IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:01.08.2016

Date of Reserving the Order	*Date of Pronouncing the Order*
11.07.2016	**01.08.2016**

Coram

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

W.P.No.1781 of 2008

M/s.Sella Synergy India Pvt Ltd.,
I Floor, "Elnet Software City",
TS-140, Block 2 & 9, Rajiv Gandhi Salai,
Taramani, Chennai – 600 113. ... Petitioner

Vs

1.The Income Tax Officer,
Company Circle VI (2),
Chennai – 600 034.

2.The Additional Commissioner of Income Tax,
Transfer Pricing Officer VI,
Nungambakkam,
Chennai – 600 034. ... Respondent

Prayer :-These Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari, to call for the records of the first respondent in his TN PAN:AACCS9750N/GIR SE 88 and quash the impugned notice dated 28.05.2007.

For petitioner .. Mr.M.V.Swaroop

For Respondent .. Mr.J.Narayanaswamy Standing counsel

ORDER

Heard Mr.M.V.Swaroop, learned counsel appearing for the petitioner and Mr.J.Narayanaswamy, learned Standing counsel appearing for the respondent.

2. The petitioner is a 100% Export Oriented Unit registered under STPI for the assessment year 2005-06. The petitioner is stated to be a wholly owned subsidiary of Sella Holding Banca S.P.A., Italy engaged in the business of development and sale of computer software. In this Writ Petition, the petitioner seeks for issuance of a Writ of Certiorari, to quash the notice issued by the first respondent dated 28.05.2007, wherein the first respondent stated that he has reason to believe that the petitioner's income in respect of which they are assessable and chargeable to tax for the assessment year 2005-06 has escaped assessment within the meaning of Section 147 of the Income Act, 1961, (hereinafter referred to as 'Act'). Therefore, the first respondent proposed to assess/reassess the income/recompute loss/depreciation allowance for the said assessment year and called upon the petitioner to file a return in the prescribed form.

3. The petitioner filed their return of income for the assessment year 2005-06 on 28.10.2005, claiming exemption under Section 10A/10B of the Act, by virtue of which 90% of the profits earned from the export business is fully exempted. It is not in dispute that the first respondent did not initiate any proceedings under Section 143 of the Act, but has now resorted to issue the impugned notice under Section 148 of the Act. Parallely, the first respondent issued notice by initiating penalty proceedings under Section 271BA of the Act vide notice dated 19.07.2002, with respect to non-filing of the audit report along with return of income for the assessment year 2005-06, to substantiate the claim of exemption under Section 10A/10B of the Act and proceeded to levy penalty vide order dated 25.06.2007. It is the contention of the petitioner that they have furnished all the material particulars and facts well in time before the first respondent and there being no default on the part of the petitioner, there is no legal basis for the first respondent to initiate re-assessment proceedings. On receipt of the impugned notice, the petitioner by reply dated 29.06.2007, requested the first respondent to furnish the reasons for issuing the notice under Section 148 of the Act. In response to such request, the first respondent by communication dated 03.10.2007, furnished the reasons for reopening stating that the petitioner had declared business

loss of Rs.36,03,553/- and income under other sources of Rs.3032/- and while computing the business income, the assessee has claimed loss on sale of asset of Rs.69,243/-, which is a capital gain and the petitioner is not entitled to this amount and hence, it has to be disallowed while computing the business income and therefore, income chargeable to tax to the tune of Rs.69,243/- has escaped assessment.

4. Mr.M.V.Swaroop, learned counsel appearing for the petitioner submitted that the first respondent having omitted to issue notice under Section 143(2) of the Act within the statutory time limit (31.03.2007), has resorted to reopening the assessment without any reasonable cause or basis. That apart, the first respondent exceeded in his jurisdiction by referring the matter to the second respondent under Section 92CA of the Act, which is arbitrary. It is submitted that even if there was a mistake in the claim of loss, the same could have been rectified under Section 154 of the Act and the present attempt is only on account of the failure on the part of the first respondent to initiate assessment proceedings within the statutory time limit. Referring to the decision of this Court in the case of ***CIT vs. M.Chellappan and Anr.,*** reported in ***281 ITR 444 (Mad),*** it is submitted that omission of the Assessing Officer to issue notice within

the statutory time, does not empower him to reopen the assessment proceedings. Further, the first respondent failed to appreciate that there was no wilful default on the part of the petitioner to disclose all material facts necessary for completing the assessment and there is no suppression of fact in order to confer jurisdiction on the first respondent to issue the impugned notice. Therefore, it is submitted that the impugned proceedings is without jurisdiction. Further, it is submitted that the first respondent having issued the impugned notice for reassessment on recording a different reason, has proceeded to refer the matter to the second respondent under Section 92CA of the Act, which is impermissible and thereby trying to improve upon the available materials to justify the reason for reopening. It is submitted that during the pendency of this Writ Petition, the petitioner filed an additional affidavit, as certain facts were not elaborated in the main affidavit. By referring to the said affidavit, it is contended that the petitioner company is engaged in providing services related to development of computer software and 100% of such income is eligible for deduction from tax under Section 10A of the Act and for the relevant assessment year 2005-06, the petitioner filed 'NIL' return of income and did not claim any deductions under Section 10A, since they had suffered loss from business of Rs.36,03,553/-, computed in

accordance with the provisions of the Act. It is submitted that the respondent has sought to reopen the assessment on the ground that the income has escaped assessment, since sum of RS.69,243/- related to loss of sale of asset has been claimed as deduction which is not allowable as business deduction under the provisions of the Act, being a loss of capital in nature. It is submitted that even if the loss of sale asset amounting to Rs.69,243/- is ignored for the purpose of computing loss from business, the taxable income of the petitioner would still be "NIL" after such adjustment, since the loss from business was Rs.36,03,553/-. Furthermore, the petitioner did not carry forward the said loss related to assessment year 2005-06 and set of against the income of the petitioner in the subsequent years. Therefore, it is the contention of the learned counsel that there is no revenue loss for the department, even if the adjustment is made to the total income of the petitioner by disallowing the loss on sale of assets amounting to Rs.69,243/- for which the impugned notice has been issued by the first respondent. Therefore, the learned counsel submits that the first respondent lacks jurisdiction to reopen the assessment for the relevant assessment year 2005-06, as there is no income that had escaped assessment to invoke the provisions of Section 147 of the Act and issue the impugned notice under Section 148 of the Act. The learned

counsel referred to the return of income for the assessment year 2005-06, the forms 3CA and 3CD for the assessment year 2006-07 and the return of income for the assessment year 2006-07 to demonstrate that they have not carried forward the loss during the subsequent year and there is no income that has escaped assessment to tax. In support of his contentions, the learned counsel referred to the decision of the Calcutta High Court in the case of ***Baijnath Saboo & Ors vs. ITO, J Ward & Ors.,*** reported in ***1978 (113) ITR 303.***

5. Countering the submissions made by the learned counsel, Mr.J.Narayanaswamy, learned Standing counsel for the respondent contended that the petitioner has not filed their objections to the reasons issued for reopening the assessment as mandated by the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd vs. ITO,*** reported in ***2003 (259) ITR 19.*** Therefore, the Writ Petition is liable to be dismissed as pre-mature. Further, it is submitted that the notice for reopening was issued on 28.05.2007, within four years from the end of the assessment year being 30.03.2006, therefore, the proviso to Section 148 cannot be made applicable to the case on hand. With regard to the contention raised by the petitioner in the additional affidavit, it is submitted that even if

the return is loss, then subject to certain other conditions penalty under Section 271(1)(c) can be levied and therefore, the contention that there is no revenue loss, is not warranted and such factor is not relevant in the matter of re-assessment proceedings. With regard to the contention that the impugned proceedings are based on a change of opinion, it is submitted that no assessment was made under Section 143(3) of the Act and therefore, no opinion was formed on the issue sought to be raised in the reassessment proceedings and therefore, the ground of change of opinion is liable to be rejected. Referring to Explanation 2(b) to Section 147, it is submitted that if no assessment had been made and it is noticed that the assessee had understated the income or claimed excessive deduction, allowance, any relief, then it is deemed that the income chargeable to tax had escaped assessment. It is submitted that the proceedings initiated under Section 92CA seeking information under Section 92D/Section 92E for determination of Arms Length Price for international transaction are independent proceedings and were rightly initiated by the respondent. It is further submitted that during the assessment year 2005-06, the assessee had international transaction with its associated entreprises viz., Banca Sella SPA Italy; Banca Sella; Maimi Agency; International Capital Gestion, SA Paris; Investment Bank, Luxmburg; Easy Nolo SPA;

Gerstnard Fondi S.G.R.Italy; and Fidsel Italy. Therefore, as per provision of Section 92E, the assessee ought to have filed report in Form No.3CEB on or before 31.10.2005. However, the assessee filed the same on 19.07.2006. As the assessee did not comply with the requirements of provisions of Section 92E within due date, penalty notice under Section 271BA was issued to the assessee on 19.02.2007. In response to the penalty notice, the assessee stated that in its case the information was maintained at Italy in Italian language because of which the accountant was not able to certify about the same and had requested for English Version of the information maintained. The assessee attributed the delay in filing the report in Form 3CEB to the delay in getting the transaction which was in Italian language. The assessee had given the same explanation in reply to the penalty notice under Section 271BA for the assessment year 2004-05 also. The assessee had filed an appeal to CIT (Appeals) also in this regard. However, the assessee's appeal has been dismissed by the CIT(A) for the assessment year 2005-06 and the penalty had been confirmed. It is further submitted that in the course of assessment proceedings for the assessment year 2004-05, a query was raised about the non-filing of the form-3CEB and the assessee filed explanation for both the years. Therefore, it is submitted that the

assessee has not proved that there was reasonable cause for failure as mentioned in Section 271BA and the assessee has failed to comply with the requirement of Section 92E without reasonable cause. Further, it is submitted that the relief sought for by the petitioner is beyond the scope of a Writ, as it requires appreciation of facts and evidence and the petitioner has not made out any case of violation of principles of natural justice and the prayer sought for by the petitioner is liable to be rejected, as pre-mature on the grounds of availability of alternate remedy. In support of his contention, the learned Standing counsel relied on the decision of the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd vs. ITO,*** (supra), and in the case of *Thambbi Modern Spinning Mills Ltd., vs. CIT & Ors., [W.P.No.31294 of 2014, dated 01.12.2014]*.

6. I have heard the learned counsels appearing for the parties and perused the materials placed on record.

7. As noticed above, the prayer sought for in the Writ Petition is for issuance of a Writ of Certiorari, to quash the notice dated 28.05.2007, which is a notice issued under Section 148 of the Act. However, even at the time of filing the Writ Petition, the petitioner's

request to communicate the reasons for reopening was acceded to and reasons had been furnished vide proceedings dated 03.10.2007. Though the petitioner did not specifically seek for quashing the said communication by suitably amending the prayer in the Writ Petition, they chose to file an additional affidavit elaborating certain facts, which according to the petitioner would cover their challenge to the reasons assigned in the communication dated 03.10.2007, which were recorded by the respondent before issuance of the impugned notice under Section 148 of the Act. Nevertheless, the first respondent having filed a counter affidavit adverting to the averments made in the affidavit filed in support of the Writ Petition as well as the additional affidavit, the technical glitch is not taken up for consideration and the Court proceeds to consider as to whether the petitioner has made out a case for grant of the relief sought for.

8. The fact that the petitioner is a 100% export oriented unit registered under the STPI for the relevant assessment year namely 2005-06 is not in dispute. In the return of income for the said year, the petitioner admitted a total income of 'NIL' after claiming exemption under Section 10A/10B of the Act on the ground that profits earned from export business is fully exempt.

9. Broadly the impugned action of the first respondent is challenged on four grounds, firstly that the first respondent having not issued any notice under Section 143(2) of the Act in order to complete the regular assessment proceedings could not have resorted to issuing the impugned notice under Section 148 of the Act; secondly, it is submitted that the first respondent had levied penalty under Section 271BA of the Act vide order dated 25.06.2007, even before completing the assessment; thirdly, it is contended that the first respondent exceeded in his jurisdiction by making a reference to the second respondent under Section 92CA for valuation and the second respondent in turn had issued notice, dated 20.08.2007, calling upon the petitioner to furnish details in terms of the said provision; lastly, it is submitted that for the relevant assessment year i.e., 2005-06, the petitioner filed 'NIL' return of income and did not claim any deduction under Section 10A of the Act, since the petitioner had a loss from business of Rs.36,03,553/-, computed in accordance with the provisions of the Act and even if the loss of sale of assets as mentioned in the reasons for re-opening, is ignored for the purpose of computing the loss from business of the petitioner for the relevant assessment year, the taxable income for the petitioner would still be “NIL” after such adjustment and the petitioner did not carry forward

the loss related to the assessment year 2005-06 and set off against the income of the petitioner in the subsequent years. Therefore, it is the contention of the petitioner that there is no revenue loss for the department, even if the adjustment is made to the total income of the petitioner by disallowing the loss on sale of assets amounting to Rs.69,243/- for which impugned notice under Section 148 of the Act has been issued.

10. The revenue resists the prayer made in the Writ Petition firstly on the ground that it is premature. Apart from that the Revenue would state that even if the return is loss then subject to certain other conditions penalty under Section 271(1)(c), can be levied and therefore, the contention that there is no revenue loss is not relevant in the matter of reassessment proceedings. Thirdly, the revenue would justify their action in initiating proceedings under Section 271BA for non-submission of necessary records and proceedings under Section 92CA seeking information under Section 92D/92E for determination of Arms Length price.

11. Undoubtedly, the contentions raised by the petitioner is on facts. The sheet anchor of the submission on behalf of the petitioner is

that, even accepting for sake of argument that the stand of the Revenue is correct, it is a case of no loss of revenue to the Department and hence, does not justify reopening.

12. Before going into the issue as to whether it is a case of no loss of revenue, it would be first essential to take into consideration the decision of the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd*** (supra). In the said case, the Hon'ble Division Bench of the Delhi High Court, dismissed a Writ Petition filed by an assessee challenging the validity of the notices issued under Section 148 and 143(2) of the Act by taking a view that all objections could be taken by the assessee in its reply to the notices and at that stage, the Writ Petition was pre-mature. The Hon'ble Supreme Court while refusing to interfere with the order passed by the Delhi High Court clarified that when a notice under Section 148 of the Act, is issued, the proper course of action for the noticee is to file a return and if he so desires to seek reasons for issuing notices and Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. Thus, the Hon'ble Supreme Court

indicated as to what is the procedure to be adopted by the assessee on receipt of a notice under Section 148 of the Act. This legal position has held the field since 2002 and has been consistently followed by courts.

13. In the case of ***Thambbi Modern Spinning Mills Ltd., (supra),*** a Writ Petition was filed to quash a notice issued under Section 148 of the Act. The petitioner submitted their reply pointing out various factual details and referring to the decisions of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax vs. Kelvinatore of India Ltd., (SC),*** reported in ***[(2010) 320 ITR 561 (SC)],*** and the decision of the Delhi High Court in the case of ***BBC World News Ltd vs. Assistant Direct of Income Tax*** reported in ***[(2014) 362 ITC 577 (Delhi)],*** and pointed out that the lack of fresh materials coupled with change of opinion would vitiate the assumption of jurisdiction under Section 147 of the Act. When the objections given by the assessee was pending consideration before the officer, the Writ Petition was filed contending that reopening of the assessment is without jurisdiction and contrary to law. Various other factual averments were also raised in the Writ Petition. This Court after referring to the decision in the case of ***GKN Driveshafts***

(India) Ltd vs. ITO, (supra), held that the Assessing Officer is bound to furnish reasons within a reasonable time and on receipt of the reasons, the noticee is entitled to file objections and the Assessing Officer is bound to dispose of the same by passing a speaking order. Accordingly, the Writ Petition was held to be premature and while declining to quash the notice, the Assessing Officer was directed to consider the objections.

14. The question would be whether the petitioner herein should be permitted to depart from the procedure to be followed as pointed out by the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd vs. ITO,*** (supra). The learned counsel for the petitioner referred to the decision of the Calcutta High Court in the case of ***Baijnath Saboo & Ors vs. ITO, J Ward & Ors.,*** (supra) to buttress his argument that on facts when there was no loss of revenue, the petitioner is justified in approaching this Court. In the said case, the challenge was to a notice under Section 148 of the Act for the assessment year 1968-69. The assessment was in respect of a trust and as it was a public charitable trust, the income was entirely exempt. The trust claimed that it had received as gift certain shares from a private trust and therefore, the taxes that were deducted at

source in respect of the dividends on all the shares, which had been gifted to the public charitable trust, were refunded to the trust of which the petitioner's were the trustees. It came to the knowledge of the Income Tax Officer that gift by the private trust in favour of the public trust was void, as there was no power to make such a gift and therefore, held that refund of taxes deducted at source given to the public charitable trust, were wrongly given and had to be rectified and it was for that purpose, the assessment for the relevant year was sought to be reopened. The learned Single Judge of the Calcutta High Court after analysing the factual position, pointed out that the question would be as to whether there has been any escapement of income of the trust of which, the petitioners or the trustees entitling the revenue authorities to reopen the said assessment. After referring to Section 147, it was pointed out as the trust on which the petitioners therein were trustees is a public charitable trust, its income was not assessable to tax and there is no question of any income escaping assessment because, the income was not assessable nor was there any question of any under assessment or assessment at a too low a rate, apart from that there is also no question of excessive loss or depreciation allowance being computed. Thus, it concluded that the income being not chargeable to tax, being the income of a public

charitable trust, there was no question of that income being given excess relief. Therefore, the fact that the petitioner therein got away with refund which they were not entitled in law, does not authorise the income tax authorities to say that the petitioners had been given excessive relief on income chargeable to tax.

15. The one common feature between the facts of the case before the Calcutta High Court and the present case is that the income earned by both the petitioners were exempt from tax, but the distinguishing feature is, there was no contention raised in the case before the Calcutta High Court that the assessee, while filing the return of income had incorrectly computed one portion of the income [in the case on hand, business income]. In the absence of such dispute and owing to the fact the entire income of the public charitable trust was exempt, the Court had granted the relief and the said judgment revolved around the facts of the case and cannot be *ipso facto* made applicable to the case on hand.

16. As already pointed out the petitioner while filing the return of income on 28.10.2005, declared business loss and income from other sources and while computing business income, the assessee had

claimed the loss on sale of assets, as a capital loss. This according to the first respondent, the assessee is not entitled to do and he is of the opinion that it ought to have disallowed the same while computing the business income and such amount claimed as loss on sale of asset is chargeable to tax under escapement assessment.

17. If such is the reason, this Court cannot interfere with the impugned notice on the ground that there is no loss of revenue and that the petitioner did not carry forward the loss related to the assessment year 2005-06 or set off against the income of the petitioner in the subsequent years. These issues are factual issues, which the assessee has to raise before the first respondent. More particularly, this Court will not go into the aspect as to what is the effect of not carrying forward the loss to the next year or not setting it off against the income in the subsequent years and whether the petitioner would be entitled to file revised returns for the subject year etc. These being factual, it is best left to the assessing authority to decide.

18. Countering the submissions of the learned counsel for the petitioner, the revenue takes a stand that no revenue loss or not

carrying forward the loss, is not relevant for reassessment proceedings and submit that penalty under Section 271(1)(c) can be levied and hence a Writ would not be issued, when a procedure has been outlined by a Supreme Court in the case of ***GKN Driveshafts (India) Ltd vs. ITO,*** (supra).

19. In ***Swaraj Engine Ltd., vs. Assistant Commissioner of Income Tax & Anr.,*** reported in ***2003 (260) ITR 202 (P&H),*** it was held that the Writ court can only consider, whether the notice is valid and it cannot consider the sufficiency of material justifying reassessment. In the said case, it was found that special deduction under Section 80I was wrongly allowed in the original assessment and notice of reassessment was held to be valid. At this stage, it would be useful to refer to the decision of the Hon'ble Supreme Court in the case of ***Comunidado of Chicalim vs. ITO*** reported in ***2001 (247) ITR 271 (SC).***

20. In the light of the above, this Court is not inclined to interdict the proceedings initiated by the first respondent by issuing a Writ and the prayer sought for by the petitioner to quash the notice under Section 148 of the Act, is held to be not maintainable and as the

petitioner had been communicated with the reasons for reopening by communication dated 03.10.2007, liberty is granted to the petitioner to submit their objections within a period of three weeks from the date of receipt of a copy of this order, after which, the first respondent shall take a decision thereon on merits and in accordance with law after affording an opportunity of personal hearing to the petitioner, uninfluenced by any observations made in this order.

Writ Petition is dismissed with the above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

01.08.2016

pbn
Index :Yes/No
Internet :Yes/No

To

1.The Income Tax Officer,
Company Circle VI (2),
Chennai – 600 034.

2.The Additional Commissioner of Income Tax,
Transfer Pricing Officer VI,
Nungambakkam,
Chennai – 600 034.

T.S.SIVAGNANAM, J.
pbn

Pre-Delivery O r d e r in
W.P.No.1781 of 2008

01.08.2016