and therefore, there was full justification for issuance of notice for reopening the assessment. It is submitted that the reasons for reopening is not change of opinion, but for not providing details, as could be seen from the impugned order and it is evident from the admission of the officers of the petitioner, who have given evasive replies. Furthermore, it is submitted that this Court, exercising writ jurisdiction, cannot examine the sufficiency of reasons for reopening.

Therefore, it is submitted that the petitioner may be directed to follow the procedure laid down in the case of ***GKN Driveshafts (India) Ltd., vs. Income tax Officer & Ors.,*** (supra).

8. Heard Mr.G.Baskar learned counsel for Ms.S.Sriniranjani learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Senior Panel counsel for the respondent and perused the materials placed on record.

9. The decision of the Hon'ble Supreme Court in the case of the ***GKN Driveshafts (India) Ltd., vs. Income tax Officer & Ors.,*** (supra), has spelt out the procedure to be adopted while challenging the jurisdiction for reassessment. The reasons are required to be recorded by the Assessing Officer and he is obliged to furnish the copies of the reasons recorded, if required by the assessee. Thereafter, the Assessing Officer has to hear the objections of the assessee, if any, to the jurisdictional issue raised by the assessee and pass a speaking order. In the instant case, the respondent issued the notice under Section 148 of the Act, dated 31.03.2015, stating that he has reasons to believe that the petitioner's 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. Therefore, the respondent proposed to assess/reassess the income for the said assessment year and directed the petitioner to file returns in the prescribed form.

10. The contentions raised by the petitioner in this Writ Petition are broadly two fold, firstly on the ground that the entire proceedings are barred by limitation as the period of six years for reopening the assessment came to an end on 31.03.2015, and hence the impugned notice is barred by limitation. The second point is on the ground that there is no allegation of suppression and the reopening itself is on account of change of opinion.

11. The impugned proceedings is sought to be questioned on the ground of "has been hit by limitation" by referring to the postal cover in which the impugned notice dated 31.03.2015, was sent. The postal cover shows the franking endorsement was made on 01.04.2015. Therefore, the petitioner's contention is that though notice was dated 31.03.2015, the same was franked only on 01.04.2015, which is beyond the time limit. Secondly, by downloading the "article tracking information" from the official website of the Postal

Department, it is stated that the letter was booked/despached only on 02.04.2015, and received by the petitioner on 06.04.2015 and therefore, it is barred by limitation. To buttress the submission, strong reliance has been placed on the decision in the case of **Kanubhai M.Patel (HUF)** (supra). The stand of the department is that there is an arrangement called "business post arrangement" by which a designated authority of the Postal Department comes to the department and collects the documents/communications to be mailed to each person physically and the same is acknowledged in the Despatch Register maintained by the designated ranger/commissionerate. In this regard, reference was made to the register to show that despatch was effected on 31.03.2015 and to further confirm the same, reference is made to a letter given by the Department of Posts dated 25.09.2015.

12. On a careful reading of the decision in the case of **Kanubhai M.Patel (HUF)** (supra), it is clear that the same would not apply to the facts of the present case. In the said case, the undisputed fact was that the notices in question were sent for booking to the Speed Post centre only on 07.04.2010 and this was confirmed by the Department of Posts by their report, which was taken on record

by the Court. Therefore, the decision in the case of **Kanubhai M.Patel (HUF)** (supra), is factually distinguishable and does not in any manner advance the case of the petitioner.

13. Coming back to the facts of the present case, there is nothing on record to dispute the “business post arrangement” between the Income Tax Department and the Department of Posts to show that the cover was despatched on 31.03.2015 and the copy of the Despatch Register signed by the Despatching Officer has been produced and there is nothing to discredit this document. Apart from that, the Department of Posts, Business Post Centre, Chennai has given a letter on 25.09.2015, stating that item No.73 addressed to the petitioner was received by their designated personnel from the office of the respondent on 31.03.2015. This communication, which has come from the Department of Posts cannot be discredited nor disbelieved. The communication dated 25.09.2015, is a confirmation to the effect that the postal cover was received by the designated personnel of the Department of Posts on 31.03.2015.

14. Thus, in the light of the arrangement between the respondent Department and Department of Posts, it is held that the despatch having been done in terms of "business post arrangement" is sufficient to hold that the notice was despatched well within the period of limitation. Accordingly the first contention raised by the petitioner is rejected.

15. The second contention is on the ground that the impugned proceedings is a clear change of opinion. There may not be a necessity to examine this issue as the same is pre-mature. In terms of the directive issued in ***GKN Driveshafts (India) Ltd.***, (supra), as soon as the reasons for reopening are sought for and furnished by the officer, the assessee has to submit his objection. Without doing so, the petitioner has approached this Court.

16. Nevertheless to examine as to whether there is any *prima facie* case made out by the petitioner on this ground, the Court examined the submissions. On a perusal of the reasons recorded, it is evident that it is not restricted to dis-allowance under Section 40(a)(i) of the Act, alone. The statements recorded from their Vice President (Finance), Deputy Managing Director and Secretary of the petitioner

have been referred to and the reasons for reopening have been set out. The statements have been recorded during the course of enquiry under Section 131 of the Act, and the assessee's contention is that the enquiry was completed in 2011, the statements very much available on the date of assessment was finalised by the Assessing Officer and therefore, there is no cause for reopening and the respondent has taken a stand that the enquiry report was received only during 2013. There would be no necessity to go into these aspects of the matter, and if done, it would amount to prejudging the issue and giving a go-by to the directives issued by the Hon'ble Apex Court in the case of ***GKN Driveshafts (India) Ltd.,*** (supra). Thus, this Court having come to the conclusion that the impugned notice is not barred by limitation, is not inclined to examine the adequacy of the reasons assigned by the respondent for reopening, as the petitioner has to comply with the directives issued in ***GKN Driveshafts (India) Ltd.,*** (supra).

17. Accordingly, the Writ Petition fails and is dismissed and the petitioner is granted 15 days time from the date of receipt of a copy of this order to submit their objections to the reasons for reopening as communicated vide order dated 09.09.2015 and thereafter, the

respondent shall pass a speaking order on merits and in accordance with law. No costs. Consequently, connected Miscellaneous Petitions are closed.

08.11.2016

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Index :Yes/No
Internet :Yes/No

To

The Deputy Commissioner of Income Tax,
Corporate Circle I (1),
VI Floor, New Block,
No.121, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

T.S.SIVAGNANAM, J.
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