

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.12.2020

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P. Nos.34963 of 2019 and 4063 of 2020

and

WMP.Nos. 4800, 4803 of 2020 & 35746, 35748 & 35751 of 2019

M/s.Dass Media Private Limited,
26 Poes Gardens, Chennai 86. .. Petitioner in both WPs

Vs

- 1 Income Tax Officer,
Corporate Ward 1, (4), Room No.616,
Wanaparthi Block, VI Floor, 121 MG Road,
Nungambakkam, Chennai 34.
- 2 Assistant Commissioner of Income Tax (OSD),
Corporate Range 1, Room No.603,
Wanaparthi Block, VI Floor, 121 MG Road,
Nungambakkam, Chennai 34.

...Respondents in both WPs

Prayer in W.P. No.34963 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorari, to call for the records of the 1st respondent contained in its notice bearing Letter No. ITBA/ AST/ S/ 148/ 2018-19/ 1015382191 (1) issued under u/s. 148 of the Income Tax Act 1961 for PAN.AAACD2726M for the assessment year 2014-15 dated 21.3.2019 and all proceedings in furtherance thereof including but not limited to the order bearing

Letter No. ITBA/ AST/ F/ 17/ 2019-20/ 1021733903 (1) dated 5.12.2019 passed by the 1st respondent disposing of the petitioners objections to the reopening of the income tax assessment for the assessment year 2014-15 and to quash the same as arbitrary unjust and illegal.

Prayer in W.P. No.4063 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorari, to call for the records of the 1st Respondent contained in its assessment order bearing Letter No. ITBA/ COM/ F/ 17/ 2019-20/ 1022818181(1) passed under u/s. 143(3) read with section 147 of the Income Tax Act 1961 for PAN. AAACD2726M for the assessment year 2014-15 dated 21.12.2019 and to quash the same as arbitrary unjust and illegal.

For Petitioner : Mr.Suhrit Parthasarathy in both WPs.

For Respondents : Mrs.Hema Muralikrishnan,
Senior Standing Counsel

ORDER

The petitioner is a company and had entered into an agreement for joint development in the capacity of a land owner with one M/s. Bashyaam Construction Pvt. Ltd. (BCPL) as developer. The petitioner filed a return of income (ROI) for assessment year (AY) 2014-15 on 04.03.2015 admitting a total loss. The return was not taken up for scrutiny. In its return of income for AY 2016-17, the petitioner had

returned long term capital gain (LTCG) in regard to the project of joint development. The return of income was selected for scrutiny by issuance of notice under Section 143(2) of the Act and vide questionnaire under Section 142(1) various details/particulars were sought from the petitioner including copy of annual report, financials (profit and loss accounts and balance sheet with complete schedules) and a computation of Long Term Capital gains (LTCG) along with an explanation in regard to the purported mismatch between the income credited in the profit and loss account and sales turnover/receipts.

2. The petitioner responded vide letter dated 28.07.2018 enclosing the details sought including the computation of LTCG. A notice under Section 133(6) was also issued to BCPL seeking the details of cost of construction and basis of valuation of the same. On the basis of the reply furnished by BCPL, a notice was issued on 20.12.2018 to the petitioner calling upon it to show cause why the sale consideration for the purpose of capital gains not be 70% of the total sale receipts, on the understanding that the ratio of sharing on profits between petitioner and BCPL was 70-30%. In response, while accepting the quantum of turnover per se, the petitioner submitted that the correct proportion was 69-31% and not 70-30%. The assessment

was, however, completed along with the lines proposed for the SCN and is stated to be challenged by the petitioner and pending in appeal.

3. While this is so, a notice under Section 148 of the Act came to be issued on 21.03.2019 seeking to reopen the income tax assessment of the petitioner for AY 2014-15. The petitioner requested the reasons for re-assessment vide letter dated 23.09.2019 parallely filing a return of income on 03.04.2019 in response to the notice under Section 148. The reasons were furnished and read as follows:

*GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT DC/ACIT (OSD) CORP RG 1 CHENNAI*

To,
DASS MEDIA PVT LTD
26, POES GARDENS,
600086, Tamil Nadu
India

PAN: AAAC D272 6M	Assessment year: 2014-15	Dated 16/06/2 019	Letter No: ITBA/AST/F/17/2 019- 20/1016023565(1
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Sir/Madam/M/s,

Subject: Furnishing of reasons for reopening in the case of M/s Dass Media P.Ltd.

Ref:1. Notice u/s 148 of the Income Tax Act, 1961 dated 21.03.2019

2. Your letter dated 29.03.2019.

Kindly refer to the above.

The Reasons for reopening the assessment proceedings u/s 147 of the Income-tax Act, 1961 in the case of M/s Dass Media P. Ltd AY 2014-15 are as follows:

“1. The assessee company had entered into a joint Development Agreement with M/s. Bashyaam Constructions Pvt. Ltd., Chennai for promotion of its property at old No.26, new No.57, Poes Garden, Chennai-600 086 as a high rise luxurious apartments numbering 8 units. The Joint Development Agreement was entered into on 11.09.2013 with the Developer wherein the land owner M/s. Dass Media pvt Ltd transferred the rights and conveyed the same to the extent of 30% to the Deeloper including UDS and the super built-up area. As the Developer was handed over the above share, thee assessee stood to have capital gain with the execution of the above transaction. The assessee company received R.2.5 Crores on 11.09.2013 and Rs.81 Lakhs on 06.03.2014.

2. The total number of flats as per JDA was 8 flats out of which assessee's share was 6 flats. From the information regarding the break up of cost centre expenses received in resonance to 133(6) notice dated 14.12.2018 sent to M/s Bashyam Constructions Pvt. Ltd., it is seen that the total cost of construction is Rs.24,51,07,602.38

The Capital gains is computed as under;

70% of Cost of Construction: 70% of Rs.24,51,07,602.38=R.17,15,75,322

Add:

Monetary Compensation pertaining to developer's share) =Rs.3,30,00,000 (+)

Less: Cost of Acquisition (Indexed)

Proportionate land value: Rs.16,24,940

30% of the above :Rs.4,87,482/-

Purchase in FY 1985-86-Captial gain index is 133

Cost indexed for FY 13-14 index is 939 Rs.34,41,696 (-)

Long Term Capital Gain Rs.20,11,33,626

3. It was also learnt during the survey that the CMDA approval for the building was obtained in FY 2013-14 itself. Thus it is clear that the incidence of capital gain arose in AY 2014-15 itself. The assessee has offered capital gains in AY. 2016-17 which was subsequently assessed vide order u/s 143(3) of the Income Tax Act, 1961 dated 29.12.2018. The assessee has preferred an appeal before the CIT(A) against the above ordre u/s 143(3) of the Income-tax Act dated 29.12.2018. It is noticed that the assessee company has not offered any capital gain in AY 2014-15 which is the correct year of incidence of capital gain. Therefore, the assessment has to be reopened for AY. 2014-15 and assessed protectively to safeguard the interest of revenue.

4. The petitioner wrote to the respondent on 15.06.2019 objecting to the proposed re-assessment and pointing out that the very income proposed to be brought to tax in AY 2014-15, had suffered tax in AY 2016-17. The assumption of jurisdiction by the Assessing Officer was challenged on the ground that there existed no valid reasons for the proposed re-assessment and no material on the basis of which the Officer has arrived at the prima facie conclusion that income had escaped assessment.

5. The proposed re-assessment was also challenged on merits by the petitioner stating that profits were realized from the project only in the financial year relevant to AY 2016-17, the Officer proceeded on the basis that the approval of the Chennai Metropolitan Development Authority had been received in FY, relevant to AY 2014-15 and as such the capital gain ought to have been brought to tax in AY 2014-15 itself. Moreover, one of the reasons for re-opening was to safeguard/protect the interests of the revenue and this was also, according to the petitioner, legally incorrect.

6. The objections came to be rejected by order dated 05.12.2019, challenged in Writ Petition No.34963 of 2019. Though an interim stay was granted by this Court

on 17.12.2019, it appears that the order came to the notice of the respondent only on 23.12.2019, by which time, the order of assessment had been passed. This order came to be challenged by the petitioner in W.P.No.2390 of 2020. The Officer has, at paragraph 8 of counter dated 23.01.2020 in W.P. No.34963 of 2019 expressed regret for proceeding to pass the order of assessment despite interim order dated 17.12.2019. He assigns the blame to a gap in intra-department communication by which order dated 17.12.2019 came to his attention only on 23.12.2019 by which time the impugned order of assessment had been passed, on 20.12.2019. The explanation offered is accepted. Both matters have thus been taken up together.

7. Revenue points out that as the original processing of the ROI was only by way of intimation and no scrutiny assessment under Section 143(3) had been made, the assumption of jurisdiction under Section 147 is unassailable. It was only when the return of income for AY 2016-17 was taken up that the Officer gleaned that the appropriate year for taxing the capital gain would be 2014-15 and not 2016-17.

8. The question of change of opinion or review of the earlier order would not arise insofar as no opinion was formed and no order passed at the first instance. It is for this reason that the reopening has been done protectively, to ascertain the correct

year in which the incidence of taxing the capital gain arose. According to the revenue, the very fact that the reopening was protective would establish that the Officer had no intention whatsoever to engage in double taxation of the same income in both AY 2013-14 and 2016-17, but only wanted to ascertain the appropriate year for taxation of the capital gain.

9. The issue that arises turns on whether the assumption of jurisdiction in terms of Section 147 for AY 2012-13 is proper, particularly, seeing as the Officer only proposes a re-assessment, on protective basis. Admittedly, there has been no scrutiny assessment for AY 2012-13 and only an intimation has been passed. The issue based on which the re-assessment has been initiated is whether the capital gains offered to tax in AY 2016-17 should have been offered in the earlier year i.e. AY 2012-13.

10. Ordinarily the limitation provided for the initiation of re-assessment is four years from the end of the relevant financial year, extended to six years upon satisfaction of the conditions elaborated in the proviso to Section 147, conditional upon an order under Section 143(3) having been passed at the original instance. Since only an intimation under Section 143 (1) has been passed in this case,

limitation of six years is, available. (See *The Assistant Commissioner of Income Tax (ACIT) Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* (291 ITR 500).

11. Coming to whether a re-assessment may be initiated on protective basis, I see no legal infirmity in the same. Though the assumption of jurisdiction to re-open an assessment must be based on the satisfaction of the officer that income has escaped assessment, such reasoning is not expected to be ironclad even at that preliminary stage. It will suffice that the Officer has a legitimate and reasonable basis to come to such a conclusion. In the present case, the return of income for AY 2012-13 was not scrutinized and only the return of income of the petitioner for AY 2016-17 was taken up for scrutiny. The question of whether the capital gain is assessable in AY 2012-13 or 2016-17 is thus, a matter to be decided by the Authorities after due verification of relevant documents and in accordance with the law. Thus, while the merits of the matter relating to the year in which the instance of capital gain would fall is left entirely open for decision by the Officer, the assumption of jurisdiction is upheld.

12. The concept of a protective assessment is not new to income tax proceedings and in *Banyan and Berry Vs. Commissioner of Income Tax* (222 ITR

831), a Division Bench of the Gujarat High Court states that where there is a doubt or ambiguity about the real entity in whose hands particular income is to be assessed, the Assessing Authority is justified to take recourse to a protective assessment in the hands of one entity and a regular assessment in the hands of the other. At the end of the day, it is only one assessment that would survive, after the authorities, with the cooperation of both the assesseees, ascertain which the proper entity is to be assessed. So too in ascertaining the proper year of assessment.

13. In *Smt. Hemlata Agrawal Vs. CIT* (64 ITR 428), a Division Bench of the Allahabad High Court considered the scope of protective assessment in the context of re-assessment. The issue concerned the nature and source of investment in immovable property. The amount in question was brought to tax in the hands of both the husband and wife, the former substantively and the latter protectively. Both the assesseees therein challenged the orders of assessment till the Income Tax Appellate Tribunal. In the wifes' case an additional point taken was that the re-assessment was only by way of change of opinion and was thus unsustainable. This argument was rejected by the Tribunal stating that a protective assessment did not amount to a change of opinion but merely indicated caution on the part of the income tax officer

in deciding the question of law. In further appeal, the Court was of the view that the proper approach of the Tribunal would have been to hear both the appeals together and then determine whose hands the income was assessable. The tax case filed by Mrs.Agrawal was allowed.

14. In this case the issue that arises is whether the capital gain is taxable in one year or the other and thus, it is only if the material pertaining to both years were available before the officer that a proper decision in this regard could be arrived at.

15. The petitioner argues that the order of assessment for AY 2016-17 has been challenged in appeal only on the aspect of computation of the capital gain and thus as far as the year of taxability is concerned, the order has attained finality. This argument is misconceived since the very doubt entertained by the Officer turns on the question of whether the year of taxability adopted by the petitioner is correct or not. The finality attained by filing of the first appeal by the petitioner is subject to statutory processes such as 263 and 147 of the Act, if otherwise valid. This argument is thus rejected.

16. The impugned order is confirmed and this writ petition dismissed. The re-assessment shall be taken up on merits and decided as expeditiously as possible and

at any rate within a period of eight weeks from today. Let the appeal filed by the petitioner also be taken up for hearing and disposed by the Commissioner of Income Tax (Appeals) parallelly. Connected miscellaneous petitions are closed. No costs.

15.12.2020

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Index: Yes
Speaking order

To

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- 2 Assistant Commissioner of Income Tax (OSD),
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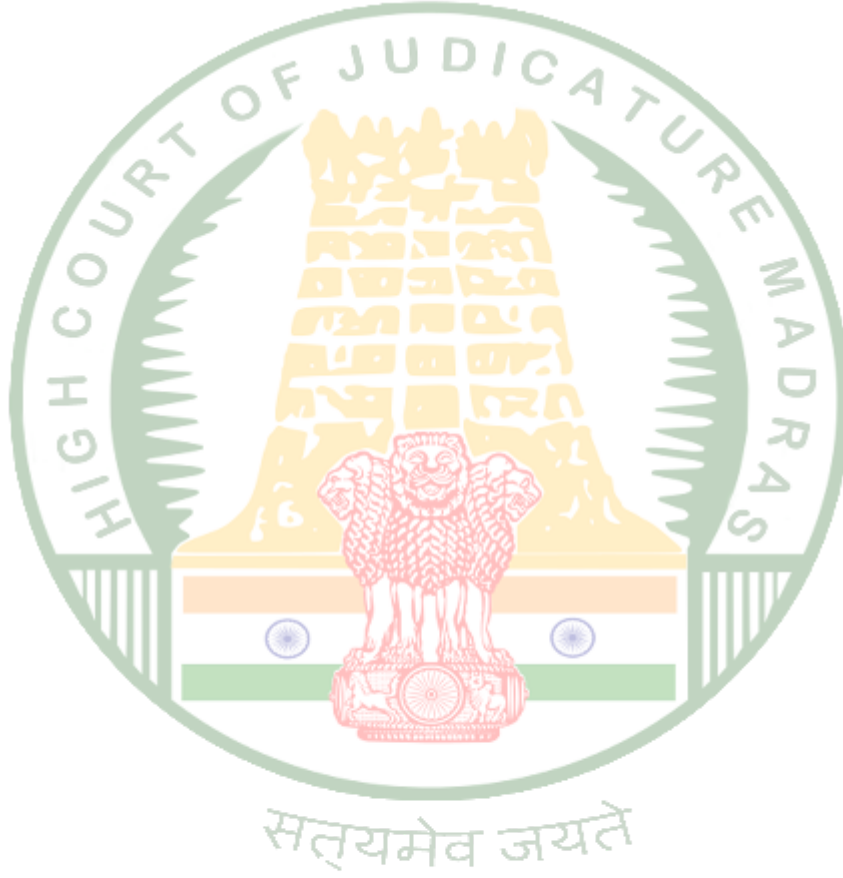
DR. ANITA SUMANTH, J.

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