



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 01.12.2022

PRONOUNCED ON : 28.12.2022

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD).Nos.1156, 1158 and 2308 to 2326, 2328, 2329, 2331, 2332, 2333, 2334, 2336, 2338, 2339, 2340, 2346 and 2480, 2481, 2483, 2484, 2485, 2487, 2489, 2490 to 2506, 2508, 2510, 2512, 2514 and 2515 of 2020

and

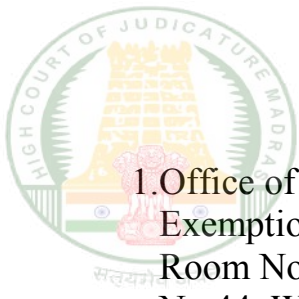
WMP.(MD).Nos.12778, 12781, 914, 915, 15383, 15415, 15351, 15352, 1987, 15354, 15350, 15353, 15355, 15356, 15357, 15358, 15359, 15360, 15384, 15386, 15388, 15389, 15402, 15403, 15405, 15407, 15408, 15411, 15412, 15413, 15414, 15416, 1960, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1995, 2147, 15339, 15337, 15338, 15340, 15341, 15344, 15345, 15346, 15347, 15349, 15367, 15368, 15370, 15371, 15372, 15373, 15375, 15376, 15378, 15380, 15390, 15394, 15396, 15397, 15398, 2130, 2134, 2135, 2136, 2137, 2138, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2160, 2162, 2163 and 2164 of 2020

Cause title in W.P.(MD).No.1156 of 2020:

M/s. The Karur Kongu Charitable Trust,
Represented by its Chairman and Secretary,
Door No.464, Vaiyapurinagar,
Second Cross, Sengunthapuram Road,
Karur- PIN- 639 002.

... Petitioner

Vs.



1.Office of the Income Tax Officer,
Exemptions Ward,
Room No.210, 2nd Floor,
No.44, Williams Road,
Cantonment, Trichirapalli-620 001.

2.Income Tax Officer,
Ward 1, Karur.

... Respondents

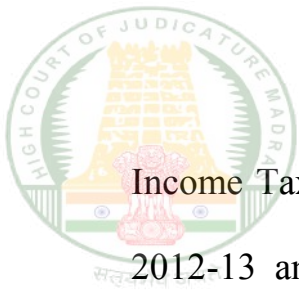
Prayer:Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for records pertaining to the notice dated 29.03.2019 issued by the 1st Respondent under Section 148 of the Income Tax Act, 1961 for the assessment year 2012-13 also the rejection of objections by proceedings dated 19.12.2019 and quash the same.

For Petitioner : Mr.ARL.Sundaresan,
Senior Counsel
for Mr.C.T.Murugappan

For Respondents : Mr.N.Dilipkumar
Senior Standing Counsel

COMMON ORDER

This is a batch of sixty-one (61) writ petitions of which two writ petitions are filed by the Petitioner Trust while the remaining fifty-nine (59) writ petitions are filed by the Trustees. The Petitioner/ Trust has filed W.P.(MD).Nos.1156 and 1158 of 2020 challenging the rejection of objections filed by the petitioner/ Trust vide proceedings dated 19.12.2019 in response to the notices dated 29.03.2019 under Section 148 of the



Income Tax Act, 1961 (hereinafter referred to as “the Act”) for the assessment years 2012-13 and 2013-14 respectively, whereas the Petitioners/ Trustees in other writ petitions have filed the remaining writ petitions challenging the orders of assessment under Section 143(3) of the Act read with Section 147 of the Act vide order dated 16.10.2019, 13.12.2019, 16.12.2019, 17.12.2019 and 30.12.2019.

2. I intend to deal with the writ petitions filed by the Trustees first. It is submitted by both the learned Senior Counsel for the petitioner as well as the Senior Standing Counsel for the Respondents that insofar as all the Trustees are concerned, the facts and questions are identical and thus it may not be necessary to examine or deal with each writ petition filed by the Trustees individually.

3. A preliminary issue has been raised by the learned Senior Standing Counsel for the Department that the petitioner / Trustees had filed an appeal before the Commissioner of Income Tax – Appeals, challenging the order dated 16.10.2019, 13.12.2019, 16.12.2019, 17.12.2019 and 30.12.2019 and thus the writ petitions filed thereafter challenging the very same orders of assessment ought not to be entertained. To the contrary, the learned Senior Counsel for the petitioner would try and justify the



filing of the present batch of writ petitions and the need for this Court to entertain the same by submitting that the order of assessment came to be passed without even disposing of the objections filed by the Petitioners/ Trustees which is clearly arbitrary and contrary to the procedure contemplated for re-assessment under the Act. As a matter of fact, the objections of the Petitioners/ Trustees were overruled vide orders dated 26.12.2019, 28.12.2019, 29.12.2019, 30.12.2019 and 31.12.2019 subsequent to the orders of assessment. It is submitted that these appeals were filed in view of recovery proceedings being allegedly initiated. However, on obtaining legal opinion, the petitioners were of the view that the impugned order suffers from want of jurisdiction and thus the present batch of writ petitions were filed.

4. It is submitted by the learned Senior Standing Counsel for the Respondents that having filed an appeal, the subsequent filing of writ petition cannot be maintained as the legal position in this regard is fairly well-settled that parallel remedies cannot be pursued. The above attempts / practise is frowned upon by Courts holding that a petitioner cannot ride two horses. This Court finds merit in the above submission of the learned Senior Standing Counsel for the Respondents that having chosen to avail a statutory remedy, it may not be permissible for the petitioners to file a writ petition



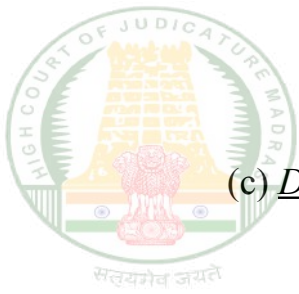
thereafter. Though, the above is not an inviolable rule, nevertheless, Courts have consistently refused to exercise discretion under Article 226 of the Constitution of India, when parallel remedies are pursued. In this regard, it may be relevant to refer to the following Judgments:

(a) Jai Singh v. Union of India, (1977) 1 SCC 1:

"4. In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time."

(b) A Division Bench of this Court in 2021 SCCOnline Mad 10612 in W.A. 2246 of 2021 dated 7.6.21 in the case of Babu Amarnath held as under:

"4. The submission made by the learned senior counsel for the appellant cannot be accepted, as having accepted the order of the learned Single Judge, even though writ appeal has been filed, he has given a representation to the Appellate Authority. He cannot be permitted to ride two horses at the same time one by approaching the Appellate Authority for reduction in punishment and keep the matter pending and another by filing the present writ appeal contending that enquiry held to be incorrect, the matter shall go back to the Enquiry Officer for the purpose of proceeding afresh that is to set the clock back prior to the Disciplinary Authority order."



(c) Deeksha Suri v. Income-tax Appellate Tribunal, 1997 SCC OnLine Del 861:

“43. We cannot resist observing that the petitioners are attempting at riding two horses at a time. They are parallely pursuing the remedy under Section 256 of the Income-tax Act before the Tribunal and under Articles 226/227 of the Constitution before the High Court, agitating the very same issues before two different for a simultaneously. They must thank themselves for creating a proverbial situation of riding two horses at a time, and the proverbial result has to follow they must fall. We are constitutionally obliged to deny indulgence in writ jurisdiction to the petitioners on the ground of availability of efficacious alternative remedy to them. By way of abundant caution we place on record that the finding on various questions of law recorded by us in this judgment are for the purpose of holding that the petitioners have an alternative efficacious remedy available under Section 256 of the Act. We do not intend to pre-empt the jurisdiction, of the Tribunal to hear and dispose of the petitioners application under Section 256 on its own merits and taking such view of the facts and law as it may deem fit to take unobsessed by any of the findings recorded hereinabove. Subject to this observation the petitions are dismissed though without any order as to costs.”

(emphasis supplied)

5. In view thereof, I am not inclined to entertain the above batch of writ petitions filed by the Petitioners/Trustees on the limited ground that the petitioners had availed alternative remedy by way of appeal even before filing of the present set of Writ Petitions. I am not expressing any views on the merits including the ground of the



proceedings being bad for want of jurisdiction. It is open to the Petitioners/Trustees to pursue their statutory remedies by way of an appeal which is availed of by the petitioners/ Trustees and agitate all grounds that may be available, including lack of jurisdiction before the Appellate Authority.

6. Now, coming to the writ petitions filed by the Petitioner/Trust challenging the rejection of the objections filed by the Petitioners against re-opening the assessment for the assessment years 2012-13 and 2013-14, it may be relevant to briefly set-out the facts:

6.1. Brief facts:

i) The Petitioner/ Trust was established as per Trust Deed dated 04.02.2011 by 32 Trustees. The activity of the trust includes running of a PolyTechnic College in the name of Kongu High-Tek PolyTechnic College. The Petitioner/ Trust was granted registration under Section 12AA of the Income Tax Act, 1961, from the assessment year 2011-2012 vide order of the Commissioner of Income Tax 1, Trichy in No.6162E(30)/2011-12/CIT-1/TRY dated 14.02.2012 and approval under Section 80G (5)(vi) of the Act vide order in No 6162E (34) 2011-12/CIT-1/TRY dated 14.02.2012.

ii) All the 32 Trustees collectively purchased land to an extent of 17.99 Acres



vide four Sale Deeds dated 09.03.2011 in their individual names during the financial year 2010-11, against a total consideration of Rs.2.60 Crores. The extent of land purchased by each trustee may not be uniform. The Trustees transferred the land to an extent of 5.02 acres out of 17.99 acres of land in favour of the Trust for a sale consideration of Rs 4.07 Lakhs.

iii) The Polytechnic College building was constructed in the said 5.02 acres of land. The construction activity was spread over three years.

iv) On 23.01.2013, a survey was conducted by the 2nd Respondent at the premises of the Petitioner /Trust under Section 133A of the Act. During the Survey, the 2nd Respondent recorded statement on oath, impounded documents and some loose sheets and an estimate by a registered valuer of the proposed construction of the PolyTechnic College, from the Petitioner's premises.

v) Thereafter, the 1st Respondent passed an assessment order dated 22.01.2016 for the assessment year 2013-2014 resulting in a taxable income of "NIL".

vi) After passing the assessment order dated 22.01.2016 for the assessment year 2013-2014, as stated above, the 1st Respondent issued a notice dated 29.03.2019 for the assessment years 2012-2013 and 2013-2014 under Section 148 of the Act for reassessment. The petitioners sought for the reasons for reopening the assessments.



vii) In response to the petitioner's request the 1st Respondent furnished the reasons for reopening vide communication dated 14.06.2019. The same is set -out below:

Assessment Year 2012-13:

“For the A.Y.2012-13 the Assessee Trust has reflected cost of construction at Rs.1,57,08,037/- against total cost of construction of Rs. 4,99,92,439/- with difference in cost of construction of Rs.3,42,84,402/-, which is unaccounted investment chargeable to tax that has escaped assessment within the meaning of Section 147. Further, the Trustees sold 5.02 acres to trust as per the sale deed dated 01.06.2011 for consideration of Rs.4,07,000/- and the cost reflected in the balance sheet is Rs.4.47.315/-. This land is part of the total land of 17.99 acres purchased by the trustees for Rs.2,60,50,000/- including the unaccounted on - money of Rs.2,25,00,000/-. The trustees transferred part of 17.99 acres, Le. 5.02 acres to the Trust Therefore, source for corresponding payment of Rs.72,69,094 4,47,315) is to be treated as unexplained income of the trust. This sum ought to be assessed in the hands of the trust also for the reason that the trust owns 5.02 acres of land. In these circumstances, have reason to believe that the undisclosed income of the trust of Rs.68,21,779/- was paid for purchasing 5.02 acres of land, which escaped assessment for the A.Y.2012-13. Similarly, have also reason to believe that the cost of construction of Rs.3,42,84,402/- has escaped assessment for the A.Y.2012-13 within the meaning of section 147 of the



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Assessment Year 2013-14:

“Basis of forming reason to believe and details of escapement of income:

The construction activity is spread over in both the financial years 2011-12 and 2012-13. As per the valuation Report, the total cost construction is Rs.17,02,16,000/-. If this is proportionately bifurcated for both the financial years the cost would be Rs.4,99,92439/- for the Financial Year 2011-12 and the cost would be Rs.12,02,23,561/- for the Financial Year 2012-13 based upon the cost of construction admitted by the Assessee trust which is at 29.37% and 70.63%.

As the proportionate value of the building for the A.Y.2013-14 has to assessed to tax in this AY.2013-14 works out to Rs.8,24,50,872/-, I have a reason to believe that income has escaped assessment within the meaning of sec.147 of the IT Act, 1961.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act as all the material facts necessary for assessment have not been made as there is mismatch in the value of building as accounted in the balance sheet and valuation report. Accordingly, attracting provisions of Explanation 1 of section 147 of the Act.”

7. In response, the Petitioner/ Trust filed its objection dated 12.12.2019 which is



extracted below:

“With reference to the above, we have received this authority's letter dated 14.06.2019 providing reasons for reopening of the assessment. In this connection, we humbly submit that we have the following objections for reopening the assessment

i)The notice is issued without any proper reasons to believe or is based on vague and factually incorrect assumptions that income has escaped assessment and hence lacks jurisdiction

The reasons cited alleges that there is an unaccounted investment (Cost of Construction) to the tune of Rs.3.42 Crores and undisclosed income to the tune of Rs.68.21 Lakhs which is paid for acquiring land from the trustees. With regard to the unaccounted investment of Rs.3.42 Crores, we humbly submit that this authority had arrived at the figure on a notional basis with no relevant material on hand. This authority has not clearly specified as to how this figure is arrived at. Presumptions cannot be the basis for forming a reason to believe for issuing notice u/s. 148 of the Act.

With regard to the undisclosed income of Rs.68.21 Lakhs for purchase of land from trustees, this authority had alleged that this forms part of the land measuring 17.99 acres bought by the trustees by making on money payment to the tune of Rs.2.25 Crores. Land measuring 5.02 acres was transferred by the trustees to the trust for a consideration of Rs.4.47 Lakhs. This authority has claimed that the trustees had made on money purchase to the tune of Rs.2.25 Crores and transferred a part of the land measuring 5.02 acres to the trust. So, the source for the transfer of 5.02 acres which is proportionately valued at Rs. 72.69 lakhs must be taxed as income of the trust.



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In this connection, we wish to submit that there is no material on record to show that the assessee trust had in fact paid on money to the trustees over above the sale value registered. The sale deed for the transfer of land to the trust mentions the consideration of Rs.4.47 lakhs and we humbly submit that it is the prerogative of the trustees and the trust to decide on the consideration involved and not the prerogative of the assessing officer. This is a presumption on the part of this authority that the transfer by the trustees to the trust also involves unexplained investment of Rs.72 lakhs and this cannot be a reason for issuing notice u/s 148. Moreover, the on-money payment made by the trustees for purchase of the 17.99 acres has been dealt with during the original assessment and appropriately taxed. Further treating Rs.68.21.779/- (proportionate value 5.02 Acres) without any basis and evidence as unexplained income of the trust under the purview of reassessment again is an exercise for double taxation of an income as the trustees have been taxed earlier.

None of the reasons which formed the basis for issuing notice is based on facts and this authority had acted on assumptions and believed it to be true We humbly submit that going through the reasons provided by this authority it evokes doubt whether proper sanction was ever accorded to this notice by the concerned higher authorities. As the reasons provided lack proper basis this reopening lack jurisdiction and we request this authority to drop the proceedings.

ii) Basis for forming the reasons to believe is not provided, making the allegations a mere assumption and reopening for making roving enquiries:

The reasons provided by this authority alleges that there are unexplained



investment and undisclosed income by the trust. Apart from this, this authority has not given any basis or furnished details of the materials for forming the belief. It is established practice that the basis for forming belief should be from the material on record and it must be communicated in the reasons provided. This authority has not provided the basis for the belief bringing in doubt whether there was a reason to believe or whether this reassessment is taken up on the direction of any other external authority

*iii) Reopening of assessment cannot be made to revise its own order.
Mere change of opinion cannot be a reason for reopening:*

During the year 2013, a survey u/s. 133A was conducted on the assessee trust and certain materials and loose sheets were impounded by the income tax authorities. It will be pertinent to mention here that the survey had taken place without any jurisdiction. Section 133A as it existed then did not stipulate conducting survey on premises. of a trust conducting charitable activity. The assessee trust in order to cooperate with the proceedings did not dispute the survey jurisdiction. Consequently, scrutiny proceedings were initiated on the trust for the assessment year 2013-2014 and the assessment was closed without making any addition on the trust. The allegations which are made now have been raised during the scrutiny proceedings and it was explained to the satisfaction of the assessing officer the fact of which is admitted in the assessment order itself.

Now, after four years this authority on after thought having a change of opinion have initiated the reopening proceedings to revise or review their own order. CIT, Delhi Vs. The Kelvinator of India Ltd. (2010) 320 ITR 561(SC).



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iv) No fresh material to initiate proceeding u/s. 147 after a period of four years from the end of the assessment year:

As mentioned above scrutiny proceedings were taken up in the case of the assessee trust and details were called for based on the statements and the impounded materials. With regard to the allegations by this authority, these were taken up during the original assessment proceedings for the Assessment year 2013-2014 and the trust had explained the details called for. After thorough scrutiny the assessing officer closed the assessment and made no addition on the trust. It would be appropriate to mention here that simultaneously the assessment proceedings were taken up for all the trustees and certain additions were made on the trustees as the alleged undisclosed income was not pertaining to the trust.

Now, after four years without any valid reasons to believe notice was issued u/s.148 assuming arbitrary powers to reopen the case merely on change of opinion on the basis of same facts and circumstances which were already considered by this authority during the original proceedings. This tantamount to revision of its own order which is elsewhere provided in the act. The reasons provided by this authority also does not mention any fresh material to suggest that the assessee trust had fully failed to disclose the facts. Reopening after four years can be resorted to only when the assessee is at fault and not when the income tax authorities are at fault. Reopening after four years based on reappraisal of existing material is invalid. *Techspan India (p)Ltd. Vs. ITO 92 Taxmann.com 361 (SC) (2018)*. In a situation where according to Assessing Officer he failed to apply his mind to relevant material in making assessment order, he cannot take advantage of his own wrong and reopen assessment by



taking recourse to provisions of section 147 Asian Paints Ltd. v. Dy. CIT (2009) 308 ITR 195.

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v) Extended period beyond four years under first proviso to sec. 147 necessarily mandates that there must be a failure on the part of the assessee to fully disclose facts and the reasons provided should specifically mention the same:

This authority while providing the reasons for the reopening of assessment for the assessment year 2012-13 did not mention that there was any failure on the part of the assessee to fully disclose facts. This authority had mentioned that the income has escaped assessment and hence the reopening. As mentioned above there was no failure on the part of the assessee trust and the original assessment proceeding for the Assessment year 2013-2014 was completed without making any addition. As the assessee trust had cooperated fully with the original assessment and disclosed all facts and the reasons provided for reopening do not mention the failure on the part of the assessee, then it is logical to conclude that the reopening is an exercise to revise its own order and is liable to be dropped. It is necessary for the AO to first state that there is a failure to disclose fully and truly all material facts. If he does not record such a failure, he would not be entitled to proceed u/s147 NYK Line (India) Ltd. v. Dy. CIT (2012) 68 DTR 90 (Bom)(High Court) & Titanor components Ltd. Vs. ACIT (2011) 60 DTR 273 (Bombay).

vi) Protective reassessment on the trust & trustees means that the assessing officer is not sure as to whose income has escaped to form a firm belief:



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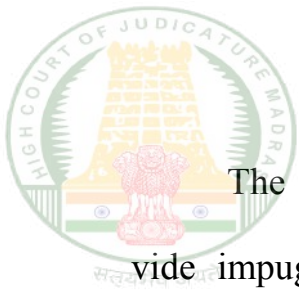


The alleged income which is an unexplained investment for construction of polytechnic building is being reopened for both the trust and the trustee simultaneously, this is in effect a protective assessment. It is apparent from the of assessment in both the trust and the trustee that the assessing officers are not sure about the taxability of the income in the hands of the trust of the trustees. Therefore, it can be concluded that there is no reason to believe as claimed by the assessing officer to reopen the assessment. Sagar Enterprises Vs.ACIT (2002) 124 Taxman 641 (Guj).

vii) The notice lacks jurisdiction as the sanction u/s.151 is not proper.

The notice u/s 148 can be issued after four years from the end of the relevant assessment year only after the sanctioning authority has satisfied himself based on the reasons provided by the Assessing officer that it is a fit case for issue of such notice. Based on the above objections it is most respectfully submitted that the notice and the proceedings suffer from irreparable flaws and proper sanction could not have been obtained or a satisfaction is received in a mechanical manner by the approving authority without application of mind. We would like to request your good self to kindly provide me with the satisfaction note recorded by CIT (Exemptions) as claimed by this authority in the notice u/s 148.

Based on the above-mentioned objections, wemost humbly submit that the notice u/s 148 is not in order and request this authority to drop the consequential proceedings.”



The above objections of the Petitioner/ Trust was rejected by the Respondents vide impugned order dated 19.12.2019. It is this order rejecting the petitioner's objection which is under challenge in the two writ petitions viz., W.P.(MD).Nos.1156 and 1158 of 2020 filed by the Petitioner/Trust.

8. Against the above background, I shall proceed to examine the grounds/issues raised in the two writ petitions filed by the Petitioner/Trust:

8.1. Case of the Petitioners:

In short, the case of the petitioners is the following:

a. That though the Trustees had purchased land to an extent of 17.99 acres against a consideration of Rs.2,60,50,000/- and the proportionate value of the land which was transferred to the Trust by the Trustees i.e., to the extent of 5.02 acres works out to Rs.72,69,094/- however, the Trustees have chosen to transfer the said extent of 5.02 acres to the petitioner/ Trust for a consideration of Rs.4,47,315/-. There is nothing which would prohibit the Trustees from doing so and thus any reliance on the above fact to enhance the income or fasten liability on the Petitioner/ Trust is misconceived.

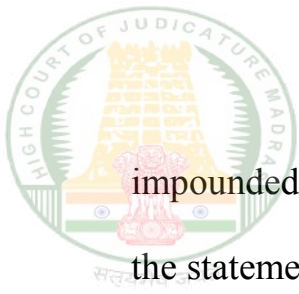
b. Secondly, the fact that the cost of construction of the building was valued at



Rs.17,02,16,000/- which is based on the valuation report was allegedly available and part of the impounded material during the survey proceeding. The original assessment having been made after the survey, the impugned assessment proceeding to reopen is a mere change of opinion without new tangible material and thus not a circumstance which would enable exercise of power of re-assessment. It is further contended that the assessing officer having stated in the original assessment that it was a result of survey proceedings, the same is again indicative of the fact that the impugned proceeding to reopen the assessment is a result of change of opinion.

c. It is submitted that the college building was constructed out of the voluntary contributions made by the Trustees/ other parties and out of the fees collected from students during the Assessment year 2012-13 and 2013-14. The Petitioner /Trust also obtained a loan from the Bank of India during the financial year 2013-14 towards construction cost.

d. That the survey proceedings itself is without jurisdiction inasmuch as Section 133A was amended to enable survey being conducted in respect of “Charitable Institution” only with effect from 01.04.2017, whereas the Survey of the petitioner/ Trust was conducted on 23.01.2013 i.e., prior to the amendment enabling survey of charitable institutions under Section 133A of the Act and thus the materials



impounded/ gathered cannot be used or form the basis in/ for any proceeding nor does the statement on oath during survey have any sanctity/ legal value/basis.

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e. It is submitted that the reassessment proceedings on the Trust and the Trustees cannot be sustained without indicating which of the two is substantive or protective, which the Respondents failed to indicate.

8.2. Case of the Respondents:

To the contrary, the learned Senior Standing Counsel for the Respondents resisted the same on the premise that the writ petition itself cannot be entertained for the following reasons:

a. That the writ petition challenging the rejection of the objections to re-opening of assessment is pre-mature.

b. The submission that the re-assessment proceedings is based on change of opinion, cannot be sustained inasmuch as the order of assessment dated 22.01.2016 does not indicate application of mind to the aspect of undervaluation of land purchased by the Trustee to the extent of 5.02 acres nor the source of the cost of construction. In other words, there was never a formation of any opinion in the first place in respect of undervaluation of land and source of funds for construction of the



building for the initiation of re-assessment to be bad for want of jurisdiction on the ground of being a change of opinion.

c. Assuming that the survey was illegal, it is submitted by the Learned Senior Standing Counsel for the Respondents that it cannot be a reason for the Respondents being barred from using the material gathered / collected during the course of an illegal survey.

d. In response to the submission of the petitioners that in the assessment of the Trust as well as the Trustees it has not been indicated as being protective or substantive, it was stated as matter of fact that both are substantive. Even assuming that one is substantive and the other protective, failure to indicate which is substantive or protective would not vitiate the proceedings.

9. Heard both sides, perused the materials on record. Both the learned Senior Counsel for the Petitioner and the learned Senior Standing Counsel for the Respondents had filed Written Submissions/Notes, reiterating the grounds and had referred to judgments in support of their contentions. I do not intend to propose to deal with the same as I am not inclined to entertain these writ petitions except to state that the reference to any judgments is only for the limited purpose of indicating that this



case does not warrant interference under Article 226 of the Constitution as it is necessary for the petitioners to participate in the assessment proceeding and raise any/all grounds before the assessing authority.

10. As stated above, I am of the view that the writ petitions filed by the Trustees cannot be entertained at this stage for the following reasons:

a. The case of the petitioners / Trustees is that the re-opening of assessment is based on change of opinion. There appears to be lack of clarity, if there was application of mind by the assessing officer while making the original assessment with regard to the above issues i.e., undervaluation of land and source of fund for construction of building. This would be evident from the assessment order which is extracted below:

"The assessee is a Trust constituted by execution of trust deed dated 04.02.2011. The assessee Trust was granted registration u/s 12AA from the Assessment Year 2011-12 vide order of the Commissioner of Income tax-1, Trichy in No.6162E(30)/2011-12/CIT-1/TRY date 14.02.2012 and approval u/s 80G(5) (vi) of the Act vide order in No. 6162E(34)/2011-12/CIT-1/TRY dated 14.2.2012.

2. The assessee Trust filed the return of income for Asst. Year 2013-14 on 30.09.2013 showing total Income of NIL after claiming exemption u/s 11.



The case was selected for scrutiny by issue of notice u/s 143(2) of the Act dated 29.5.2014 and 30.09.2014 which was duly served on the assessee on 12.06.2014. Notice u/s 142(1) along with questionnaire dated 27.05.2015 was issued calling for details and production of books of account. In response to the notices, Shri. R. Subramanian,CA, A/R appeared from time to time and furnished the books of account, necessary details which were carefully examined.

3. Perusal of the trust deed reveals the following objects - To carry out all social and community service activities and charitable activities wide enough for the benefit there of irrespective of caste, creed, color, community, religion and for relief of poor, advancement of education provision of medical and advancement of any object of general and/or public utility decided to be executed by the Trust.

4. It is observed that the trust is running Polytechnic college by name "Kongu Hi-Tek Polytechnic College" at Karur. Sources of funds for carrying out the stated activities are derived by way of Fees collected from the students and Voluntary contribution.

5. The financial statements filed along with the return of income for the AY 2013-14 has been examined. The assessee trust has admitted Rs. 4,17,50,000/- as corpus donation receipts. The assessee has submitted the necessary details of the donors. It is observed that the assessee trust has admitted gross income of Rs. 1,07.91,560/-. The trust has applied Rs.82,03,840/- as revenue expenditure(exclusive of depreciation) and Rs.4,86,28,307/- towards



acquisition of fixed assets for the purposes of the above objects. The application of the income of the previous year 2012-13 relevant to the AY 2013-14 for the purposes of the above said charitable activities is above the prescribed rate of 85%. Therefore, it is to be mentioned that the assessee trust has fulfilled one of the main conditions for claiming exemption u/s. 11 of the Act.

All the other conditions for claiming exemption u/s 11 are satisfied and in view of the foregoing observations, the total income of the assessee Trust is computed as under:

Total income : Rs. 1,07,91,560/-

Amount required to be applied @85% : Rs 91,72,826/-

Amount actually spent:

Revenue Expenditure : Rs. 82,03,840/-

Capital expenditure : Rs. 4,86,28,307/-

: Rs 5,68,32,147/-

Excess income applied : Rs. 4,60,40,587/-

Taxable income : NIL”

A reading of the above order of assessment would show that there is no reference either to the survey or the issue of undervaluation of the land or the sources of funds for the cost of construction of the building. The submission of the Respondents that there is no formation of opinion on the above issues for the



proceedings to be hit by the restriction of reassessment not being permitted on the ground of change of opinion *prima facie* appears to have merit. While this Court has no doubt that reassessment on the basis of change of opinion is bad for want of jurisdiction. There is merit in the submission of the learned counsel for the Revenue, inasmuch as for challenging the initiation of reassessment or assumption of jurisdiction of reassessment on the ground of change of opinion, it may be necessary to show / demonstrate that while framing the original assessment the Assessing Officer had applied its mind and formed an opinion and the reassessment is with reference to the very same issue and on the basis of mere change of opinion, without any new tangible material which in the facts of the present case can be arrived at only on a deep/close scrutiny of the documents and books of accounts. Further, with regard to the assessment year 2012-13 as no assessment has been made, the only requirement for the Revenue is to show escapement of assessment to assume jurisdiction.

11. While it is trite law that reassessment cannot be on the basis of mere change of opinion as held by the Supreme Court in *Kelvinator* reported in 320 ITR 561 (SC) and the other judgments relied upon by the Petitioner. Whether there is change of opinion or otherwise could either be apparent on the face of the record or may require



an investigation of facts to arrive at the said conclusion*. The present case falls under the latter category and to decide the issue viz., whether the assessment is on the basis of change of opinion, a close scrutiny of documents and books of accounts is necessary. The above aspect viz., reassessment is bad as having been made on change of opinion, may require investigation into facts in the present case. Therefore, it is only appropriate for the appellant to participate in the proceedings before the statutory authorities. Similarly, whether there is escapement of turnover is again a question of fact which ought to be decided by the statutory authorities on appreciation of evidence.

12. Yet another reason which would prompt me to think there is a need to exercise restraint in entertaining these writ petitions is in view of Explanation 1 to Section 147 of the Act which reads as under:

“Explanation 1- 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 income chargeable to tax has been under- assessed; or*
- (b) where such income has been assessed at too low a rate; or*
- (c) where such income has been made the subject of excessive*

*M/s.Durr India Private Limited vs. Assistant Commissioner of Income Tax and another in W.A.Nos.1081 and 1083 of 2021 dated 29.08.2022.



relief under this Act or under the Indian Income- tax Act, 1922 (11 of 1922); or

(d) where excessive loss or depreciation allowance has been computed.”

A reading of the above Explanation appears to suggest that mere production of books of accounts or other evidence would not by itself tantamount to disclosure within the meaning of the foregoing proviso even if material evidence could with due diligence have been discovered by the assessing officer. Whether the above Explanation would apply to the facts of the case again requires examination of books of accounts and other documents by the Assessing Officer and not under Article 226 of the Constitution of India. The above exercise requiring a close look at/ examination of books of accounts and other documents is alien to the jurisdiction conferred on this Court under Article 226 of the Constitution of India.

13. This Court *prima facie* finds that there is merit in the submissions of the Respondents that assuming that the survey was not legal when the same was conducted on 23.01.2013, the same would not bar the materials from being used. In this regard, reliance was placed by the learned Senior Standing Counsel for the



Respondents, on the following judgments of the Hon'ble Supreme Court and various other High Courts which have on more than one occasion held that the materials seized during the case of illegal search would not bar the authorities from using the same, some of them being:

(a) Pooran Mal vs. The Director of Inspection (Investigation), New Delhi ((1974) 1 SCC 345) (Supreme Court)

(b) Rategain Travel Technologies (P) Ltd. v. Union of India (45 S.T.R 493) (Delhi High Court)

(c) The Joint Commercial Tax Officer, Central Intelligence Wing, Board of Revenue (C.T.) Madras v. Purushotham Rungta (27 LW 499) (Madras High Court)

(d) Devashi Enterprises v. Joint Commissioner (CT) (2019 SCC OnLine Mad 35177) (Madras High Court)

14.1. Finally, the cost of construction which is stated to be more than Rs.17 crores on the basis of a valuation report is sought to be explained by the Petitioner /Trust that the source is from corpus donation receipts and fees collected from the students. It is submitted by the learned Senior Standing Counsel for the Respondents that the construction of the building itself was over only in year 2013-14, thus the explanation offered by the Trust that the fees were collected from the students and utilised for construction is factually incorrect and false. The above aspect is a disputed question of



fact and it may not be appropriate to examine such disputed questions of fact in a writ petition, as the same is beyond the realm of judicial review. In this regard, it may be useful to refer to the following judgments, wherein it was held :

(i) State Bank of Travancore v. Mathew K.C., reported in (2018) 3 SCC 85:

"10. In United Bank of India v. Satyawati Tondon (2010) 8 SCC 110, the High Court had restrained Satyawati Tondon v. State of U.P., [2009 scc OnLine All 2608] further proceedings under Section 13(4) of the Act, Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding :(SCC pp.123 & 128, paras 43 & 55).

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal



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of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

(ii) Thansingh Nathmal v. Supdt. of Taxes, reported in (1964) 15 STC 468 :

"7.....The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of



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the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

(emphasis supplied)

(iii) Assistant Collector of Central Excise vs. Dunlop India Ltd., reported in (1985) 1

SCC 260 :

"3. In Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433, it was held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters."

(emphasis supplied)

14.2. It may also be relevant to refer to the recent judgment of the Hon'ble



Supreme Court of India in the case of ***State of Maharastra and Others vs. Greatship (India Limited)***, reported in ***2022 SCC Online SC 1262***, wherein it was held as under:

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"14.the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India challenging the assessment order in view of the availability of statutory remedy under the Act."

15. The writ petitions filed by the Petitioner /Trust are dismissed. It is open to the Respondents to proceed with the assessment from the stage of disposal of the objections in accordance with law. The petitioners are at liberty to raise all/ any objections, including lack of jurisdiction on the ground of change of opinion or permissibility/legality of using evidence/material gathered during the course of the alleged illegal search. If any such objection is raised the same shall be dealt with by the Assessing Officer uninfluenced by any of the observation. I intend to clarify that the finding on various questions of law recorded in this judgment are for the limited purpose of holding that the petitioners have an alternative efficacious remedy available under the Act. The Respondents shall proceed to complete the assessment from the stage of rejection of the petitioners objection, after affording the petitioners the



opportunity provided/contemplated under the Act, on its own merit and taking such view of the facts and law as it may deem fit to take uninfluenced/ unobsessed by any of the findings recorded hereinabove.

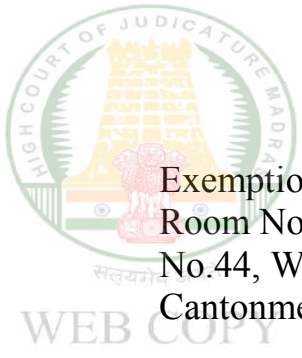
16. The Writ Petitions filed by the Petitioners /Trustees are dismissed for the reasons set-out above, it is open to the Petitioners/Trustees to pursue their statutory remedies by way of an appeal which is availed of by the petitioners/ Trustees and agitate all grounds that may be available, including lack of jurisdiction before the Appellate Authority. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

28.12.2022

Index: Yes/No
Speaking order: Yes/No
Neutral Citation : Yes/No
mka

To:
1.Office of the Income Tax Officer,

32/34



W.P.(MD).Nos.1156 of 2020 and



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2.Income Tax Officer,
Ward 1, Karur.

MOHAMMED SHAFFIQ, J.



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W.P.(MD).Nos.1156 of 2020 and



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**Pre-delivery order made in
W.P.(MD).Nos. 1156 and 1158 of 2020 and etc., batch**

28.12.2022