

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.09.2021

CORAM

The Honourable Mr. Justice T.S.SIVAGNAM
and
The Honourable Mr. Justice SATHI KUMAR SUKUMARA KURUP

W.A. Nos. 2452 and 2453 of 2021
and
C.M.P. Nos. 15747 and 15750 of 2021

M/s. Saravana Stocks Investments Pvt. Ltd.,
Rep. by its Director Mr. D. Sathyamoorthi,
New No.6, Old No.29, Second Main Road,
CIT Nagar, Mylapore,
Chennai - 600 004.

... Appellant in both WAs

Vs.

The Deputy Commissioner of Income Tax,
Company Circle - VI (1),
121, Nungambakkam High Road,
Chennai – 600 034.

... Respondent in both WAs

Appeals filed under Clause 15 of Letters Patent, praying to allow the above Writ Appeals by setting aside the order dated 12.07.2021 passed in W.P.Nos. 30610 of 2012 and 30980 of 2014 on the file of this Court and allow the Writ Petitions.

For Appellant : Mr. A.L.Somayaji
Senior Advocate
for Mr. G.Baskar
For Respondent : Mr. A.N.R.Jayaprathap
Senior Standing Counsel

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

These writ appeals have been filed by the writ petitioner, an assessee under the provisions of the Income Tax Act, 1961 ('the Act' for short) challenging two separate orders passed in W.P. No. 30610 of 2012 dated 12.07.2021 and W.P. No. 30980 of 2014 dated 12.07.2021. Since the appellant in both appeals is the same assessee and both pertaining to the assessment year 2006-07, these appeals were heard together and disposed of by a common judgment and order. Since W.A. No. 2452 of 2021 is a substantive appeal in the said appeals, we have taken up for consideration.

2. We heard Mr. A.L.Somayaji, Learned Senior Counsel, assisted by Mr. G.Baskar, Learned counsel on record for the appellant-assessee and Mr. A.N.R.Jayaprathap, Learned Senior Standing Counsel, assisted by Mr. A.P.Srinivas, Learned Senior Standing Counsel for the respondent-Revenue.

3. As mentioned, the assessment pertains to the assessment year 2006-07 relevant to the financial year 2005-06. The assessee filed E-return on 22.11.2006, pursuant to which, a notice under Section 142(1) dated 24.04.2008

was issued calling upon the assessee to furnish various details as mentioned in the annexure to the said notice, which were as many as 31 details. The assessee through a Chartered Accountant submitted the details called for in the form of paper book along with letter dated 02.06.2008. It appears that the Assessing Officer held in discussion with the assessee and called for further details, which were supplied by the assessee through the Chartered Accountant by their letter dated 04.07.2008. Pursuant to which, the assessment under Section 143(3) of the Act was completed vide order dated 17.09.2008. The Assessing Officer after expiry of four years issued notice under Section 148 of the Act dated 21.03.2012 proposing to reopen the assessment. The assessee by letter dated 23.03.2012 sought for reasons for reopening so as to enable them to know the reasons for reopening and referred to the decision of the Hon'ble Supreme Court in **GKN Driveshafts (India) Limited Vs. ITO** reported in (2003) 259 ITR 19 (SC). The Assessing Officer vide communication dated 10.07.2012 furnished the reasons for reopening the assessment, which read as hereunder :-

"The assessee company had purchased and sold the shares. The income derived has been treated as capital gain and paid tax @ 10%. However, it is seen that there were no investments. Therefore, the income of Rs.5,05,59,650/- has to be treated as business income. The income has escaped the taxable rate of

30% but the assessee company paid the taxes on capital gain @ 10%."

4. The assessee submitted their objections through their Chartered Accountant vide letter dated 25.07.2012. The assessee had set out the details as to how the case was discussed by the Assessing Officer on as many as four days and the details which were furnished by the assessee and how the assessment should complete. On the reasons given for the reopening of the assessment, the assessee pointed out that the reasons do not attribute that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment and further, does not state how there has been a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Further, the assessee pointed out that the assessment proceedings were completed under Section 143(3), after issuing notice under Section 142(1) and examining the voluminous details filed by the assessee, pursuant to the said notice and specifically addressing the fact on which the assessment was proposed to be reopen. After referring to proviso to Section 147 of the Act, the assessee contended that the assumption of jurisdiction under Section 147 can be made only if the two conditions are satisfied, namely,

- (i) there should be a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment;

- (ii) notice should be issued within four years from the end of the relevant assessment year.

5. It was pointed out that the assessment proceedings were completed under Section 143(3) by order dated 17.09.2008 and four years from the end of the relevant assessment year, viz., 2006-07 expires by 31.03.2011 and the notice of re-assessment having been issued on 21.03.2012, one year after the due date, cannot be valid unless and until it states as to the failure on the part of the assessee to disclose fully and truly all material facts or on account of existence of any fresh tangible material. The assessee relied upon several decisions of the Hon'ble Supreme Court to support their contentions. Further, it was submitted that the reopening is a case of change of opinion and such exercise cannot be done and to support such contentions, the assessee placed reliance on the decision of the Hon'ble Supreme Court in *CIT Vs. Kelvinator of India Ltd* reported in [2010] 320 ITR 561 (SC). Without prejudice to the objections to the reopening of the assessment after assumption of jurisdiction of the Assessing Officer under Section 147 of the Act, the Assessing Officer submitted the following details with regard to the merits of the matter :-

"26. Without prejudice to the above, it is further submitted that the assessee is a non-banking finance company incorporated

on 31st August 2004 and registered with Reserve Bank of India. The first financial year is 31st March 2005 i.e., assessment year 2005-06.

27. As per the RBI regulations the assessee has to keep the money as fixed deposit till the date of granting of registration as NBFC by RBI. For the assessment year 2005-06, i.e., previous year ended 31st March 2005, the assessee has kept the entire money in cash and bank balance and not as investment in any securities as the company is prohibited from any other investment till the NBFC registration is granted.

28. The assessee company was incorporated as NBFC with specific objects of investments in shares and securities. The assessee has started operations of investing in shares and securities only from the financial year 2005-06 after getting NBFC Registration from RBI on 18.05.2005.

The Finance Act 2004 introduced new section 111A tax on short-term capital gain in certain cases.

"Where the total income of an assessee included any income chargeable under the head "Capital Gains" arising from the transfer of a short term capital asset, being an equity share in a company or a unit of an equity oriented fund and

a) The transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No.2) Act, 2004 comes into force, and

b) Such transaction is chargeable to securities transaction tax under that chapter,

c) The tax payable by the assessee on the total income shall be the aggregate of

d) The amount of income-tax calculated on such short-term capital gains at the rate of 15%.

29. *As the company is entitled to commence operation in FY 2005-06 i.e. Assessment Year 2006-07, there will not be any opening Investments.*

30. *The presumption that income derived from capital gainst is to be taxed as business income merely because there is no investment is incorrect and the income has been rightly assessed as capital gains and does not require reassessment."*

6. The Assessing Officer is purported to have disposed of the objections by communication dated 01.11.2012 which requires to be done in terms of the decision in **GKN Driveshafts** (cited supra). It pre-proposes that the Assessing Officer should deal with the objections and if not satisfied, should specifically state as to how the objections are unjustified and how the assumption of jurisdiction is valid. We have perused the order disposing of the objections dated 01.11.2012, from which, we find that the Assessing Officer has not dealt with any of the objections raised by the assessee both on assumption of jurisdiction as well as on merits. But, merely refers to explanation 1 of section

147 and states that there is no change of opinion. The Assessing Officer refers to the decision of the Hon'ble High Court of Delhi in the case of **Consolidated Photo & Finvest Ltd Vs. ACIT [2006] 151 Taxman 41**. The assessee filed the writ petition, viz., W.P. No. 30610 of 2012 questioning the said proceedings dated 01.11.2012. The writ petition was pending and an order of interim stay was granted. The respondent filed the counter affidavit. We find from the counter affidavit in para 8 that the Assessing Officer has merely reiterated the stand taken by her, while disposing of the objections by order dated 01.11.2012, which was impugned in the writ petition. The writ petition was tagged along with a batch of cases. When writ appeals were also filed, some of which by the Revenue against the grant of interim orders by the Learned Single Bench and those batch of cases were dismissed on the ground that whether an order passed by the Assessing Officer on objections of an assessee over adjudicating facts cannot be assailed before this Hon'ble Court under Article 226 of the Constitution of India. This decision reported in **Joint Commissioner of Income Tax Vs. Kalanithi Maran** reported in [2014] 366 ITR 453 (Madras). The assessee along with the other assessee preferred appeals before the Hon'ble Supreme Court and the Hon'ble Supreme Court granted an order of interim stay on 14.11.2014. However, one day prior to the same, the Assessing Officer issued reassessment order dated 13.11.2014, which was challenged by

the petitioner in W.P.No.30980 of 2014, which is subsequent of the cases of the appellant. It is the submission of the Learned Senior Counsel for the appellant that technically there might not have been a necessity to challenge the reassessment order. But, nevertheless which according to the assessee the reassessment order was despatched much later to the date of the order of stay granted by the Hon'ble Supreme Court, dated 14.11.2014. But, however, since the reassessment was coupled with the demand notice, the assessee was constrained to challenge the same by way of a separate writ petition. The Hon'ble Supreme Court allowed the appeals filed by all the assessees including the assessee before us in a batch of cases in ***Jeans Knit Private Ltd Vs. Deputy Commissioner of Income Tax & ors.*** reported in [2017] 390 ITR 0010 (SC) . The Hon'ble Supreme Court held that the decision arrived at by the Division Bench of this Court in ***Joint Commissioner of Income Tax -vs- Kalanithi Maran*** reported in [2014] 366 ITR 453 (Madras) is contrary to the law laid down by the Hon'ble Supreme Court in ***Calcutta Discount Limited Company Vs. Income Tax Officer, Companies District I, Calcutta & Anr.*** reported in [1961] 41 ITR 191 (SC) and therefore, set-aside the judgment and remitted the case to this Court to decide the writ petitions on merits. Further, there is an observation that each case shall be examined on its merits keeping in view the scope of judicial review while entertaining such matters as laid down by the

Hon'ble Supreme Court in various judgments. Further, the Hon'ble Supreme Court pointed out that during the pendency of the appeal before it, stay of reassessment was granted, which was directed to be continued till the disposal of the writ petition before the High Court. The appeals were allowed on the aforesaid terms.

7. Thus, in terms of the direction issued by the Hon'ble Supreme Court, the Learned Single Bench was required to decide the matter on its own merits, bearing in mind the scope of judicial review, while entertaining such appeals. The writ petition in W.P. No.30610 of 2012 was not decided on merits, but, it has been disposed of as infructuous in view of the order passed in W.P.No.30980 of 2021. In fact, what was required to be decided at the first instance was W.P. No.30610 of 2012 in terms of the directions issued by the Hon'ble Supreme Court. Therefore, this would suffice to hold that the order impugned in W.A. No.2452 of 2021 has to be set aside. However, the writ petition is of the year 2014 and the matters have been remanded by the Hon'ble Supreme Court, we have proceeded to consider the case on merits.

8. In the preceding paragraphs, while noting the facts, we have also made observation as to how the objections raised by the assessee were dealt with by

the Assessing Officer, while passing the order dated 01.11.2012, which in our considered opinion does not sanctity of law. The larger issue is whether there is any allegation against the assessee having failed to fully and truly disclose all material facts necessary for the assessment. We have purported the reasons for reopening in the preceding paragraphs and bare reading of those reasons will show that there is no such allegation against the assessee. That apart, the reopening having been made beyond the period of four years, unless and until there is fresh tangible material available in the hands of the Assessing Officer and putforth to the assessee in the proper manner, reopening could not have been resolved. The decision of the Hon'ble Supreme Court in ***Kelvinator India Pvt Ltd.*** would clearly come to the aid and assistance of the assessee. In the absence of any allegation against the assessee of any non-disclosure, we have no hesitation to hold that the assessment is a clear case of change of opinion, which has been held to be bad in law in terms of decision of the Hon'ble Supreme Court in the case of ***Kelvinator India Pvt Ltd.*** Furthermore, we found that during the scrutiny assessment, the case was discussed with the assessee on four dates, prior to which, a questionnaire containing as many as 13 questions were put to the assessee with direction to file relevant documents and on scrutiny of those documents, the Assessing Officer called for further particulars which had also been furnished by the assessee on 04.06.2018 and

therefore, it has to be presumed that the order has been passed by the Assessing Officer under Section 143(3) of the Act dated 17.09.2008 by forming an opinion and reopening the same on the same ground for the very same issue is a clear case of review. This view is supported by the decision in the case of **Principal Commissioner of Income Tax-6, Chennai -vs- Safe Corrugated Containers (P.) Ltd.** Reported in [2020] 120 taxmann.com 312 (Madras). It will be beneficial to refer to the decision of the Division Bench of this Court in **Commissioner of Income Tax -vs- Eco Media (P) Limited** reported in [2012] 81 CCH 0085 Chen HC, wherein, it has held that the Re-opening of assessment u/s 147 beyond the four years' time limit, as per the proviso, is valid only if the Assessing Authority has the satisfaction that the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee 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 assessment. To the same effect, the decision of this Court in **Indus Teqsite Pvt Ltd -vs- Deputy Commissioner of Income Tax** reported in [2021] 112 CCH 0013 ChenHC.

9. Thus, for all the above reasons, we are of the clear view that the reopening of the assessment is a clear case of change of opinion and what is

the Assessing Officer purported to review the scrutiny assessment, which is impermissible under law. With the above directions, the Writ Appeal in W.A. No. 2452 of 2021 is allowed and the order passed by this Court in W.P.No. 30610 of 2012 dated 12.07.2021 is set aside and the writ petition is allowed and the order impugned in that writ petition is quashed.

10. In the light of the above judgment in W.A.No.2452 of 2021, consequently, the reassessment order dated 13.11.2014 has to be quashed. Accordingly, the writ appeals are allowed and consequently, the connected Civil Miscellaneous Petitions are closed. No costs.

[T.S.S., J.]

[S.S.K., J.]

28.09.2021

Sp/Maya

Index: Yes/ No

Speaking Order : Yes/ No

To

The Deputy Commissioner of Income Tax,
Company Circle - VI (1),
121, Nungambakkam High Road,
Chennai – 600 034.

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W.A. Nos. 2452 and 2453 of 2021

T.S.Sivagnanam, J.
and
Sathi Kumar Sukumara Kurup, J.

(Sp)



W.A.No.2452 and 2453 of 2021
and
C.M.P.Nos.15747 and 15750 of 2021

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Dated : 28.09.2021