IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2020

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P. Nos. 12300 of 2007, 27987 of 2006 and 9353 of 2018
and
M.P. Nos. 1 of 2007, 1 of 2006 and 11163 of 2018

Indian Syntans Investments Pvt. Ltd.
Rep. By N.Narayanan Managing Director,
New No.12, Old No.71 Third Main Road,
Kasturba Nagar, Adyar, Chennai 600 020. ... Petitioner in W.P. No.12300 of 2007 & 27987 of 2006

M/s.The Villupuram District Central Cooperative Bank Ltd.
Rep by its General Manager
R.Saravanan, No.2, Hospital Road,
Villupuram 605 602. ...Petitioner in W.P. No.9353 of 2018

Vs.

The Asst. Commissioner Of Income Tax Company Circle II (3),
5th Floor, New Block, 121 Mahatma Gandhi Road,
Chennai-34. .. Respondent in W.P. No.12300 of 2007 & 27987 of 2006

The Asst. Commissioner of Income Tax,
O/o.The Asst. Commr. of Income Tax Circle 1,
Villupuram Income Tax Office,
No.1 Chairman Subbarayar St,
West Shanmugapuram, Villupuram. ... Respondent in W.P. No.9353 of 2018

Prayer in W.P. Nos.12300 of 2007 & 27987 of 2006: Writ Petitions filed under Article 226 of the Constitution of India praying **Writ of Certiorari** to call for the records on the file of the respondent herein and quash the impugned notice issued under section 148 of the Act in P.A.No.AAACI 1775K-2035 I dated 22.11.2006, 30.3.2006 and consequential quash the proceedings in

G.I.No.43-I/Co.Cir.II(3)/2000-2001, 1999-2000 dt 7.3.2007 and 26.07.2006 as illegal and without jurisdiction.

Prayer in W.P. No.9353 of 2018: Writ Petitions filed under Article 226 of the Constitution of India praying **Writ of Certiorari** to call for the records pertaining to the impugned notice in ITBA/ AST/ S/ 148/ 2017-18/ 1008770272 (1) dated 12.2.2018 of the respondent and consequential order dated 26.3.2018 passed by the respondent and quash the same as the reasons recorded for issue of notice and the reasons attributed for rejection of objections would not stand the test of law.

For Petitioner : Mr.R.Sivaraman in W.P. Nos.12300 of 2007 and 27897 of 2006

Mr.K.Ravi in W.P. No.9353 of 2018

For Respondents: M.A.P.Srinivas
Senior Standing Counsel

O R D E R

A single order is passed in these three Writ Petitions since a common proposition of law arises, relating to the validity of proceedings for re-assessment in terms of Section 147 of the Income Tax Act, 1961 (in short 'Act') in cases where the original proceedings for assessment were by way of an intimation under Section 143(1)(a)/143(1) of the Act.

2. Before proceeding to discuss the proposition of law, it would be appropriate that the facts are encapsulated briefly.

3. In W.P.Nos.12300 of 2007 and 27987 of 2006, the petitioner is Indian Syntans Investments, a company registered under the provisions of the

Companies Act 1956. A return of income had been filed by the petitioner on 27.10.2000 in relation to Assessment Year (AY) 2000-2001 accompanied by all necessary financials. An intimation under section 143(1) had been issued on 27.12.2001 and no proceedings for assessment had been taken up thereafter.

4. In the return of income filed, the petitioner had not offered any lease/rental income from Wind Turbine Generator (WTG) and hence the respondent officer was of the view that income chargeable to tax had escaped assessment. Thus, a notice under Section 148 dated 22.11.2006 was issued proposing to re-assess the petitioner for AY 2000-01, beyond a period of 4 (four) years as stipulated under Section 147(1) but within six (6) years as stipulated in the proviso to Section 147(1) of the Act.

5. The petitioner had purchased two WTGs, one in AY 1996-97 and the other in 1997-98 under a hire purchase agreement from a group of companies referred to as 'REPL Group' and had leased the WTGs back to the same group. According to the petitioner it had come to know thereafter that the assets, the WTGs, were non-existent and, since the transaction of the sale and lease back was fraudulent and not tenable, the company had voluntarily withdrawn the claim as per its income tax returns for AYs 1996-97 and 1997-98 by filing revised returns for both years. The resultant tax liability is stated to have been paid. The revised returns of the aforesaid two years have been accepted and orders of assessment dated 30.03.1998 (1996-97) and 31.03.1998 (1997-98)

completed under scrutiny, had been passed. Those assessments have attained finality. For the subsequent assessment years, AYs 1998-99 and 1999-2000, no income had been offered, since the petitioner had taken the stand the asset had been misappropriated and thus there was, for all intents and purposes, no income earning apparatus and consequently no income that arose for taxation. Such returns were accepted summarily and no proceedings for assessment under scrutiny or re-assessment had been initiated.

6. In the financials accompanying the returns for AY 2000-01, a note had been filed along identical lines as for the previous two years to the effect that no income was offered in relation to the lease transaction. Admittedly this note, and the financial statements of which it is part, have accompanied the return of income, filed within time.

7. A notice under Section 148 dated 28.11.2006 was issued pursuant to which a return of income along the same lines as that filed earlier was filed, and the reasons for re-assessment sought. The reasons furnished read as follows:

> '*The assessee company has taken legal proceedings against M/s.REPL Engg. Ltd. and M/s REPL Synergy Power System Ltd., Mumbai for misappropriation of company's assets while in possession as a lease treating it as tantamounting to criminal breach of trust. In the above circumstances, the lease rental on Turbine Generator amounting to Rs.48.00 lakhs was not recognised as income and the interest on HP Loan of Rs.13.67 lakhs was also not claimed as expenditure. The income had to be brought to tax on accrual basis, pending finalisation of legal proceedings.*
>
> *Under the head 'Administrative Expenses', the assessee had claimed an amount of Rs.26,41,631/- as debit balance no longer required as expenditure. As this not an allowable expenditure, the claim has to be verified.'*

Therefore, there were reasons to believe that income chargeable to tax has escaped assessment within the meaning of Sec.147 of the Income-tax Act, 1961 and accordingly the assessment for the asst. year 2000-01 in this case has been reopened.'

8. In line with the procedure set out in *GKN Drive Shafts V ITO* (259 ITR 1), the petitioner filed objections to the assumption of jurisdiction in February, 2007 relying on the decision of the Madras High Court in *Bapalal & Co. Exports* (289 ITR 37) and *Apollo Hospitals and Enterprises Ltd.*(287 ITR 25). As regards the second reason for re-assessment which was a claim of administrative expenditure, the petitioner pointed out that no material has been pointed out as to why the claim was incorrect and thus the reason itself only indicated a roving enquiry, impermissible under Section 147/148 of the Act.

9. The objections were rejected on 07.03.2007, challenging which the petitioner is before this Court. Mr.Sivaraman, arguing that the assumption of jurisdiction was bad in law, also places reliance upon the decision of this Court in the case of *Tanmac India V. Deputy Commissioner of Income-tax, Circle I, Pondicherry* (78 Taxmann.com 155).

10. Both in the reasons as well as in the impugned order of rejection of objections, the Officer makes it clear that no subsequent or new material has been found upon which he relies and the basis of the re-assessment is only the notes of account forming part of the financials that accompanied the return of income. The Officer relies on the decisions in *Indo-Aden Salt Mfg. & Trading Co. (P) Ltd. V. Commissioner of Income Tax Bombay* (159 ITR 624), *Modi*

spinning and weaving mills Ltd. V. ITO, Special Investigation Circle B, Meerut (59 ITR 401), *Dr. Amins Pathology Laboratory vs P.N. Prasad, Joint Cit & Ors* (252 ITR 673), *Sushila Devi Jain vs Commissioner Of Income-Tax, Delhi* (138 ITR 551), *MRF Limited V. ACIT Company Circle, VI (3), Chennai* (W.P.No.24310 of 2005) *and Techspan India (P) Ltd v. ITO*(282 ITR 212) in support of the rejection.

11. A counter has been filed wherein the Income Tax Department argues that an intimation under Section 143(1) cannot be construed to be an assessment and in case where there has been an escapement of income, the principles applicable to an assessment conducted under scrutiny cannot be extended to protect those cases where proceedings have not progressed beyond the stage of issue of intimation. The argument is fortified by reference to the judgment of the Supreme Court in the case of *ACIT V. Rajesh Jhaveri Stock Brokers (P) Ltd.*(291 ITR 500) and the learned Standing Counsel in the course of oral arguments has also relied on the judgment of the Supreme Court in the case of *Deputy Commissioner of Income Tax V. Zuari Estates Development and Investment Co. Ltd.*(373 ITR 661).

12. As regards W.P.No.9353 of 2018, the petitioner is a co-operative Society registered with Registrar of Co-operative Societies, Tindivanam and carrying on the business of banking under a licence issued by the Reserve Bank of India dated 09.01.2012. The petitioner lends to Primary Agricultural

Cooperative Credit Societies which in turn lend to their members, substantially for agriculture. A return of income was filed for AY 2015-2016 electronically. The petitioner points out that as per Rule 12(2) of the Income Tax Rules, 1962 (in short 'Rules') the return of income for that year need not be accompanied by any other document as the Form of Return and statement of computation of tax payable, itself captures all required particulars.

13. The petitioner had, in its return of income, claimed deduction under Section 36(1)(viia) of the Act read with Rule 6ABA of the Income Tax Rules. This very issue, in regard to the allowability of the aforesaid deduction, had arisen for earlier assessments year as well, that is, for AY 2008-09 to 2013-14, and the assessment for those years are stated to be pending in appeal before the Appellate Authority. The question that arose was whether the deduction should be restricted to the computation as prescribed in Section 36(1)(a) or the provision for bad and doubtful debts made in the books of accounts. This would involve an interpretation of Rule 6BAA, which utilizes the phrase *'amount of advances made by each rural branch as outstanding at the end of the last date of each month',* as to whether, 'the amount' would be represented by the entirety of the advances made by the branch or the outstanding amount of advances made during the month.

14. There is no necessity to advert in further detail to the merits of the matter as the issue is pending resolution before the Appellate Authority for the

previous years. Suffice it to note the following events in relation to the impugned proceedings. Intimation under Section 143(1) dated 15.12.2016 was issued after the return was electronically processed by the Central Processing Centre (CPC), Bangalore. No notice under Section 143(2) was issued. This was followed by a notice under Section 148 dated 12.02.2018 issued on the basis that there was escapement of income. As required statutorily, the petitioner filed a return of income on 01.03.2018 and sought the reasons on the basis of which the proceedings for re-assessment had been initiated. The reasons state as follows:

> *The reason for opening of the assessment u/s 147 for the assessment year 2015-16 is as below:*
>
> *The assessee has filed its Return of Income on 30.09.2015 electronically with a returned income of Rs.15,30,71,285/-. This case was not selected for Scrutiny by CASS. On verification of the return of income and with the previous records, the assessee has claimed deduction under Section 36(1)(viia) towards bad and doubtful debts at Rs.24,31,26,926/- in the Return of Income. The Section 36(1)(viia) is reproduced below:*
>
> > ***36.*** *(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—*
> > *(viia) in respect of any provision for bad and doubtful debts made by—*
> >
> > *(a) a scheduled bank [not being a bank incorporated by or under the laws of a country outside India] or a non-scheduled bank or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank, an amount not exceeding eight and one-half per cent of the total income (computed before making any deduction under this clause and Chapter VIA) and an amount not exceeding ten per cent of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner :*
>
> *Assessee made a provision for bad and doubtful debts of Rs.10,74,15,080/- by debiting in its profit and loss account. Then, as per*

Section 36(1)(viia), the assessee is eligible to claim a deduction of 7.5% of the total income (computed before making any deduction under the clause and chapter VIA) and an amount not exceeding 10% of the aggregate average advances made by the rural branches of such bank or provision for bad and doubtful debts whichever is less.

It was found that the provision for bad and doubtful debts (Reserve for NPAs) made and debited in the accounts during the year is Rs.10,74,15,080; whereas, the assessee has claimed deduction under Section 36(1)(viia) towards bad and doubtful debts at Rs.24,31,26,926/- in the Return of Income. Therefore, the excess deduction of Rs.13,57,11,846 claimed by the assessee need to be disallowed.

Regarding, the computation of aggregate average advances made by the rural branches of such bank, assessee had taken entire cumulative outstanding balance of aggregate average rural advance at the end of the year instead of the fresh aggregate average rural advance made during the year under Rule 6ABA. The aggregate average rural advance made during the year need to be worked out.

The approval for assessment u/s 147 has been obtained from the Joint Commissioner of Income Tax, Villupuram Range.

Any objection in this regard may kindly be intimated on or before 14/03/2018.

15. The proceedings for re-assessment were objected to by the petitioner relying on the decision of this Court in the case of *Tanmac India* (supra). By communication dated 26.03.2018, the Officer replies in the following terms:

Your response to the reason for re-opening for the A.Y.2015-16 is duly considered and the same cannot be accepted due to the following reasons:

i) Assessee had claimed that the reasons recorded for re-opening was already part of the return filed under Section 139(1). However, the quantum of provisions made is not explicitly mentioned in the return of income filed by the Assessees.

ii) It would require due diligence by the Assessing Officer to find the issue and the same is recorded in the reasons for re-opening. Without such due diligence, the issue mentioned in the reasons for re-opening cannot be unearthed.

iii) Therefore, the same cannot be considered as explicitly provided in the return of income filed.

iv) The preconditions for re-opening, mentioned in the Income Tax Act, 1961 and the various judicial pronouncements are satisfied in this case.

16. *Tanmac* (supra) was distinguished saying that in that case the return had been filed manually, whereas in the present case, electronically, and secondly, that the intimation had been issued electronically by the CPC and not by the Assessing Officer and there was thus no application of mind by the Assessing Officer in the case of return electronically filed that had also been processed electronically. The objections were rejected as against which, the petitioner has filed the present Writ Petition.

17. The provisions of Section 147 of the Act provide for the assessment of income that has escaped taxation. The provisions of Section 147 read as under:

> ***Income escaping assessment.***
>
> ***147.*** *If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
>
> ***Provided*** *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the 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 his assessment, for that assessment year:*
>
> . . . .

18. As regards Indian Syntans, the notice for re-opening in relation to AY 2000-01 was issued beyond a period of four years. The proviso to Section 147 would thus swing into operation. The proviso grants the benefit of an extended limitation of six years as against four years provided in the main Section in three situations (i) where a return of income has not been filed under Section 139 (ii) where a return of income has not been filed in response to notice under Section 142(1) (iii) if the escapement is attributable to the failure of the assessee in not having made a full and true disclosure of income in the return of income.

19. The return of income filed by Indian Syntans was accompanied by financials that contained a note explaining the lease transaction and a perusal of the reasons for re-assessment make it clear that the reasons are based entirely upon the documentation accompanying the return and no material extraneous to that already on record or anew, has been discovered by the respondent indicating income that had escaped taxation. This is the position both as regards the lease income as well as the claim of administrative expenses.

20. In such circumstances, the escapement of income, if any, cannot be attributed to the assessee. A full and true disclosure has been made in so far as all material germane to the computation of income forms part of the return of income.

21. In W.P.No.9353 of 2018, the impugned proceedings relate to AY 2015-16 and have been initiated within a period of four years from the end of the relevant assessment year, as provided for under Section 147(1) of the Act. The mere fact that the respondent had not originally taken the return up for scrutiny by issuing notice under Section 143(2) would not debar the Department from initiating proceedings for re-assessment. The impugned proceedings for re-assessment are, according to the reasons for re-assessment as well as the counter filed by the respondent, based upon certain discrepancies noted in the figure of bad and doubtful debts in the statement of computation of income and the financials. I thus, find no legal infirmity in the initiation of proceedings for re-assessment in this case.

22. In both *Zuari Estate Development* (supra) as well as *Rajesh Jhaveri* (supra), the specific question decided by the Hon'ble Supreme Court was whether an intimation under Section 143(1)(a) or 143(1) could be treated to be an order of assessment and whether in issuing an intimation there has been application of mind by the Assessing Officer. The answer was, to quote the Bench, *'an emphatic no'* to both the issues. The intimation was merely held to be a notice of demand and nothing more.

23. In the present cases, it is not really this question that arises for consideration. The argument of the revenue relying on *Rajesh Jhaveri* (supra) and *Zuari Estate Development* (supra) and distinguishing *TANMAC* (supra) is

that there is no application of mind at the stage of issuance of intimation. This argument is accepted as being a settled position. That being the case, it would hardly make a difference as to whether the intimation were issued by an Assessing Officer or by CPC and non-application of mind to the issues arising for assessment is apparent.

24. However, there are other tests, equally well settled by the Courts, such as, in a case where proceedings are initiated beyond four years from the end of the relevant financial year where the proviso to Section 147 stood attracted and whether the reasons indicate the existence of any material beyond what was available on record to test the validity of the proceedings.

25. In *Kelvinator India Ltd. Vs. Income Tax Officer* (320 ITR 561) the Hon'ble Supreme Court considered the case of a re-assessment that has been initiated within four years. The reasons for re-opening merely reiterated material that was already on record as a result that the Bench came to the conclusion that the proceedings were not one of re-assessment but one of review, impermissible under the Act. The conclusion of the Supreme Court to this effect is extracted below:

. . . .

> *On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and*

only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the

> opinion'. Other provisions of the new section 147, however, remain the same."

For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs.

26. The above settled position has been reiterated ad nauseum by Courts, indisputably settling the proposition that a re-assessment, be it within or beyond four years, has to be based on tangible material dehors that which is available on record, that has come to the notice of the Assessing Officer. Thus, once an intimation has been issued, be it manually by the Assessing Officer or electronically by CPC, the mechanism for selection of returns for assessment must be robust, ensuring that issues requiring scrutiny are picked up promptly and addressed in time. If the Department lets sail this ship, recourse to proceedings for re-assessment is available only if the department comes into possession of material apart from that already available as part of its records or if the primary particulars reveal discrepancies that are not explained or resolved by the accompanying documentation. This is subject, therefore, to the assessee having placed on record all material necessary for the appreciation of the issues arising for assessment including financials and annexures along with its return of income, at the first instance.

27. In the light of the discussion as above, W.P.Nos.12300 of 2007 and 27987 of 2006 are allowed and W.P.No.9353 of 2018 is dismissed. The impugned proceedings for re-assessment, in this case are held to be valid and

will continue by issue of notice. After hearing the petitioner either over video conference or physically as per mutual convenience of the parties, let an order of re-assessment be passed in accordance with law, within a period of eight (8) weeks from date of uploading of this order. No costs. Connected Miscellaneous Petitions are closed.

07.09.2020

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Index: Yes
Internet: Yes
Speaking Order

To

1. The Asst. Commissioner Of Income Tax Company Circle II (3),
   5th Floor, New Block, 121 Mahatma Gandhi Road,
   Chennai-34.
2. The Asst. Commissioner of Income Tax,
   O/o.The Asst. Commr. of Income Tax Circle 1,
   Villupuram Income Tax Office,
   No.1 Chairman Subbarayar St,
   West Shanmugapuram, Villupuram.

Dr.ANITA SUMANTH, J.

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