

WEB COPY



W.P.No.21995 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.3.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI,
CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.No.21995 of 2021 &

WMP.Nos.23212 and 23213 of 2021

M/s.Tamil Nadu State Marketing Corporation Ltd
4th Floor. CMDA Tower II, Gandhi Irwin Bridge Road
Egmore Chennai 600 008 Represented by its
Managing Director Shri R. Kirlosh Kumar

.. Petitioners

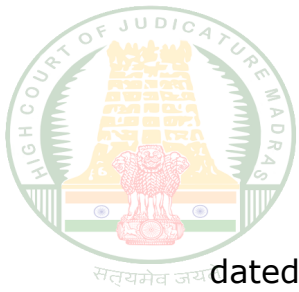
Vs

1 Additional/Joint/Deputy/Asst
Commissioner of Income tax/ Income Tax
Officer National e-Assessment centre Delhi

2 The Deputy Commissioner of Income Tax
Corporation Circle-3(1) 121
Mahatma Gandhi Road, Chennai-600 034.

.. Respondents

Prayer: Petition filed under Article 226 of The Constitution of India
praying for the issuance of a Writ of Certiorari to call for the records of
the petitioner on the file of 1st respondent and quash the Impugned
Assessment Order in ITBA /AST / S / 147 / 2021- 22/ 1035986761 (1)



W.P.No.21995 of 2021

dated 28.09.2021 in PAN AAAct2964P for the Assessment year 2015-16 passed by the 1st respondent.

For Petitioner : Mr.Vijayaraghavan and
Mr.Vikram Vijayaraghavan
for M/s. Subbaraya Aiyer
Padmanabhan
For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

ORDER

(Order of the Court was made by
the Hon'ble Chief Justice)

By this writ petition, challenge is made to the assessment order dated 28.09.2021 for the Assessment Year 2015-16, without availing the remedy of appeal and therefore, to justify the maintainability of the writ petition, argument was raised in reference to the judgment of the Hon'ble Apex Court in the case of **GKN Driveshafts (India) Ltd -Vs- ITO (259 ITR 19 (SC))**.

2. Learned counsel for the petitioner submitted that, writ petition challenging the assessment order is maintainable for the



W.P.No.21995 of 2021

WEB COPY

reason that after the notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), the petitioner submitted the objections, however, without deciding the objections, the respondents have given another show cause notice pursuant to the amendment made in Act of 1961 in the intervening period. The assessment order could not have been passed without deciding the objections raised by the petitioner. Since there was a procedural lapse and irregularity in passing the re-assessment order, the writ petition is maintainable in the light of the judgment cited supra. A specific reference to the judgment was given to indicate that in cases where objections were submitted by the assessee pursuant to the notice under Section 148, the assessing officer is bound to dispose of the same by passing a speaking order before proceeding with the assessment order.

3. A reference to Para 34 of the judgment in the case of **Commissioner of Income Tax -Vs- Pentafour Software Employees Welfare Foundation** reported in **418 ITR 427 (Mad)** was also made, wherein it was held that when a notice under



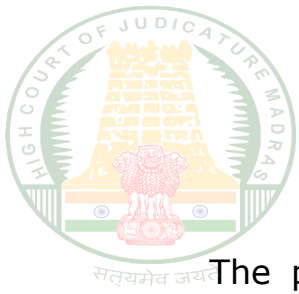
W.P.No.21995 of 2021

WEB COPY

Section 148 of the Act is issued, the proper course of action for the noticee is to file a return and if the assessee so desires, to seek disclosure of reasons for issuing such notice. Further, it was held that the assessing officer has to furnish reasons within a reasonable time and on receipt of the objections, the assessing officer is bound to dispose of the same by passing a speaking order.

4. Since in the present matter, the objections raised by the petitioner pursuant to the show cause notice remained undecided, the assessment order becomes illegal on the face of it, thus the writ petition was rightly maintained by the petitioner and accordingly the prayer sought for is to set aside the order of assessment for the assessment year 2015-16.

5. Learned counsel for the Revenue has opposed the writ petition on facts as well as on the legal issue. It is submitted that, after a notice under Section 148 of the Act, the course of action, as held by the Apex Court in the case of **GKN Driveshafts (India) Ltd -Vs- ITO (259 ITR 19 (SC))** cited supra, has been followed.

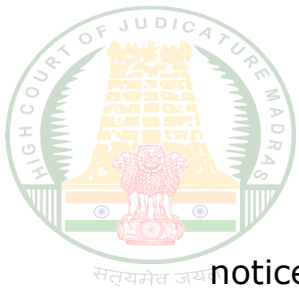


W.P.No.21995 of 2021

WEB COPY

The petitioner had in fact submitted the objections to the notice under Section 148 and an order could not be passed immediately due to COVID-19 pandemic situation. However, a detailed order was passed on 24.09.2021 where the objections raised by the petitioner were dealt with. A show cause notice along with order was sent to the petitioner. When the petitioner failed to send a reply to the same, vide letter dated 25.09.2021, the petitioner was further asked to send a reply clarifying that there is no interim order of the High Court in regard to the assessment year 2015-16 and if it exists the petitioner may send a copy of the same to the assessing authority. In the said letter, it was also informed to the petitioner that the limitation for reassessment is expiring on 30.09.2021 and thus petitioner has to send reply to the draft assessment order within the time given therein. As no response was received, the assessment order was thereupon passed on 28.09.2021.

6. At this stage, the learned counsel for the petitioner submitted that the notice dated 24.09.2021 was again a show cause



W.P.No.21995 of 2021

WEB COPY

notice and not an order on the objections raised pursuant to the notice under Section 148 of the Act.

7. The aforesaid issue has been dealt with by the learned counsel for the Revenue by referring to the order in detail and justifying it in reference to the judgment of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd -Vs- ITO (259 ITR 19 (SC))**. Accordingly the learned counsel for the Revenue prays this Court not to quash the order of re-assessment and for dismissal of the writ petition.

8. We have heard the learned counsel for the parties and have perused the records. The case has a checkered history and the brief facts of the case is as follows.

9. The petitioner is a Government of Tamil Nadu Undertaking incorporated on 28.05.1983 under the Companies Act, 1956. It was involved in retail vending of alcoholic liquor and accordingly shops were opened across the State for the sale of liquor. During the



W.P.No.21995 of 2021

WEB COPY

assessment year 2014-15, the petitioner had paid VAT amount of Rs.11,491.97 Crores as per the Second Schedule to Tamil Nadu Value Added Tax Act 2006 and claimed as expenditure in the Profit and Loss Account and the same was accepted by the assessment order under Section 143(3) of the Act on 30.12.2016. It is thereupon the Principal Commissioner of Income Tax, Chennai issued a notice under Section 263 on 18.03.2016 to show cause as to why the assessment order passed under Section 143(3) of the Act on 30.12.2016 should not be treated as erroneous and prejudicial to the interest of the Revenue for the reason that the charge of VAT levied on the State Government undertaking by the State Government though comes within the provisions of Section 40(a)(iib) of the Act and hence shall not be allowed as deduction for the purpose of computation of income of such undertakings under the head 'profits and gains of business or profession'. The petitioner challenged this show cause notice under Section 263 of the Act by maintaining a writ petition in W.P.No.8629 of 2019, where an interim order was passed. During the intervening period, the petitioner paid VAT amounting to Rs.12,889.53 Crores for the



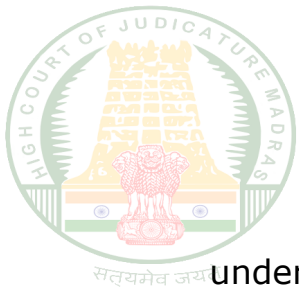
W.P.No.21995 of 2021

WEB COPY

assessment year 2015-16 and claimed as expenditure in the Profit and Loss Account in the same manner as given in the previous assessment year 2014-15. The petitioner filed original return of income on 30.09.2016 declaring NIL income. The return of income was processed under Section 143(1) of the Act on 22.07.2017 resulting in a refund of Rs.2,76,320/-. It is thereupon the respondent Revenue issued a notice under Section 148 of the Act on 23.03.2020 to reopen the assessment of income for the assessment year 2015-16.

10. In response to the said notice, the petitioner filed a reply vide letter dated 22.04.2020 requesting the assessing officer to treat the revised return of income as the return filed pursuant to the notice under Section 148 of the Act and also requested the assessing officer to furnish the reasons recorded for reopening the assessment.

11. The second respondent / assessing officer furnished the reasons recorded for reopening of assessment along with the notice



W.P.No.21995 of 2021

WEB COPY

under Section 142(1) of the Act on 26.09.2020, where they proposed to disallow the amount of VAT towards expenditure in terms of Section 40(a)(iib) of the Income Tax Act, the petitioner filed detailed objections on 20.10.2020. In the meanwhile, the petitioner challenged the constitutional validity of Section 40(a)(iib) of the Income Tax Act, 1961 in W.P.No.6284 of 2020, which was dismissed by this Court by order dated 11.03.2020, against which the petitioner filed a Special Leave Petition before the Hon'ble Supreme Court in S.L.P.No.10613 of 2020 and the Hon'ble Supreme Court, vide order dated 25.11.2020 quashed the impugned judgment of the Madras High Court and remitted the matter back to the High Court in respect of the challenge to the vires of Section 40(a)(iib) of the Income Tax Act, 1961.

12. The assessment orders pertaining to different assessment years viz., 2014-15, 2015-16 and 2017-18 were challenged in different writ petitions. The Central Government, vide notification dated 30.08.2020, made an amendment in the E-Assessment Scheme 2019 and it was named as Faceless Assessment Scheme.



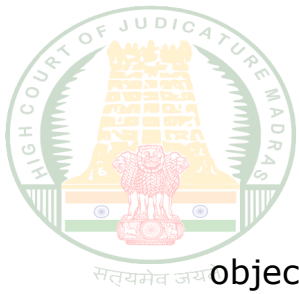
W.P.No.21995 of 2021

WEB COPY

The respondents thereupon sent a letter on 01.02.2021 as a reminder to file the return of income under Rule 12 in response to the notice issued dated 23.03.2020.

13. The main issue for consideration is as to whether the objections raised by the petitioner pursuant to the notice under Section 148 of the Income Tax Act 1961 were decided or not and if not, the assessment order passed pursuant to the notice under Section 148 would not be legally sustainable. However, we find that in the notice dated 24.09.2021, the objections raised by the petitioner company were dealt with.

14. Since the objections raised by the petitioner have been dealt with by the Revenue and it was pursuant to the same, the show cause notice along with draft assessment order was issued to the petitioner. Thus, it cannot be stated that the assessment order under challenge is without an order on the objections raised pursuant to the notice under Section 148 of the Income Tax Act. Rather, a detailed order was passed and finding no substance in the



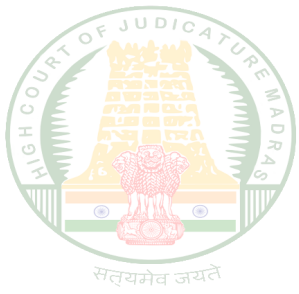
W.P.No.21995 of 2021

WEB COPY

objections, a show cause notice along with the draft assessment order was sent to the petitioner, which remains without reply by the petitioner and accordingly, before the expiry of the period for re-assessment, the assessment order was passed on 28.09.2021.

15. Thus, in view of the facts given above, we find that it is not such a case where a writ petition can be maintained directly challenging the assessment / reassessment order. The judgment of the Hon'ble Apex Court in **GKN Driveshafts (India) Ltd -Vs- ITO (259 ITR 19 (SC))** case has been applied. For ready reference, the relevant portion of the said judgment is extracted hereunder.

"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by



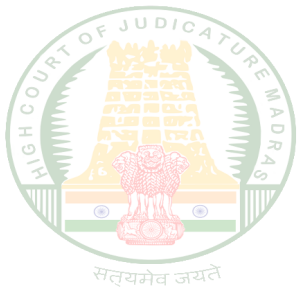
W.P.No.21995 of 2021

WEB COPY

passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed, by passing a speaking order before proceeding with the assessment in respect of the above said five assessment years.

Insofar as the appeals against the assessment before the CIT(A), we direct the appellate authority to dispose of the same, expeditiously."

16. The aforesaid judgment shows that, when a notice under Section 148 of the Act is given, the proper course of action for the assessee is to file a return and if he so desires, to seek reasons for issuing the notice, and the assessing authority is bound to furnish the reasons for reopening the assessment. On receipt of the reasons, the assessee is entitled to file his objections to the issuance of the notice and the assessing officer is bound to dispose of the same by passing a speaking order.

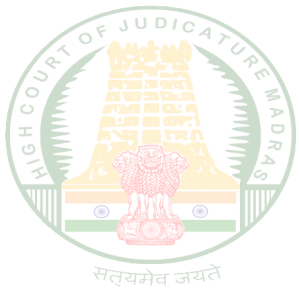


W.P.No.21995 of 2021

WEB COPY

17. In the instant case, the allegation of the petitioner is that, pursuant to the notice under Section 148 of the Act, when an objection was submitted by the petitioner, no speaking order was passed on it, rather an assessment order was passed directly. The arguments have been raised without taking note of the fact that while sending the show cause notice and draft assessment order on 24.09.2021, the order on the objections was also sent, after dealing with the objections. When no response to the show cause notice along with the draft assessment order was received, the final assessment order was passed on 28.09.2021.

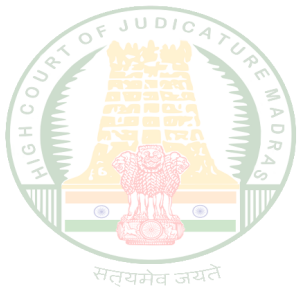
18. Accordingly, we do not find this as a fit case for maintaining a writ petition to challenge the assessment order. However, the petitioner can seek remedy by filing an appeal against the assessment order because, we have not touched the merits of the issue. Rather, the present order is only with reference to the maintainability of the writ petition in reference to the notice under Section 148 of the Income Tax Act and the objections thereupon.



W.P.No.21995 of 2021

WEB COPY

19. At this stage, the learned counsel for the petitioner prays for liberty to file an appeal against the assessment order within a period of three weeks, for which no objection has been raised by the learned counsel for the Revenue. Accordingly, the petitioner is at liberty to file an appeal before the appellate authority against the assessment order within a period of three weeks and if it is filed, the appeal shall be entertained after applying the provisions of law. However, taking note of the peculiarity of the case, the respondents shall not take any coercive action against the petitioner till the disposal of the appeal and the appellate authority is directed to expedite the hearing and decide the appeal at the earliest so that the position in reference to the legal issue regarding the acceptance of VAT towards expenditure on the income may become clear as to whether it is allowable or not. This order shall not be taken as a precedent, as it is passed after taking note of the peculiar facts of the present case only.



W.P.No.21995 of 2021

WEB COPY

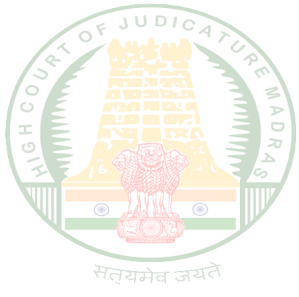
20. With the above observations, this writ petition is disposed of. However, there shall be no order as to costs. Consequently, connected W.M.P.Nos.23212 and 23213 are closed.

(M.N.B., C.J.) (D.B.C.J.)
21.3.2022

Index : Yes/No
Internet : Yes/No
KST

To

- 1 Additional/Joint/Deputy/Asst
Commissioner of Income tax/ Income Tax
Officer National e-Assessment centre Delhi
- 2 The Deputy Commissioner of Income Tax
Corporation Circle-3(1) 121
Mahatma Gandhi Road, Chennai-600 034.



WEB COPY



W.P.No.21995 of 2021

M.N.BHANDARI, CJ
AND
D.BHARATHA CHAKRAVARTHY,J

KST

W.P.No.21995 of 2021

21.3.2022