IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.06.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.1626 and 2057 of 2015
And M.P.Nos.1 & 1 of 2015

Reserved on 31.03.2015

M/s.PVP Ventures Limited,
A Limited Company,
Rep. by its Head – Finance & Accounts,
Mr.S.Kannan ..Petitioner in both
Writ Petitions

-Vs-

1. The Assistant Commissioner of Income Tax
Corporate Circle 5(2),
121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034. .. 1st Respondent in
W.P.No2057 of 2015

2. The Deputy Commissioner of Income Tax,
Corporate Circle 5(2),
121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

..2nd Respondent in both

Writ Petitions

Prayer in W.P.No.1626 of 2015: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, to call for the records on the file of the 2nd respondent and quash the impugned proceedings in PAN No.AAAC3101/P/Corp.Cir-5(2)/2014-15, dated 12.1.2015 along with notice issued by the first respondent under Section 148 of the Act, dated 10.2.2013.

Prayer in W.P.No.27726 of 2014: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, to call for the records on the file of the respondent, quash the impugned order dated 20.1.2015 and consequently direct the respondent to afford an opportunity of being heard and pass orders.

For Petitioner : Mrs.Nalini Chidambaram,
in both WPs. SC for Mr.R.Sivaraman

For Respondents : Mr.Pramod Kumar Chopda
in both W.Ps. Mr.Rajkumar Jabhak

COMMON ORDER

The petitioner company is a public limited company engaged in the business of infrastructure and development. It is assessed to Income Tax on the file of the respondents under PAN No.AAACS3101P. For the assessment year 2008-09, the petitioner company had filed its original return of income on 30.9.2008, declaring a loss of Rs.14,07,72,863/- and filed revised return on 26.3.2009, declaring a loss of Rs.17,45,251/-. According to the petitioner, since it was a loss of return, the petitioner did not claim the unabsorbed loss and depreciation of the earlier years. The said return was duly processed under Section 143(1) of the Income Tax Act. 1961 (in short, the Act) and it was selected for scrutiny and a notice under Section 143(2) was issued, calling for the details. Pursuant to the same, the petitioner filed all the details called for by the

respondents from time to time. During the scrutiny of the assessment, having considered the materials placed before them, the respondents had completed the assessment under Section 143(3) of the Act on 31.12.2010, determining the total income at Rs.415,20,26,520/-. Thereafter, it appears that the petitioner filed a rectification application under Section 154 of the Act pointing out certain additions, viz., FBT, non-allowing of brought forward losses, depreciation of earlier years, etc., which according to the petitioner, were the mistakes apparent from the records and accordingly, pleaded to the respondents to rectify the same. The second respondent vide order, under Section 154 of the Act, dated 6.9.2011 was pleased to rectify his order and revised the total income of the petitioner company at Rs.365,77,16,292/-, thereby allowing the unabsorbed loss and depreciation. It is stated that the petitioner had also filed an appeal against the assessment order passed under Section 143(3) of the Act, dated 31.12.2010 before the CITA (A)-V in ITA No.605/13-14(A)-V. While so, after a period of four years, the respondent, by notice dated 10.2.2013 issued under Section 148 of the Act, sought to re-open the concluded assessment under Section 143(3), which according to the petitioner, without any tangible materials and without giving a finding that there is a failure on the part of the petitioner company to disclose fully and truly all the materials at the time of completion of the original assessment. It is seen that vide letter dated 19.12.2013, the petitioner company, requested the respondents to provide the reasons for re-opening of the assessment 2008-09 after a period of four years.

2. In the meanwhile, the CIT (A), vide order in ITA No.605/13-14 dated 27.3.2014 deleted the addition of Rs.377,71,78,316/- being on account of foreign direct investment (FD) and thus partly allowed the appeal filed by the petitioner company. Thereafter, vide order under Section 143(3) read with Section 254 of the Income Tax Act, 1961 dated 5.8.2014 gave effect to the order of the CIT(A)-V in ITA No.605/13-14 dated 27.3.2014 and revised the rectification order under Section 154 of the Act, dated 6.9.2011 and calculated the total taxable income at NIL and unabsorbed depreciation at Rs.11,94,62,024/-. According to the petitioner, despite the rectification order under Section 154 and also giving effect order under Section 254, the respondents continued his parallel proceedings under Section 147 of the Act for the impugned assessment year and issued reasons for re-opening vide letter dated 8.12.2014 after the pronouncement of his own giving effect order dated 5.8.2014. The petitioner objected for re-opening the assessment proceedings under Section 147 of the Act. However, according to the petitioner, without deciding the jurisdictional issue, the respondent passed order, dated 12.1.2015, holding that the proceedings under Section 147 have been rightly initiated and rejected the objections raised by the petitioner.

3. It appears that along with the above said rejection order, dated 12.1.2015, the respondent had issued a show cause notice dated 12.1.2015, calling upon the petitioner to file their objections on or before 19.1.2015 to complete the re-assessment proceedings. Pursuant to the same, the petitioner filed its detailed reply on 19.1.2015 objecting to the jurisdiction to reopen and also on merits of the case. A representative of the petitioner company appeared in person on 19.1.2015 before the respondent and requested for grant

of time till 28.1.2015 to file additional submissions. Thereafter, according to the petitioner, since no re-assessment order was served on the petitioner, a writ petition was moved before this Court, however, later it came to know that the re-assessment order was passed on 21.1.2015 and dispatched to the petitioner by speed post.

4. According to the petitioner, the respondent, without giving any opportunity of being heard, passed the impugned order on 20.1.2015 itself, whereas the notice of demand was issued on 21.1.2015, wherein, it was stated that the re-assessment was passed on 20.1.2015. The respondent dispatched the impugned order dated 10.1.2015 by speed post on 22.1.2015 at about 3.14 p.m. much after the petitioner company moved this Court. Therefore, the act of the respondent in completing the re-assessment is not in accordance with the principles of natural justice. Hence, the petitioner has come forward with the present writ petitions.

5. Two separate counter affidavits have been filed on behalf of the respondent in these writ petitions, stating that after serving notice under Section 148 of the Act, at the request of the petitioner, the reasons for reopening the assessment, were communicated to the petitioner. Pursuant to the same, the petitioner filed objections, which were considered and disposed of by a speaking order. Thereafter a show cause notice was issued, calling for explanation on the proposed additions. The petitioner has submitted the reply to the said show cause notice and after considering the same, the impugned order was passed. Therefore, before passing the impugned order, the petitioner was provided an opportunity. Since, there was a reason to believe that income has escaped assessment, the income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act, a notice under Section 148 of the Act was issued and the reasons were recorded for reopening the assessment and the petitioner has participated in the said reassessment proceedings by filing objections and reply to the show cause notice. It is stated that though the assessment order was passed on 20.1.2015, the date on the demand notice was inadvertently mentioned as 21.1.2015 and there is no bar under the Act that the demand notice is also to be dated as that of the assessment order. It is only a typographical error which was set right by passing a corrigendum on 4.2.2015 and thereby denied that the order was ante dated as alleged by the petitioner. It is also stated that the impugned notice has merged with the re-assessment order, dated 20.1.2015 impugned in W.P.No.2057 of 2015 and hence, the writ petition in W.P.No.1626 of 2015 challenging the impugned show cause notice, dated 12.1.2015 is not maintainable since, it has become infructuous virtually. As against the impugned orders, the petitioner is having efficacious alternative remedy under the Act and without exhausting the same, the petitioner has come forward with the present writ petition and hence, it is not maintainable.

6. It is also stated that the additions made under Section 68 and 69A are deemed income of the petitioner and fall under Chapter VI of the Act and not under any of the head of income specified in Chapter IV of the Act and therefore, the petitioner is not

entitled to set off and carry forward of losses as under Section 72 of the Act. This has been clarified by insertion of a specific section namely Section 115BBE. The above said aspect was not adjudicated in the assessment order and therefore, the question of change of opinion as contended by the petitioner is not valid and is only self service statement. It is also pertinent to note that the CIT (A) has upheld the addition under Section 69A made in the assessment under Section 143(3). With these averments, the respondent sought for dismissal of the writ petitions.

7. Mrs.Nalini Chidambaram, learned senior counsel appering for the petitioner would contend that after four years of the assessment year 2008-09, the respondent issued notice dated 10.12.2013 under Section 148, seeking to reopen the assessment, without any tangible materials and without a finding that income chargeable to tax has escaped assessment by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment which is a precondition for reopening the assessment, which is untenable and that the notice merely stated that the Assessing Officer has 'reason to believe' that the income chargeable to tax for the assessment year 2008-09 has escaped assessment and such ground is available only if the notice is within four years of the assessment year. According to learned senior counsel, reassessment notice is without jurisdiction since it has not been issued within the time limit of 4 years as prescribed under Section 149 of the Act. She has further contended that reassessment notice was issued based on an audit report without independent application of mind of the assessing officer and hence, it is not sustainable. She contended that parallel proceedings under Section 154 and 147 of the Act cannot be undertaken simultaneously and that the Assessing Officer ought not to have refused to set of unabsorbed depreciation of the year years and carried forward loss against deemed income under Sections 68 and 69A. She has further contended that the impugned proceedings were initiated only based on the audit report and the respondent has not applied his mind and only in circumstances where the audit party expresses its opinion on a question of law, re-opening of assessment based on audit objection is permissible. Therefore, the impugned notice under Section 148 of the Act based on an audit objection, which is not a valid ground to reopen a concluded assessment under Section 147 of the Act. She pointed out that the Assessing Officer has refused to set of unabsorbed depreciation of earlier years and carried forward losses against income computed under Sections 68, 69 and 69A of the Act by relying upon Section 115BBE, which was introduced by Finance Act, 2012 with effect from 01.04.2013 which cannot operate prospectively and since the issue under consideration in the present case is pertaining to assessment year 2008-09 and hence, Section 115BBE will not apply to the facts of the present case. In support of her contentions, the learned senior counsel relied upon the following decisions, viz.,

i) "CIT versus DRM Enterprises" reported in (2015) 55 Taxmann.com 181 (Bombay)

"Once the audit party raised objections, one of which was not accepted, then, the Assessing Officer was expected and in the given facts and

circumstances to record reasons for his belief. Those reasons have not been recorded, as is clear from the material placed before the Tribunal. Despite sufficient opportunity, the reasons for reopening the assessment having not been placed on record and as such, it was held that the appeals preferred by the Revenue do not raise any substantial question of law."

ii) "**Allanasons Ltd. Versus DCIT and others" reported in (2014) 369 ITR 648 (Bom)**

"In terms of the proviso to section 147 of the Income tax Act, 1961, where any assessment is sought to be opened beyond a period of four years from the end of relevant assessment year, two jurisdictional conditions have to be cumulatively satisfied: a) there must be reason to believe that income chargeable to tax has escaped the assessment and (b) such escapement of income should have arisen on account of failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment. The exercise of jurisdiction has to be examined on the basis of the reasons recorded at the time of issuing the notice. It is not open to the Revenue to substitute or make addition to the reasons recorded at the time of issuing the notice."

iii) "**Vinod Dhudlal Shah versus ACIT" (2014) 362 ITR 345 (Guj)**

"Beyond the period of four years, if any notice of reopening of assessment is issued in the absence of any failure on the part of the assessee to disclose fully and truly all the material facts, it would have no validity. In the original assessment proceedings, if the Assessing Officer, had examined the claim in detail after raising queries which were fully answered by the assessee, such action of reopening cannot be sustained in such circumstances."

iv) "**Jagat Jayantilal Parikh versus DCIT" (2013) 355 ITR 400**

v) Fenner (India) Ltd. Versus DCIT (2000)241 ITR 672 (Mad)

"Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such

escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment."Unless, the condition in the proviso is satisfied, the Assessing Officer does not acquire jurisdiction to initiate any proceeding under Section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. If the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice."

vi) CIT versus A.V.Thomas Exports Ltd." (286 ITR 603 (Mad)

vii) CIT versus Elgi Ultra Industries Ltd."(296 ITR 573 (Mad)

viii) Elforge Ltd versus DCIT (83 CCH 066)

8. On the other hand, the learned standing counsel appearing for the respondent/revenue would contend that though while issuing the impugned notice, no reasons were mentioned to reopen the assessment, however, later on request of the petitioner, reasons were intimated in conformity the provision of Section 147 of the Act and after considering the objections raised by the petitioner, the impugned proceedings were issued.

9. A notice under Section 148 of the Act, dated 10.12.2013 has been issued to the petitioner proposing to re-assess the income for the assessment year 2008-09 by the respondent, since the respondent has reason to believe that the income in respect of the said assessment year has escaped assessment within the meaning of Section 147 of the Act. It is relevant to extract Sections 147 to 149 of the Act, which read as under:

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he

may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss of or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assesses to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year."

"Explanation 1.--Production before the Assessing Officer of 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 foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

"**148.** Issue of notice where income has escaped assessment.--(1) Before making the assessment, reassessment or recomputation under Section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed ; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

"**149**. Time limit for notice.--(1) No notice under Section 148 shall be issued for the relevant assessment year,-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under Clause (b);

(b) if four years, but not more than six years, have

elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

Explanation.--In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 to Section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of Sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151.

(3) If the person on whom a notice under Section 148 is to be served is a person treated as the agent of a non-resident under Section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."

10. It is no doubt true that an assessment order once made is ordinarily final. Section 154 of the Act confers a power of rectification of mistakes apparent from the record. Section 147 of the Act empowers the Assessing Officer to assess or reassess the income in the circumstances mentioned therein. The power to reopen an assessment under Section 147 is in the nature of an exception to the general principle that an assessment order once made would be final. The power to reopen an assessment is not unbridled or unrestricted and it is subject to the proviso embodied in the section itself. The proviso prescribes restrictions on the power of reopening the assessment by limiting the time period to four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee (i) to submit a return under Section 139, or (ii) to respond to the notices issued under Section 142(1), or (iii) to respond to the notices issued under Section 148, or (iv) to disclose fully and truly all material facts necessary for the assessment of the income for

that assessment year. Explanation 1 to Section 147 lays down that mere production of the books of account or other evidence from which the Assessing Officer could, with due diligence, have discovered certain facts would not amount to disclosure within the meaning of the provision. Explanation 2 to Section 147 enumerates cases where it would presume that income chargeable to tax has escaped assessment. If the assessment is to be reopened after the expiry of four years from the end of the relevant assessment year, under the proviso to Section 147 of the Act, following conditions must exist, viz.,

(i) The Assessing Officer must have a reason to believe that any income chargeable to tax has escaped assessment for the any assessment year. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Assessing Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief has a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this extent, action of an Assessing Officer in starting the proceedings under Section 147 in respect of income escaping assessment is open to challenge in a court of law.

(ii) The Assessing Officer must have a reason to believe that such income had escaped assessment by reason of failure on the part of the assessee (a) to make a return under Section 139 ; or (b) to respond to the notice issued under Section 142(1) or 148 of the Act, or (c) to disclose fully and truly all the material facts necessary for his assessment of income for that year.

11. Therefore, it is clear that both the aforementioned conditions imposed must co-exist to confer jurisdiction on the Assessing Officer to reopen the assessment under Section 147. Sub-section (2) of Section 148 of the Act makes it imperative for the Assessing Officer to record his reasons before initiating proceedings. Where a notice under Section

147 of the Act is to be issued after the expiry of four years from the end of the relevant assessment year, the Commissioner or the Joint Commissioner, as the case may be, should be satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of such notice.

12. The power of reassessment conferred under Section 147 of the Act can be exercised within a period of four years from the end of the relevant assessment year without restrictions imposed by the proviso to that section. **However, after the expiry of four years from the end of the relevant assessment year, power of the Assessing Officer is restricted by the limitations imposed under the proviso, as stated earlier**.

13. Section 147 of the Act is the source of power of the Assessing Officer for reopening of the assessment. Section 148 contains procedural restrictions for issuance of a notice for exercise of the power of reopening of an assessment conferred under Section 147. Section 149 prescribes the time limit for issuance of a notice under Section 148. Therefore, the conditions laid down under Section 147 of the Act for the purposes of reopening the assessment must be satisfied before the notice can be issued. The conditions laid down in Section

147 are the jurisdictional facts necessary for the purpose of exercise of the power under Section 147. The jurisdictional facts prescribed under Section 147 must exist before a notice under Section 148 can be issued. The time limit prescribed under Section 149 of the Act for issuance of a notice under Section 148 is in addition to and not in derogation with the necessary conditions required to be satisfied under Section 147 of the Act. In other words, if the basic jurisdictional facts required for reopening of an assessment under Section 147 of the Act do not exist it would not be competent for the Assessing Officer to issue a notice under Section 148. Even where the jurisdictional facts prescribed under Section 147 exist and all conditions laid down under Section 147 and the proviso thereto are satisfied, the notice under Section 148 can be issued only after the Assessing Officer has recorded his reasons for doing so under Sub-section (2) of Section 148 and has further obtained the necessary sanction for issuance of the notice as required under Section 151 of the Act. Such notice is also required to be issued within the time limit prescribed under Section 149 of the Act. In fact, Section 149 of the Act, does not relax the restriction of four years prescribed in the proviso to Section 147 of the Act for issuance of a notice under the proviso to Section 147. **The restriction of four years would be applicable unless the income**

chargeable to tax has escaped assessment by reason of failure of the assessee to make a return under Section 139 or in response to a notice under Section 142 or 148 of the Act or the failure of the assessee to disclose fully and truly all material facts. If the reassessment is required to be made on account of the failure of the assessee to disclose fully and truly all material facts necessary for his assessment, obviously, the restriction of four years put under the proviso to Section 147 would not be applicable and notice can be issued after the expiry of a period of four years, but within the time limit of 7 or 10 years, as the case may be, prescribed under Section 149 of the Act. The object of Section 149 in imposing the restriction of seven years or ten years where the income likely to have escaped assessment is less than Rs.50,000 or Rs.1,00,000, as the case may be, is not to permit reopening of the assessment where the tax liability would not be significant as compared with the efforts that would be required for reopening of an assessment after a passage of seven or ten years, as the case may be. **To repeat, the time-limit imposed under Section 149 of the Act for issuance of the notice is not in derogation of and is not for enlarging the time restriction imposed under the proviso to Section 147 of the Act but to put an additional time restriction even where there is no**

restriction of time for reopening of the assessment on account of failure of the assessee to disclose fully and truly all material facts.

14. In the present case, it is not in dispute that the petitioner filed returns of income for the assessment year 2008-09, declaring loss of income at Rs.14,07,72,863/- and later on 26.3.2009, revised returns were filed declaring loss of 17,47,251. Thereafter, the assessment under Section 143(3) of the Act for the year 2008-09 has been concluded on 31.12.2010 determining the total income at Rs.415,20,26,520/- and the demand payable at Rs.187,31,76,820/-. It is pertinent to note that in the original returns filed on 30.9.2008 as well as in revised returns on 26.3.2009, the petitioner had not disclosed the material regarding the unabsorbed depreciation and business loss of earlier years, which according to the petitioner, since it was a loss return, the petitioner did not claim the same. It is only on 25.1.2011, a petition was moved under Section 154 of the Act, seeking rectification on the ground that there were mistakes apparent from records relating to certain additions such as Fringe benefit tax(FBT), non-allowing of brought forward losses and depreciation of earlier years. By proceedings, dated 6.9.2011, rectification order under Section 154 of the Act has been passed by the respondent, raising

demand of Rs.164,97,15,480/- as against original demand for Rs.187,31,76,820/-. Later, a notice under Section 148 of the Act, dated 10.12.2013 has been issued by the respondent proposing to reopen the assessment. It is to be noted that by proceedings, dated 8.12.2014, the respondent has narrated and communicated the reasons for re-opening the assessment under Section 147 of the Act for the assessment year 2008-09, which are extracted hereunder:

> "The scrutiny assessment was completed under Section 143(3) determining the total income at Rs.415.20 crores after making an addition of Rs.415.37 crores which included Rs.408.78 crores made under Section 68 & 69 A. The assessment was revised which interalia included to allow the assessee's claim for set off of unabsorbed depreciation aggregating to Rs.45.18 crores relating to assessment year 2004-05 and unabsorbed business loss of Rs.4.15 crores relating to assessment year 2005-06. The above addition under Section 68 & 69 A is deemed income of the assessee and does not come under any heads of income specified in Chapter IV of the Income-tax Act, 1961 and hence brought forward business loss and depreciation cannot be set off against this as per Section 72."

15. Therefore, a perusal of the above, it indicates that the Assessing Officer has a reason to believe that the income, viz.,

unabsorbed depreciation and business loss and depreciation, which was allowed to be set off by the respondent in revision proceedings, dated 6.9.2011, has escaped assessment within the meaning of Section 147 of the Act and accordingly, the respondent has rightly initiated the proceedings. It is to be noted that pursuant to the above notice and communication of reasons, the petitioner has raised objections which were duly considered by the respondent and rejected by proceedings dated 12.1.2015. Thereafter, the respondent proceeded with the reopening of the assessment, wherein, it is not in dispute that the petitioner had participated in the said proceedings and by proceedings, dated 12.01.2015, the respondent has issued impugned show cause notice by way of a final opportunity, calling for explanation as to why the additions made under Sections 68 and 69A of the Act, should not be taxed separately without giving benefit of setting off the deemed income under Section 69A with brought forward business loss and unabsorbed depreciation.

16. The main contention of the petitioner is that there is no failure on the part of the petitioner in not disclosing fully and truly all materials facts necessary for the assessment year under consideration and in the absence of the same, the assumption of jurisdiction by the respondent under Section 147 of the Act, after expiry of four years

from the end of the relevant assessment year, is illegal and invalid and thereby, the impugned proceeds cannot be sustained. This contention raised on behalf of the petitioner, in my considered opinion, is fallacious and has no force at all. It is curious enough to note that as observed above, in the original returns filed by the petitioner on 30.09.2008, the petitioner had not at all disclosed fully or truly all material facts regarding the income, viz., unabsorbed depreciation and business loss and depreciation, which the Assessing Officer has reason to believe that the same has escaped assessment within the meaning of Section 147 of the Act. Therefore, when admittedly, the material which is the subject matter of the proceedings under Section 147 was not disclosed in the original returns filed by the petitioner on 30.09.2008, it cannot be construed that the reopening of the assessment is beyond four years. In fact, the petitioner has, for the first time, has disclosed the subject material, viz., unabsorbed depreciation and business loss of earlier years, only on 25.1.2011 in the form of rectification petition under Section 154 of the Act, seeking rectification, wherein, a rectification order has been passed by the respondent on 6.9.2011. In such circumstances, since the original returns filed by the petitioner got merged with the rectification order, dated 6.9.2011, the period of four years has to be calculated not from

the end of the relevant assessment year, but should be from the date on which, the petitioner has filed a rectification petition under Section 154 of the Act, i.e. on 25.1.2011 wherein, as already stated, for the first time, brought the subject material, viz., unabsorbed depreciation and business loss of earlier years. Then, the reopening of the assessment is well within the period of four years and it cannot be construed that the respondent has proceeded to reassess the income for the assessment year 2008-09 beyond four years since the notice under Section 148 of the Act has been issued on 10.12.2013. Therefore, once it is clear that the reassessment was proposed within the period of four years, the present case does not fall under proviso of the Section 147 of the Act, which makes an embargo on the assessing officer to make reassessment beyond four years on the account of failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. Hence, the issuance of the impugned proceedings, viz., show cause notice under Section 148 of the Act, dated 10.12.2013 and the reassessment order, dated 20.1.2015 by the respondent on the ground that he has reason to believe that the income, which is chargeable to tax for the assessment year 2008-09 has escaped assessment, in my opinion, are well within the jurisdiction of the respondent and legally sustainable and I do not

find any arbitrariness in such reopening of the assessment. In such view of the matter, the reliance placed on the decisions, cited supra, by the learned senior counsel, would not any way help the petitioner since they dealt with the issue of matter wherein, the reassessment has been resorted beyond the period of four years.

17. As regards the contention that the reassessment based on audit report without independent application of mind by the Assessing Officer is not sustainable, is concerned, I do not find any force in the said contention since the respondent has given cogent reasons in his speaking order, dated 12.1.2015 while rejecting the objections raised by the petitioner, for re-opening of the assessment and therefore, it cannot be stated that the respondent has not applied his mind and solely resorted to based on the audit report. In fact, the audit party is entitled to point out a factual error or omission in the assessment and it is settled law that re-opening of the case on the basis of a factual error pointed out by the audit party is permissible under law. It has been held so in the case of "CIT versus P.V.S.Beedis" reported in (237 ITR 13), wherein, the Hon'ble Supreme Court has held as under:

> "The dispute as to whether reopening is permissible after audit party expresses on opinion on a question of law is now being considered by a larger Bench of the Supreme

> Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Re-opening of the case on the basis of a factual error pointed out by the audit party is permissible under law. .."

18. In view of my above conclusion that the re-opening of the assessment resorted to by the respondent is valid in law, all the other grounds raised on behalf of the petitioner, such as, unabsorbed depreciation of earlier years and carried forward losses can be set off against income computed under Sections 68, 69 and 69A of the Act, applicability of Section 115BBE and parallel proceedings under Sections 154 and 147 cannot be undertaken simultaneously, etc., in my opinion, are the subject matter of the appeal inasmuch as, as against the impugned proceedings, the petitioner is having an efficacious remedy. In this regard, it is worthwhile to refer to the decision of the Hon'ble Supreme Court, reported in ***CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603*****, at page 611,** wherein, it has been held as under:

> "**15.** Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of

judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case*[22], *Titaghur Paper Mills case*[3]and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co.* v. *State of Haryana*[40]this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a

mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of the instant case. In light of the same, we are of the considered opinion that the writ court ought not to have entertained the writ petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the reassessment orders passed and the consequential demand notices issued thereon."

19. In view of the above discussion, the Writ Petitions fail and they are dismissed. The petitioner is permitted to move the appeal by approaching the appellate authority in accordance with law and on such approach, the concerned appellate authority is directed to consider the same without insisting upon the limitation aspect. Generally, this Court is not inclined to give such direction to the statutory authorities to ignore the limitation aspect since it is the discretionary exercise of the authority under the statute, however, considering peculiar circumstances of this case, wherein, the petitioner has been pursuing the matter before this Court under the bona fide impression that the reopening of the assessment itself resorted to by

the respondent is not valid beyond four years, which was answered in negative, this Court feels it appropriate to direct the authority as above. No costs. Consequently, connected MPs are closed.

Suk 11-06-2015

Index: Yes/No
Internet: Yes/No

S.VAIDYANATHAN, J.

suk

COMMON ORDER

W.P.NOs.1626 & 2057 OF 2015

11-06-2015