

**IN THE HIGH COURT OF JUDICATURE AT HYDERBAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADERSH
W.P.No.2148 of 2015**

Between:

Kohinoor Hatcheries Pvt Ltd., represented by its
Managing Director D. Raghava Rao

.....Petitioner

And:

The Deputy Commissioner of Income Tax
and another

..... Respondents

JUDGMENT PRONOUNCED ON : 16.08.2016

**HON'BLE SRI JUSTICE : V.
RAMASUBRAMANIAN**

AND

HON'BLE SMT. JUSTICE : ANIS

1. Whether Reporters of local
Newspapers may be allowed to see
the Judgments? : No
2. Whether the copies of judgment
may be marked to Law Reporters/
Journals? : Yes
3. Whether their Ladyship/Lordship
wish to see the fair copy of the
judgment? : Yes

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE ANIS**

+ W.P.No.2148 of 2015

% 16-08-2016

Kohinoor Hatcheries Pvt Ltd., represented by its
Managing Director D. Raghava Rao

.... Petitioner

AND

The Deputy Commissioner of Income Tax
and another

.... Respondents

! Counsel for petitioners : Y. Ratnakar

^ Counsel for respondents : B. Narasimha Sarma,
Senior

Standing Counsel for Income
Tax

< Gist:

> Head Note:

? Cases referred:

- 1) (2014) 1 SCC 603
- 2) 247 ITR 818
- 3) 2010 320 ITR 561
- 4) 41 ITR 191
- 5) 79 ITR 609 (SC)

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE SMT JUSTICE ANIS

W.P.No.2148 of 2015

ORDER: (per V. Ramasubramanian, J.)

The petitioner has come up with the above writ petition challenging a notice dated 26-03-2014 issued under Section 148 of the Income Tax Act, 1961, for reopening the assessment for the year 2008-2009.

2. Heard Sri Y. Ratnakar, learned counsel for the petitioner and Sri Narasimha Sarma, learned senior standing counsel for the respondents.

3. The petitioner/assessee filed a return of income for the Assessment Year 2008-09 on 30-09-2008, admitting (i) a loss of Rs.1,98,26,817/- and (ii) a profit on sale of land to the tune of Rs.14,35,77,640/-. The assessment was completed under Section 143 (3) of the Act on 31-12-2010. The total loss was determined at Rs.1,87,83,175/-.

4. Thereafter, a notice dated 26-03-2014 was issued under Section 148 of the Act by the Deputy Commissioner of Income Tax, claiming that he had reason to believe that the petitioner's income chargeable to tax for the Assessment Year 2008-09, had escaped assessment within the meaning of Section 147 of the Act and that therefore, the petitioner should deliver the return in the prescribed form.

5. Since the said notice did not contain any reasons for reopening of assessment, the petitioner made a request on 25-04-2014. In response, the Assessing Officer issued a reply dated

14-07-2014 indicating that the profit on sale of land amounting to Rs.14,35,77,640/-, related to land sold to a Real Estate Company for the construction of a Special Economic Zone and that therefore, the sale was not exempt as agricultural land in view of the decision of the Supreme Court in **Sarifabibi, Mohammed Ibrahim v. Commissioner of Income Tax (204 ITR 631 (SC))**.

6. In response to the reasons communicated by the Assessing Officer, the petitioner sent detailed objections on 22-08-2014. But these objections were rejected by the Assessing Officer, by an order dated 23-01-2015. By the same order, the

petitioner was called upon to appear before the Assessing Officer on 30-01-2015.

7. After appearing before the Assessing Officer on 30-01-2015 the petitioner came up with the above writ petition challenging the very reopening of assessment under the notice dated 26-04-2014. This Court, while ordering notice before admission in the writ petition on 05.02.2015, permitted the Assessing Officer to complete the reassessment, but not to give effect to the same, until further orders of this Court.

8. But It appears that by the time this court passed the said order, the assessing officer had already completed the assessment on 31-01-2015.

9. Therefore, despite the interim order passed by this court, the Assessing officer communicated the assessment order dated 31-01-2015 and the petitioner appears to have filed a statutory appeal on 09-03-2015, so that they do not miss the bus, in the event of the writ petition being decided against them.

10. In the light of the above developments, a preliminary objection is taken by Sri Narasimha Sarma, learned senior Standing Counsel for the department, on the basis of the decisions of the Supreme Court in **Commissioner of Income Tax and others v. Chabbil Agrawal**^[1] and **Ess Ess Kay Engineering Company Limited v. Commissioner of Income Tax**^[2] that the writ petition deserves to be dismissed on the ground of availability of alternative remedy. But we do not think that the said contention can be upheld in the case on hand. The law is well settled that the refusal to entertain writ petitions on the ground of availability of alternative remedies, is a self-imposed restriction. This self-imposed restriction, as pointed out even in **Commissioner of Income Tax and others v. Chabbil Agrawal**'s case is not without

exceptions. These exceptions, which are not exhaustive, but only illustrative, are: (1) where the remedy available is ineffective; (2) where the statutory authority did not act in accordance with the provisions of the enactment; (3) where the statutory authority acted in defiance of fundamental principles of judicial procedure; (4) where the statutory authority resorted to invoke the provisions that are not available; and (5) where the statutory authority acted in total violation of the principles of natural justice.

11. In the case on hand, the petitioner challenges the very initiation of proceedings for reopening of assessment, as being without jurisdiction and also in complete defiance of the statutory prescriptions. Therefore, this is not a case, which can be thrown out on the ground of availability of alternative remedy.

12. Coming to the merits of the case, the reopening of assessment had happened in this case, admittedly after 4 years. This is also a case where an assessment under sub-section (3) of Section 143 had already been made on 31-12-2010 for the relevant Assessment Year. Therefore, by virtue of the proviso to Section 147, no action could have been taken, after the expiry of 4 years from the end of the relevant Assessment Year, unless any income chargeable to tax has escaped assessment, by reason of any one of the 3 contingencies viz., a) failure on the part of the assessee, to make a return under Section 139; b) failure on the part of the assessee to make a return response to a notice under Section 142 (1) or under Section 148; and c) failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

13. It is neither the case of the Assessing Officer nor that of the learned senior Standing Counsel that the present case would fall under the first or the second contingency. The respondents

attempt to bring the case of the writ petitioner, under the third category, viz., failure to disclose fully and truly all material facts necessary for the assessment.

14. Before testing whether the petitioner was guilty of failure to disclose fully and truly all material facts necessary for the assessment, we must keep in mind the prescription contained in Explanation 1 to Section 147. By this Explanation, it is made clear that the production before the Assessing Officer of all account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer, will not necessarily amount to disclosure within the meaning of the proviso.

15. Therefore, ***the proviso as well as the Explanation 1 to Section 147 make it obligatory on the part of the assessee (1) to make a full disclosure; 2) to make a true disclosure and 3) to ensure that such true and full disclosure is of material facts necessary for the assessment.*** A clear signal is sent to the assessee by Explanation 1 that the mere production of books of accounts or other evidence before the Assessing Officer will not be treated as a disclosure. In other words, ***a distinction is sought to be made between production of materials and disclosure of materials.***

16. Such a distinction between a mere production of materials and a true and full disclosure of materials is sought to be maintained on account of the fact that under the Act, an Assessing Officer has now power of review. This is why the Supreme Court clarified in ***Commissioner of Income Tax vs. Kelvinator India Ltd.***^[3] that though the power to reopen assessment, after the Direct Tax Laws (Amendment) Act, 1987 was much wider, Section 147 cannot be taken to confer arbitrary powers to reopen

assessment on the basis of mere change of opinion.

17. *The question of change of opinion would arise only if there had been a formation of opinion in the first instance. It is not necessary that upon mere production of material evidence, a formation of opinion or the possibility of formation of an opinion could inevitably happen. But, on the contrary, upon disclosure of material facts, fully and truly, the Assessing Officer could, nay, expected to, form an opinion. Once an opinion is formed or the possibility of forming an opinion is stepped up, at the time of assessment, the assessing officer is not allowed thereafter, by law, to take recourse to Section 147.*

18. *By making a distinction between a mere production of necessary materials and a true and full disclosure of materials necessary for assessment, the statute ensures two things viz., a) that an officer, who had once formed an opinion, does not seek to change it later; and b) that an officer, who, deliberately or by his negligence, omitted to form an opinion, despite being made aware of the material facts, do not take refuge latter under Section 147 to cover up his negligence.*

19. A question may arise in the second category of cases as to whether the interests of the Revenue would not suffer in such cases. But the answer is not too difficult to find out. It is only to safeguard the interests of the Revenue in cases of this nature that an express power is conferred upon the Commissioners under Section 263 of the Act.

20. Therefore, ***what is important in cases of this nature where a challenge is made to the reopening of assessment, is to see (1) whether there was a true and full disclosure of all***

materials or (2) whether there was a mere production of materials.

21. As pointed out by the Constitution Bench of the Supreme Court in **Calcutta Discount Co. Ltd., v. Income Tax Officer and another**^[4], the duty of the assessee stops with a true and full disclosure and does not extend to assisting the Assessing Officer with the inferences that could be drawn from out of what was disclosed.

22. Explanation 1, as pointed out by the Supreme Court in **Commissioner of Income Tax, Calcutta v. Burlop Dealers Limited**^[5], does not impose an onerous obligation upon the assessee. It merely clarifies what could not be treated as true and full disclosure.

23. Therefore, keeping the fundamental distinction between what is mere production of material facts and what tantamounts to a true and full disclosure, let us now come back to the facts of the present case.

24. It is the positive case of the petitioner that during the course of initial assessment proceedings, a detailed questionnaire was issued and the petitioner submitted their reply on 9-11-2010. There was a specific question covering the sale of agricultural lands and its taxability. The reply submitted by the petitioner to these questions at Sl.Nos.4 and 5 of the letter dated 9.11.2010 were as follows:

“The details of total land holding of the company are enclosed.

We have sold 28.13 acres of agricultural land during the financial year 2007-2008. Copies of the relevant sale deeds are enclosed along with working of computation of profit on sale of agricultural land. These lands sold are ‘agricultural lands’ within the meaning of ‘agricultural land’ as defined in Income Tax Act. Hence, the gain on sale is exempt for tax.”

25. Thereafter, the order of assessment dated 31-12-2010 was passed. Even in the order of assessment there was a clear indication to the following effect:

“The information was called and questioned that why the profit on sale of land not offered to tax though disclosed in the return and asked for to substantiate its claim that the said profit is not taxable income. The assessee was also issued a letter calling for information and produce books of accounts, bank statements, vouchers/bills etc. The AR of the assessee, Sri Syed Mansoor, CA, appeared from time to time and produced books of accounts with relevant vouchers/bills etc. and the information with regard to land details etc. After examining the books of accounts and other details at length, the case was discussed with the AR of the assessee. However, upon verification of the balance sheet, the assessee is claiming differed tax liability of Rs.9,96,257 and also agricultural expenses of Rs.47,385 was debited to P & L account.....”

26. The fact (1) that a questionnaire was issued during the initial assessment proceedings; (2) that a reply was submitted on 9.11.2010; (3) that the reply contained details about the sale of the land; (4) that the reply to the questionnaire was accompanied by the relevant sale deeds; (5) that there was a positive claim in the reply that the lands sold were agricultural lands; and (6) that the said claim was actually examined by the Assessing Officer before passing the original order of assessment dated 31-12-2010 are all patently clear from the records.

27. Therefore, the respondents cannot shy away from the fact that there was a full and true disclosure of all material facts necessary for assessment. This case will not fall under the category of mere production of books of accounts and other records. This case very clearly falls under the category of true and full disclosure, upon which the first assessment order was passed on the opinion that the lands sold were agricultural lands. Therefore, to say after 4 years that the lands were sold to a Real

Estate Company for the purpose of forming a Special Economic Zone, would undoubtedly tantamount to a change of opinion, which is not permitted by law.

28. Therefore, the writ petition is allowed and the impugned proceedings are set aside. There will be no order as to costs.

29. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

ANIS, J

Date: 16-08-2016

Ksn

LR to be marked

[\[1\]](#) (2014) 1 SCC 603

[\[2\]](#) 247 ITR 818

[\[3\]](#) 2010 320 ITR 561

[\[4\]](#) 41 ITR 191

[\[5\]](#) 79 ITR 609 (SC)