

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2018

PRONOUNCED ON: 03.12.2018

CORAM

THE HONOURABLE MR.JUSTICE **T.S.SIVAGNANAM**
and
THE HONOURABLE MR.JUSTICE **N.SATHISH KUMAR**

Writ Appeal No.2563 of 2018
and C.M.P.Nos.20763 & 20766 of 2018

Smt A. Sridevi,
L/H of Late Sri L.S.Abhinesh Babu,
No.32, Nathamuni Street,
Naduvankarai, Anna Nagar,
Chennai 600 040. .. Appellant

-vs-

The Income Tax Officer,
Non-Corporate Ward 16(1),
Chennai – 600 034. .. Respondent

Prayer:- Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order dated 04.10.2018 passed in W.P.No.20625 of 2016 by this Court.

For Petitioner : Mr.Vijayaraghavan
for Mr.Subbaraya Aiyar Padmanabhan
& Ramamani

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

JUDGMENT**T.S.Sivagnanam, J.**

This appeal, by the appellant/assessee, is directed against the order passed in W.P.No.20625 of 2016, dated 04.10.2018. The said Writ Petition was filed by the appellant challenging the proceedings of the respondent dated 26.05.2016. By the said proceedings, the respondent rejected the objections filed by the assessee for reopening the assessment under Section 147 of the Income Tax Act, 1961, (hereinafter referred to as "the Act") for the assessment year 2009-2010.

2. The assessee filed return of income for the assessment year 2008-2009 on 30.07.2009, declaring a total income of Rs.14,58,174/-, comprising of income from salary and income from other sources. The return was processed under Section 143(1) of the Act. The assessment was reopened by issuance of a notice under Section 148 of the Act, dated 21.02.2011. A letter, dated 02.11.2011, was sent to the assessee fixing the date of personal hearing on 12.11.2011. In response to the same, the assessee submitted a letter requesting to treat the return already filed on 30.07.2009, as one filed in response to the notice under Section 148 of the Act. During the course of hearing, the appellant/assessee was asked to file details of sources and nature of cash deposits made during the previous year in savings bank account maintained with Axis Bank, Anna Nagar

Branch, Chennai. The assessee's authorized representative filed copies of bank statements in respect of savings bank account maintained with Axis Bank, Anna Nagar Branch and Tamil Nadu Mercantile Bank, Aminjikarai Branch, on 21.12.2011, followed by letters, dated 29.12.2011 and 30.12.2011, setting out the details of real estate transactions undertaken by the appellant/assessee on behalf of the company. The assessment was completed and an order was passed on 30.12.2011, by adding the short fall in cash withdrawal of Rs.10,50,000/- as unexplained income under Section 68 of the Act.

3. Subsequently, the assessment was reopened by issuance of a notice under Section 148 of the Act, dated 25.03.2016. A reply was sent by the assessee requesting to treat the return already filed on 30.07.2009, as one filed in response to the notice under Section 148 of the Act and requested the reasons for reopening to be furnished. The respondent, by reply dated 27.04.2016, furnished the reasons for reopening stating that during the financial year 2008-2009, relevant to the assessment year 2009-2010, one Mr.S.Nagarajan had received a sum of Rs.2.75 crores from Sri.L.S.Abhinesha Babu for purchase of property through his bank account, the sources for such advances made require to be verified.

4. The appellant/assessee filed her objections dated 06.05.2016, *inter alia* contending that during the course of first reassessment proceedings, the assessee has produced copies of bank statements and other records including the sources of all deposits made in the account; the account of S.Nagarajan also figured in the details of receipts and payments submitted; reassessment was completed after due verification of all payments and proposal to reopen to re-verify the source of advances given by S.Nagarajan amounts to change of opinion; no new material is available to conclude that income has escaped assessment for issuing notice under Section 148 of the Act; there has been full disclosure of all material facts by the assessee based on which assessment was completed under Section 143(3) of the Act and by applying proviso to Section 147, reopening is barred by limitation.

5. The respondent considered the objections and passed an order dated 26.05.2016, rejecting the objections filed by the assessee on the ground that the reopening of assessment was to verify the cash deposits in various banks on various dates and no other issues were considered; the issue now raised is that the assessee has advanced several crores of rupees during the said year, but the source was not explained and in the return of income, the assessee has filed only statement showing computation of income consisting of

salary income and interest income from other sources and no other documents were furnished; the assessee ought to have filed balance sheet/statement of affairs which he has failed to do, which shows that the assessee has not disclosed fully and truly all the materials necessary for the assessment.

6. Further, it was stated that the information that the assessee's advance Rs.2.75 crores was received by the Assessing Officer at the time of scrutiny in the case of borrower only and not at the time of scrutiny assessment of the assessee's return. This order dated 26.05.2016 was impugned in the Writ Petition. The Writ Petition was dismissed by order dated 04.10.2018, holding that the advance made to S.Nagarajan to the tune of Rs.2.75 crores was not disclosed in the original return filed by the assessee as on 30.07.2009, and though the assessment was reopened under Section 148 of the Act by notice dated 21.02.2011, it was for a different purpose, namely, for verifying the details of sources and nature of cash deposits made by the assessee in savings bank account maintained to the tune of Rs.93,00,000/-. Even during the reassessment proceedings, the assessee did not file any fresh return, but wanted the return dated 30.07.2009, be treated as return in response to the notice for reopening.

7. Further, the Court held that there is no bar for reopening an assessment more than once within the time prescribed, if the Assessing Officer has reason to believe that income has escaped assessment based on tangible material and in cases, if reopening is done after four years, the requirement to be satisfied is that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. Thus, the Court concluded that whatever was the material, which was considered in the reassessment proceedings, was relatable to a particular issue and the present reopening proceedings is on account of the assessee not fully and truly disclosing all material facts necessary for its assessment.

8. Mr.Vijayaraghavan, learned counsel appearing for Mr.Subbaraya Aiyar Padmanabhan and Ramamani, learned counsel for the appellant/assessee while reiterating the grounds raised in the Writ Petition has drawn the attention of this Court to the letters written by the authorized representative of the assessee, dated 29.12.2011 and 30.12.2011 and the cash flow statement and the assessment order, dated 30.12.2011, wherein the Assessing Officer has recorded that the assessee was asked to file copies of bank accounts and other evidences in support of her claim and the authorized representative has filed details of receipts and payments in respect of the previous year and stated that there are sufficient

cash withdrawals prior to the cash deposits of Rs.93,00,000/-. Therefore, it is submitted that all details were considered in the first reopening of the assessment and the reasons for reopening does not place any omission on the part of the assessee to fully and truly disclose any material for its assessment and only states that the source for advances has to be verified, which was verified in the earlier proceedings and therefore, the impugned reopening is a clear case of change of opinion. Further, it is submitted that the Assessing Officer should assign reasons for reopening and cannot make a rowing enquiry as done in the case on hand.

9. Further, it is contended that no mention of satisfaction of escapement of income assessable to tax has been recorded by the Assessing Officer in the reasons for reopening dated 27.04.2016. Therefore, it is submitted that the reopening is clearly a change of opinion. Further, it is submitted that the duty cast upon the assessee is only to disclose all primary facts and it is not for the assessee to prepare a draft assessment order or what inferences the Assessing Officer should take based on the facts disclosed. In support of his contention, the learned counsel referred to the decision of the Hon'ble Supreme Court in **Calcutta Discount Co Ltd Vs. Income Tax Officer and another (1961) 41 ITR 0191**; the decision of this Court in **Fenner (India) Ltd Vs. DCIT (2000) 241 ITR 0672**; the

decision of the Division Bench of this Court in ***CIT Vs. Elgi Ultra Industries (2008) 296 ITR 0573***; and the decision of this Court in ***Tractors and Farm Equipment Limited Vs. ACIT in T.C.(A).No.1548 of 2008, dated 31.10.2018.*** On the above grounds, the learned counsel prays for setting aside the order passed by the learned Writ Court and allowing the Writ Appeal.

10. Mrs.Hema Muralikrishnan, learned Senior Standing Counsel appearing for the respondent/Revenue referred to the Explanation I to Section 147 of the Act and submitted that reopening was well within the powers conferred under the Act and the first reopening was only for cash deposits with Axis Bank account and no opinion was formed by the Assessing Officer in respect of other matters. The advances made by the assessee came to the knowledge of the Assessing Officer only after the information was given by the Assessing Officer of S.Nagarajan and therefore, the reopening is not a case of change of opinion, but a case where the assessee failed to furnish fully and truly all materials required for its assessment.

11. Further, it is pointed out that, even in the first assessment proceedings, dated 30.12.2011, the assessee was not able to explain the cash withdrawals and there was a short fall of Rs.10,15,000/- which will clearly go to show that the cash advance given to

S.Nagarajan was never disclosed. It is further submitted that the decisions relied on by the learned counsel appearing for the appellant/assessee all pertain to scrutiny assessment under Section 143(3) of the Act followed by reopening under Section 147, whereas in the instant case, the initial intimation was under Section 143(1) of the Act. Therefore, no opinion was formed when the order under Section 143(3) read with Section 147 of the Act, dated 30.12.2011, was formed by the Assessing Officer with regard to the advances given to the said S.Nagarajan. Therefore, it is submitted that the reopening of the assessment was valid and the learned Writ Court was correct in dismissing the Writ Petition.

12. Heard the learned counsel appearing on either side and perused the materials available on record.

13. The law on the subject, namely, what would be a valid reopening proceeding under Section 147 of the Act is fairly well settled as on date. The earliest of the oft quoted decision is that of the Apex Court in **Calcutta Discount Company Limited** (supra) arising under 1922 Act, questioning the correctness of the reassessment done under Section 34 of the said Act. The Hon'ble Supreme Court pointed out that the duty of the assessee is to make full and true disclosure of all primary facts and once it is done, it is for

the Assessing Authority to decide what inference of fact or law could be drawn therefrom. The law does not require the assessee to state the conclusion that could reasonably be drawn from the primary facts and if there were, in fact, some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under-assessment", that would be sufficient to give jurisdiction to the ITO to issue notices under Section 34 and whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts could not be opened for the Court's investigation.

14. In **Fenner (India) Limited**, (supra), the Court was testing the correctness of a re-assessment proceeding initiated beyond the period of four years from the end of the assessment year and it was held that 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 and failure to do so would vitiate the notice and the entire proceedings.

15. In **Elgi Ultra Industries**, (supra), the Division Bench upheld the order passed by the Tribunal on the ground that all the material facts were available at the time of making the original assessment. Thus, the sheet anchor of the arguments of

Mr.Vijayaraghavan is that the assessee was called upon to explain the sources and nature of cash deposits and through her authorized representative had filed the necessary details including the cash flow, which reflected the payments made to S.Nagarajan as advance being a sum of Rs.27,50,000/-. Therefore, it is submitted that the materials were available even at the time, when the reassessment proceedings took place and the present reopening is a clear case of change of opinion. To support such contention, the assessment order, dated 30.12.2011, was referred to.

16. We have perused the order and we find that the Assessing Officer has recorded that during the course of hearing, the authorized representative of the assessee was asked to file details of sources and nature of cash deposits made during the previous year in savings bank account maintained with Axis Bank, Anna Nagar Branch, Chennai to the tune of Rs.93,00,000/-. Further, the assessee was asked to file copies of bank accounts and other evidences in support of her claim.

17. The assessing officer has recorded that the authorized representative of the assessee filed details of receipts and payments in respect of the previous year and stated that there were sufficient cash withdrawals prior to the cash deposit of Rs.93,00,000/-. One

fact, which is visibly clear, from what has been recorded in the assessment order, is that the details called for pertaining to the savings bank account maintained in Axis Bank, Anna Nagar Branch, Chennai and the details, which were furnished by the assessee also pertain to the said amount. Therefore, merely because a cash flow statement was appended to the letter of the assessee's authorized representative dated 30.12.2011, cannot be taken to be establish that the assessee has made full and true disclosure of the advance paid to S.Nagarajan. One more factor which has weighed in our minds is even in the first reassessment proceedings dated 30.12.2011, there was a short fall of Rs.10,50,000/-. Therefore, we hold that the assessee did not fully and truly disclosed all materials necessary for its assessment.

18. Mr.Vijayaraghavan, next argued that the Assessing Officer has not recorded any reasons for reopening and he has not formed any opinion nor recorded satisfaction that there has been failure to disclose material.

19. We have perused the reasons for reopening as communicated to the assessee vide communication dated 27.04.2016 and the reason for reopening is regards the source for the advance of Rs.2.75crores to S.Nagarajan. Reading of the reasons, clearly shows

that the assessing officer intended to verify the transactions as it was not disclosed by the assessee. Thus, the omission on the part of the assessee has been pointed out and the reason why the Assessing Officer wants to verify is also clear from reading the reasons for reopening. Therefore, we do not agree with the submissions of the learned counsel that no opinion was formed by the Assessing Officer for being satisfied that there is a case for reopening.

20. Furthermore, the assessee has not filed the balance sheet or statement of affairs as noted by the Assessing Officer and in the return of income, the assessee has filed only statement showing computation of income consisting of salary income and interest income from other sources. Even when the reassessment proceedings were commenced by issuance of notice, dated 02.11.2011, the assessee did not file a fresh return of income, but informed the Assessing Officer to treat the return of income filed on 30.07.2009, as return in response to the notice under Section 147. Thus, whatever was placed before the Assessing Officer through their authorized representative's letter dated 30.12.2011, cannot be taken to be full and true disclosure pertaining to the transactions with S.Nagarajan.

21. Thus, we are satisfied with the reasons assigned for reopening of assessment is just and proper and no opinion was formed during the assessment proceedings dated 30.12.2011, for it to be termed as a 'change of opinion', more so, when the assessee has failed to fully and truly disclose all the materials necessary for its assessment. Thus, the reasons assigned by the learned Writ Court is just and proper and does not call for any interference.

In the result, the Writ Appeal fails and it is dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.

(T.S.S., J.) (N.S.K., J.)
03.12.2018

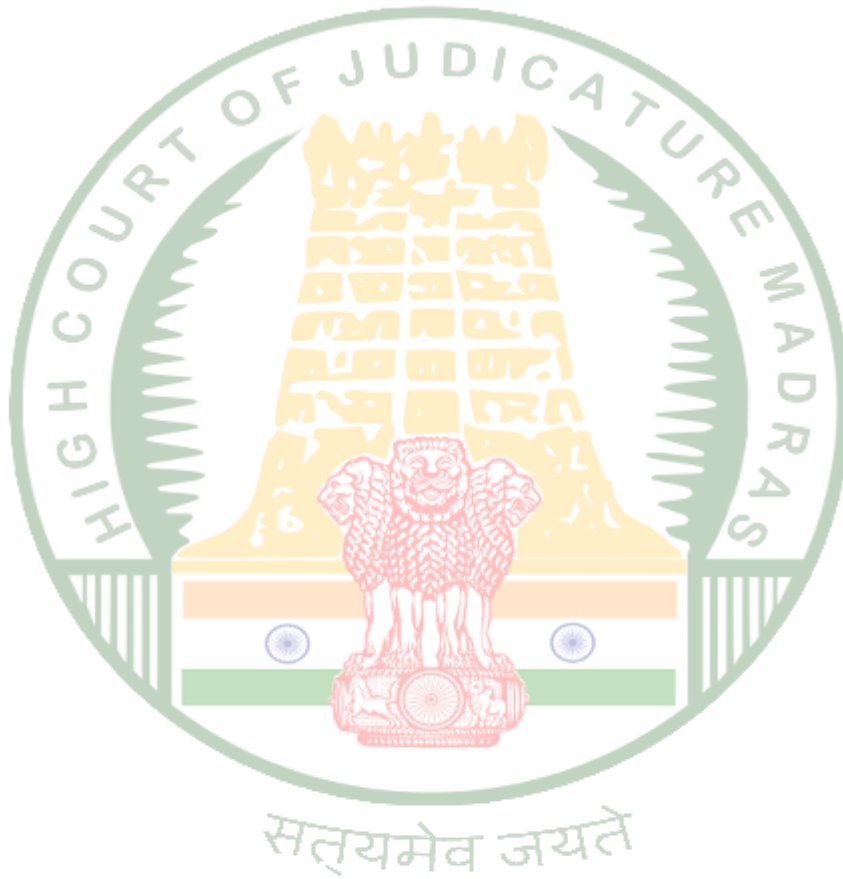
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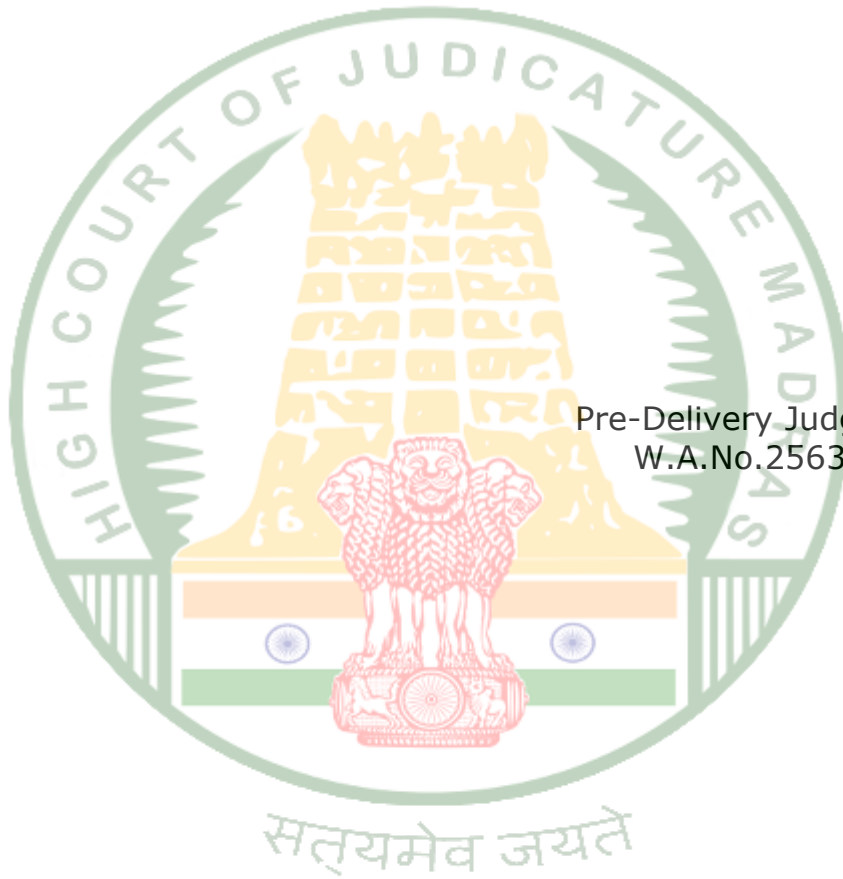
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and
N.Sathish Kumar, J.**

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Pre-Delivery Judgment in
W.A.No.2563 of 2018

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