

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.09.2015

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P. (MD) Nos.7825 to 7828 of 2015
and
M.P. (MD) .Nos.1 of 2015

JVS Export
a Partnership firm
rep.by Partner M.Britto
32,Sarojini Street,
Madurai-625 002 ... Petitioner in all WPs

Vs.

The Deputy Commissioner of Income Tax
Non-corporate Circle-2,
Madurai 625 002
... Respondent in all WPs

Writ Petitions filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records in the matter of assessment of the petitioner in file No.AABFJ2836N for the assessment years 2007-2008, 2008-2009, 2009-2010 and 2010-2011 wherein a notice dated 28.03.2014 under Section 148 of the Income Tax Act, 1961 has been issued and a composite order dated 05.03.2015 has been passed simultaneously rejecting our objections and completing the re-assessment and quash the notice dated 28.03.2014 and order dated 05.03.2015.

For all Writ Petitions :-

For Petitioner : M/s.R.Srinivasan

For Respondent : Mrs.S.Srimathy for
Mr.R.Krishnamoorthy

COMMON ORDER

Since the issue involved in all these Writ Petitions are one and the same, they are all taken up together and decided by a common order.

2. These Writ Petitions have been filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records in the matter of assessment of the petitioner in file No.AABFJ2836N for the assessment year 2007-2008, 2008-2009, 2009-2010 and 2010-2011 respectively, wherein a notice dated 28.03.2014 under Section 148 of the Income Tax Act, 1961 has been issued and a composite order dated 05.03.2015 has been passed simultaneously rejecting the objections of the petitioner firm and for completing the re-assessment and quash the notice dated 28.03.2014 and order dated 05.03.2015.

3. All the four Writ Petitions have been filed for each assessment year. In the Writ Petition in W.P. (MD).No.7825 of 2015, the petitioner has averred that the petitioner firm filed its return of income for the

assessment year 2007-2008 relating to the accounting year ended 31st March, 2007 on 29.10.2007 admitting a total income of Rs.4,22,40,120/-. Similarly, in the case of W.P.(MD).No.7826 of 2015, for the assessment year 2008-2009, the petitioner firm filed its return for the loss of Rs.1,11,47,746/-. Further, in the case of W.P.(MD).No.7827 of 2015, the petitioner filed its return of income for the assessment year 2009-2010, admitting a total income of Rs.2,74,80,260/-. So also, in the case of W.P.(MD).No.7828 of 2015, the petitioner filed its return of income for the assessment year 2010-2011, admitting a total income of Rs.4,82,02,050/-.

3.1. It is further averred in the affidavit that all the returns were processed under Section 143(1) of the Income-Tax Act, 1961 for the respective assessment years. All the cases were selected for detailed scrutiny and an assessment was made under Section 143(3) of the Act, on different occasions, determining the total income for the respective years. The petitioner firm has clearly disclosed separately the fact of payment of commission to Foreign Agents in the

profit and loss account vide separate item under the head of 'Expenditure'.

3.2. While so, nearly more than four years from the end of the respective assessment years, the petitioner received notice under Section 148 of the Income Tax Act, 1961 requiring the petitioner firm to deliver a return of income in the prescribed form within 30 days of receipt of the said notice on the ground that the Assessing officer has reason to believe that the income of the petitioner firm chargeable to tax had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961. The petitioner firm duly complied with the notice dated 28.04.2014 stating that the return already filed may be taken as one filed in response to the said notice and by another letter dated 23.01.2015 requested the Assessing Officer to disclose the reasons recorded for initiating action under Section 147 of the Income Tax Act, 1961 so as to file objections, if any, to the said notice in accordance with the decision of the Supreme Court in **GKN Driveshaft (India) Ltd Vs. ITO, (259 ITR 19 (SC)]**. The Assessing Officer by a letter dated 28.01.2015

furnished the reasons stating that there is payment of foreign sales agents commission for which no TDS has been deducted. The petitioner firm filed an objection letter dated 17.02.2015 as required by the Apex Court decision in ***GKN Driveshaft (India) Ltd Vs. ITO (259 IT 19(SC)*** .

3.3. Thereupon, the Assessing Officer has passed a composite order dated 05.03.2015 rejecting the objections and also passed the re-assessment order resulted in filing the Writ Petition in W.P.(MD).No. 7825 of 2015. In the similar set of facts, the other three Writ Petitions have been also been preferred, of course, for different assessment years.

4. To back his averment, the learned counsel for the petitioner has made the following submissions:-

- (i) If no operation of business is carried out in the taxable territories, then it can not be deemed to be an income which have either accrued or arisen in India. Therefore, the question of deducting TDS does not arise.

(ii) When notice under Section 148 of the Income Tax 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. The 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. But, in the instant case, a non-speaking and composite order have been passed.

(iii) If there is any tangible material, the Assessing Officer can come to the conclusion that there is escapement of income. However, earlier order cannot be reviewed. But, here, there is no tangible material available. In the absence of same, the assessing officer has no power to review the

order for the assessment year.

(iv) No doubt, power under Section 147 of the Act can be exercised within four years prior to the end of the relevant assessment year. But for the first two Writ Petitions, it is beyond the period of four years. Hence, on the ground of ground, it is liable to be set aside.

5. The learned Standing Counsel appearing for the respondent was put on notice on the above factual aspects of the matter.

6. Heard the submissions made by the learned counsel for the petitioner as well as the learned counsel appearing for the respondent.

7. With regard to the first ground, the learned counsel for the petitioner by relying upon a judgment reported in a Division Bench of this Court in ***Commissioner of Income Tax Vs. Faizan Shoes Pvt.Ltd, T.C. (A).No.789 of 2013,*** submitted that if the

commission amount was paid to the agent who is a non-resident for the service rendered outside India, Section 195 cannot be invoked. Since the Commission amount was paid to non-resident, it cannot be deemed to be an income. In this regard, the learned counsel for the petitioner relied upon a Division Bench of this Court in **T.C. (a).No.789 of 2013 dated 22.07.2014**, wherein, it has been held as follows:-

"9. In the instant case, the non-resident assesseees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assesseees in India as contemplated by cl.(a) of the Explanation to s.9(1)(i) of the Act. The commission amounts which were earned by the non-resident assesseees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department.

11.The facts of the present case are akin to the facts of the decision in Toshoku Limited case, referred supra. In the instant

case also, the assessee engaged the services of non-resident agent to procure export orders and paid commission. That apart, the Commissioner of Income (Appeals) as well as the Tribunal have correctly applied the principle laid down in **GE India Technology Cen. (P) Ltd. Case**, referred supra, to hold that the assessee is not liable to deduct tax at source when the non-resident agent provides services outside Indian on payment of commission.

12. In the light of the above said decision and the finding rendered by us on the earlier issue that the services rendered by the non-resident agent can at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services", we are of the firm view that Section 9 of the Act is not applicable to the case on hand and consequently, Section 195 of the Act does not come into play. In view of the above finding, the decision of Supreme Court in **Transmission Corporation of A.P. Ltd case**, referred supra, relied upon by the learned Standing Counsel for the Revenue is not applicable to the facts of the present case. We find no infirmity in the order of the Tribunal in confirming the order of the Commissioner of Income Tax (Appeals).

13. For the foregoing reasons, the substantial questions of law raised for our consideration are answered against the Revenue and we find no reason to differ with the concurrent findings rendered by the Commissioner of Income Tax (Appeals) and the Tribunal."

8. From the dictum laid down in the above judgment, it could be seen that the **commission** amounts which were earned by the non-resident assesseees for services rendered outside India cannot, therefore, be treated as an income which have either accrued or arisen in India. Therefore, the question of deducting TDS does not arise.

9. The second fold submission of the learned counsel for the petitioner is that in the instant case a non-speaking and non-composite orders have been passed. In this regard, the learned counsel for the petitioner relied upon a Division Bench of the Gujarat High Court passed in **SCA.No.1773 of 2012, 23.08.2012.**

"21. The procedure for filing and deciding objection to the notice under Section 148 of the Act had been crystallized by the Apex

Court in ***GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, (2003) 259 ITR 19***, wherein the Court has held as under:-

"However, we clarify that when a notice under Section 148 of the Income Tax 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. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of 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. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

10. The dictum laid down in the above judgment would show that pursuant to the notice issued by the assessing officer, he is bound to consider the objections of the parties and pass a speaking order. But, in the instant case, without passing a separate

order by considering the objection of the petitioner, the respondent has passed a composite and non-speaking order. Since it is a non-speaking and composite order, the same is liable to be set aside.

11. As regards to the third ground that the respondent has no power to reopen the assessment order without any tangible material, the learned counsel for the petitioner submitted that in the case of Commissioner of ***Income Tax Vs. Schwing Stetter India P. Ltd, reported (2015) 93 CCH 112 ChenHC***, it could be seen that unless there is any tangible material to come to conclusion that there was an escapement of income of assessment, the respondent cannot review his own order merely for the sake of reviewing. But in the instant case, this Court does not find any tangible material warranting the assessing officer to re-open the assessment.

12. As far as the fourth ground is concerned, Section 147 of the Act is exercised beyond a period of four years in the case of first two Writ Petitions. Therefore, the same is hit by limitation. For the said

proposition, he relied upon a Division Bench judgment of this Court in the case of **Income Tax Vs. Schwing Stetter India P. Ltd**, reported in **(2015) 93 CCH 112 ChenHC**, In paragraph No.19, it has been held as follows:-

"19. In an identical circumstance, a learned single judge of this Court had considered the issue in the decision reported in **(2000) 241 ITR 672 (Mad) Fenner (India) Ltd**, wherein, it was observed as follows:-

"The pre-condition for the exercise of the power under Section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the Assessing Officer that and the provision to Section 147 gets attracted. In this case, we find that the finding of the Commissioner of Income Tax (Appeals) and the Tribunal is that the Proviso to Section 147 of the Income Tax Act did not get attracted and it is a case of mere change of opinion of the Assessing Officer."

13. Viewed from any angle, the respondent has not made out any ground to reopen the assessment order and the orders impugned in these Writ Petitions are liable to be set aside. Accordingly, the Writ Petitions stand set aside and accordingly, they are dismissed. No costs, consequently, connected miscellaneous petitions are closed.

Index : Yes/No
Internet : Yes/No

28.09.2015

ssm

To

The Deputy Commissioner of Income Tax
Non-corporate Circle-2,
Madurai 625 002.

R. SUBBIAH, J.

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W.P. (MD) Nos.7825 to 7828 of 2015

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