

INCOME TAX : Where in original assessment order, issue of retention money of Rs. 5.88 crore was neither considered nor adjudicated by Assessing Officer and later on related incorrect claim of assessee and disclosure of reduced income were identified, reassessment was justified

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HIGH COURT OF MADRAS

S. Subrahmanyam Constructions Co. (P.) Ltd.

v.

Assistant Commissioner of Income-tax, Corporate Circle 6(2), Chennai*

S.M. SUBRAMANIAM, J.

W.P. NO. 34632 OF 2018

W.M.P. NOS. 40151 AND 40153 OF 2018

APRIL 26, 2021

Section 5, read with section 147, of the Income-tax Act, 1961 - Income - Accrual of (Retention money) - Assessment year 2011-12 - Whether once an opinion can be formed that issues raised in reopening proceedings was not adjudicated in original assessment order, then it is sufficient to confer power on Assessing Officer to reopen assessment and department must be allowed to proceed with further action as contemplated under statute - Held, yes - Assessee, engaged in construction, filed its return of income - Later on Assessing Officer found excess deduction of retention money on work-in-progress by assessee - Assessee, in reply, contended that he had followed percentage completion method and, hence retention money of Rs. 5.88 crore which was yet to be received was not declared - Assessing Officer reopened assessment on basis of non-disclosure of material facts - Whether since issue of retention money of Rs. 5.88 crore was not considered by Assessing Officer in original assessment order and later on, incorrect claim and reduced income were identified, reassessment was justified - Held, yes [Paras 25 and 26] [In favour of revenue]

FACTS

- The case of assessee construction company was selected for scrutiny under Computer Aided Scrutiny Selection (CASS). In response to the notice, the assessee had provided the details pertaining to retention money more specifically, with respect to the change in accounting policy, which was further substantiated by a Schedule to the Notes of Account forming part of the computation of total income.
- The Assessing Officer passed the scrutiny assessment order under section 143(3).
- After 4 years, the Assessing Officer sought clarification pertaining to the retention money amounting to Rs. 5.88 crore. He opined that, since the assessee was following percentage completion methods, the income as per percentage completion method was required to be assessed.
- The assessee stated that the projects were completed on percentage completion method and a sum of Rs. 5.88 crore was deducted by customer as retention money. This money would be paid by customer only after the project was completed and

defect curing period was completed. The amount would become due to the assessee only after completion of warranty period.

- According to the Assessing Officer, the assessee was offering only a part of the income and not offering the other part. In the relevant year, the assessee chose to offer part of retention money on completed projects and had not offered retention money on ongoing projects. Thus, the assessee was offering only part of the retention money accrued during the year. There was inconsistency in the accounting treatment followed by the assessee. Thus, the assessment was sought to be reopened.
- On writ petition filed by the assessee:

HELD

- The reasons furnished for reopening of the assessment dated 18-12-2018 would clearly reveal that incorrect claim and reduced income were identified. Further, it is stated that the issue of retention money of Rs. 5.88 crore was not considered by the Assessing Officer in the original assessment order. Thus, the reopening of assessment cannot be construed as change of opinion. [Para 23]
- Once the department could able to establish that reopening of assessment is made based on the new materials or with reference to the informations which were not truly and correctly provided by the assessee at the time of original assessment, then power under section 147 can be invoked. Amended provision of section 147 provides wider power to the Assessing Officer to reopen the assessment. Only when the adjudicated issues are sought to be reopened, then alone the Court can form an opinion that the case would fall under change of opinion and not otherwise. [Para 24]
- Regarding the sufficiency of material, the Court would not substitute any opinion and it is for the competent authority to conduct an enquiry, adjudicate the issues by affording opportunity to the assessee and pass appropriate orders by following the procedures contemplated. Thus, the High Court is empowered to scrutinise the process through which the decision is taken and the validity of the reasons provided in the order impugned and certainly not the decision itself. Thus, the sufficiency of the reasons cannot be gone into by the High Court in writ proceedings. Once the High Court is able to form an opinion that the issues raised in the reopening proceedings are not adjudicated in the original assessment order, then it is sufficient to confer power on the Assessing Officer to reopen the assessment and the department must be allowed to proceed with further action as contemplated under the statute. [Para 25]
- These being the principles to be followed in the present case, the non-adjudication of retention money of Rs. 5.87,61,168 is unable to be disputed by the petitioner/assessee in the present case. In other words, the petitioner could not be able to establish that the retention money stated above was adjudicated by the Assessing Officer during the original assessment. This being the factum established, there is no reason to consider the case of the writ petitioner and accordingly, the writ petition fails and stands dismissed.[Para 26]

CASES REFERRED TO

Jt. CIT v. Kalanithi Maran [\[2014\] 366 ITR 453 \(Mad.\)](#) (para 16).

R. Sivaraman *for the Petitioner.* **A.P. Srinivas**, Sr. Standing Counsel *for the Respondent.*

ORDER

1. The notice issued under section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the IT Act") for reopening of the assessment in proceedings dated 29-3-2018, and the proceedings dated 18-12-2018 furnishing reasons for reopening of the case of the petitioner/assessee are under challenge in the present writ petition.
2. The petitioner is a Private Limited Company engaged in the field of construction. The petitioner is assessed to the files of the respondent in PAN: AASCS3911A. With respect to the impugned assessment year 2011-12, the petitioner had duly filed their income on 29-9-2011 declaring total income of Rs. 38,47,535/-. The return of income was processed under section 143(1) of the IT Act. Subsequently, the case was selected for scrutiny under Computer Aided Scrutiny Selection (CASS) and notice under section 143(3) of the IT Act was issued on 10-8-2012. In response to the same, the authorized representative of the petitioner had duly provided all the details called for by the Deputy Commissioner of Income Tax, Company Circle-VI(1), the predecessor of the respondent. The petitioner, *vide* letter dated 22-5-2014, had duly submitted the details pertaining to retention money more specifically, with respect to the change in Accounting Policy, which was further substantiated by Schedule XIII to the Notes of Account forming part of the computation of total income for the assessment year 2011-12. The petitioner had filed all the details called for by the respondent from time to time. It is only after considering the submissions along with the evidences placed on record, the respondent passed the scrutiny assessment order under section 143(3) of the IT Act dated 30-3-2014.
3. The Assistant Commissioner of Income-tax, Corporate Circle 6(1), Chennai (for brevity "the ACIT") *vide* letter dated 17-1-2018, had requested certain clarification pertaining to the retention money amounting to Rs. 5,87,61,168/-, which was required to be added back to the assessed income. The ACIT further stated that since the petitioner was following percentage completion methods, the income as per percentage completion method to the tune of Rs. 1,45,31,751/- is required to be assessed for the Assessment Year 2011-12. The petitioner preferred their reply to the said clarification by letter dated 12-2-2018 stating that the petitioner had incomplete projects worth Rs. 2,92,00,91,516/-, out of which, the total expected retention money at the end of the project is Rs. 11,14,43,711/-. These projects were completed on percentage completion method and a sum of Rs. 5,87,61,167/- was deducted by the customer as retention money. This money would be paid by the customer only after the project is completed and defect curing period is completed. In other words, the amount will become due to the petitioner only after completion of warranty period. The amount of retention money has been accrued at the completion of project in the subsequent years. Moreover, the retention money has already been offered to tax in the subsequent period thereby vitiating the taxation of the same income during the impugned assessment year 2011-12.
4. After a period of four years, the respondent by notice dated 29-3-2018 issued under section 148 of the IT Act, sought to reopen the concluded assessment under section 143(3), without any tangible materials and without giving a finding that there is a failure on the part of the petitioner to disclose fully and truly all the materials at the time of completion of the original assessment. The petitioner requested the respondent to provide for the reasons for reopening of the assessment for the assessment year 2011-12, which is beyond four years.
5. The petitioner has stated that the reasons for reopening the assessment issued by the respondent were identical to the clarifications raised by the ACIT *vide* letter dated 17-1-2018. Identical information was requested by the Assessing Officer during the course of the scrutiny proceedings under section 143(3) of the IT Act relating to the retention money and the change in Accounting Policy by the petitioner for the relevant previous year.

6. Despite providing their detailed explanations to the clarifications of the ACIT, the petitioner reiterated their stand by means of a detailed objections dated 17-12-2018 before the respondent stating their objections for reopening the assessment proceedings under section 147 of the IT Act. With respect to the reasons for reopening, the petitioner had duly submitted and provided their detailed explanations during the course of the scrutiny assessment proceedings. The petitioner submitted that the retention money amounting to Rs. 5,87,61,168/- was not in the nature of income till such time the contractual obligations are fully performed to the satisfaction of the customer by the petitioner. Therefore, charging the same to tax as work in progress is not correct as per law. These facts were duly discussed and explained during the course of the original scrutiny assessment under section 143(3) of the IT Act by the petitioner and subsequently, accepted by the respondent. Additionally, the petitioner objected that they had provided all the documents and evidences during the course of the scrutiny assessment proceedings as well as while filing their response to the clarifications to the ACIT.

7. On going through the aforesaid objections, it is crystal clear that there is neither any jurisdiction of the authority, nor there are any merits to show that the income has escaped assessment on the part of the respondent herein warranting reopening of the concluded assessment, since there are no tangible materials warranting reopening of the completed assessment and there is no finding given by the respondent that there is failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment. The respondent herein without dealing with the jurisdiction issue and without even dealing with the case laws, which are binding upon him, by impugned proceedings dated 18-12-2018, had held that the proceedings under section 147 of the IT Act have been initiated correctly and rejected the objections of the petitioner. The proceeding passed by the respondent dated 18-12-2018 is devoid of merit and is not a speaking order as stipulated under law.

8. The learned counsel for the petitioner solicited the attention of this Court with reference to the Significant Accounting Policies, that is, Basis of Accounting. It is contended that as per Schedule XIII A1(c) of the Significant Accounting Policies, the company, during the year, has changed the Accounting Policy on recognition of retention money on completed projects. It has accounted retention money on completed projects on accrual basis, where the company is confident of receiving the retention money in full as compared to cash basis followed in preceding years. This apart, the Chartered Accountants, of the petitioner in letter dated 25-2-2014, categorically stated with reference to the assessment year 2011-12 regarding the change in Accounting Policy relating to retention money. The said Chartered Accountants have stated as under:-

"In the preceding years, the assessee used to account retention money on receipt basis. During the year, the assessee changed the accounting policy of retention money where there is a reasonable certainty of receiving the retention money the same has been offered to tax. During the year, a sum of Rs. 4,91,73,327.51 has been offered to tax even though the same has not been received. The change in accounting policy has been carried out to ensure that the revenue is recognised earlier than receipt. Hence compared to preceding year, the profit is higher by Rs. 4,91,73,327.51."

9. It is contended by the learned counsel for the petitioner that these aspects were considered by the Assessing Officer during the original assessment and the clarifications as well as the letter of the Chartered Accountants dated 25-2-2014 and the details given by the petitioner regarding change in Accounting Policy relating to retention money were all provided before the Assessing Officer at the time of original assessment and the Assessing Officer passed an assessment order under section 143(3) of the IT Act on 31-3-2014. Thus, there is no other reason whatsoever to reopen the assessment, which is perverse and without jurisdiction.

10. The learned counsel for the petitioner is of an opinion that once the change in Accounting Policy relating to retention money has been placed before the Assessing Officer, who in turn, considered the

same and passed assessment order, the reopening based on the same informations or materials, is nothing but change of opinion and cannot be construed as reason to believe. Thus, the respondent has no jurisdiction to invoke section 147 of the IT Act and the writ petition is to be allowed.

11. The respondent filed a counter affidavit by stating that there was a scrutiny of the assessment order issued under section 143(3) of the IT Act dated 31-3-2014 and certain clarifications were sought for by the ACIT in his proceedings dated 17-1-2018 well after the assessment order was passed by the Assessing Officer in the year 2014.

12. The Assessing Officer has recorded reasons for reopening on two issues; one in respect of retention money; and the other in respect of difference in profits admitted in the P&L account. In respect of retention money, the petitioner is not following a consistent policy in accounting the retention money, the assessee is offering retention money on some completed projects and has not offered retention money on on-going projects. The Assessing Officer has worked out the gross profit at Rs. 1,15,65,348/- as against which, it was observed that the petitioner has admitted loss of Rs. 29,66,403/- in the P & L account. Thus, the Assessing Officer found that income of Rs. 1,45,31,751/- (11565348 + 2966403) is required to be brought to tax. Though the petitioner was given an opportunity to reconcile the difference in profit by letter dated 17-1-2018, the petitioner has not reconciled the profit admitted in the P & L account. Thus, there is failure on the part of the assessee in disclosing the full facts. The Assessing Officer has applied his mind, drawn reasons to form an inference and recorded the reasons. The Assessing Officer was in possession of tangible material in the form of audited balance sheet, computation of total income *etc.* The Assessing Officer has verified the information available on record, analysed the provisions of the IT Act and arrived at the conclusion that the assessee has made incorrect claim and reduced income. The said assessment has been reopened as there is an escapement of income.

13. The Assessing Officer has opined that from the information available on record, there is escapement of income. Accordingly, the Assessing Officer has reopened the case by issuing notice under section 148, after recording reasons for reopening and taking statutory approvals from the authorities concerned. During the course of assessment proceedings, no details in respect of retention money were called for. If the petitioner had followed mercantile system of accounting and also claimed expenses relating to the retention money, then the assessee should have offered the retention money as income. The Authorised Representative of the assessee, during the course of assessment proceedings, *vide* letter dated 13-5-2013, has stated that the company continues to follow percentage completion methods during the previous year. There is no change in the method of accounting during the assessment year 2011-12. However, as per Schedule-XIIIA1(c) of the Significant Accounting Policies in the Basis of Accounting, it is mentioned that the company during the year has changed the Accounting Policy on recognition of retention money on completed projects. It has accounted retention money on completed projects on accrual basis, where the company is confident of receiving the retention money in full as compared to cash basis followed in previous year. Thus, there is failure on the part of the assessee in disclosing full facts. There has been recording of reasons for reopening based on tangible material to come to the conclusion that there is escapement of income.

14. As per *Explanation 2(c)* to section 147 of the IT Act, the following shall also be deemed to be the case where income chargeable to tax has escaped assessment, *viz.*,

"where an assessment has been made, but -

- (i) income chargeable to tax has been under assessed; or
- (ii) such income has been assessed at too low a rate; or
- (iii) such income has been made the subject of excessive relief under this Act; or
- (iv) excessive loss or depreciation allowance or any other allowance under this

Act has been computed;"

15. Since in this case there is escapement of income, this case falls within the ambit of the provision of section 147. The Assessing Officer has applied his mind, drawn reasons to form an inference and recorded the reasons. The said assessment has been reopened, as there is an escapement of income. A letter dated 14-12-2018 was issued by the respondent communicating the reasons for reopening the assessment informing how the Assessing Officer has jurisdiction over the case. Since in this case, excess deduction of retention money on work in progress has been claimed and allowed, this case falls within the ambit of *Explanation 2(c)* to section 147 of the IT Act. The Assessing Officer has issued the notice after recording the reasons and taking necessary statutory approvals from the higher authorities concerned. The Assessing Officer has jurisdiction to issue the notice under section 148 of the IT Act. The objections raised by the petitioner were duly considered and the letter dated 18-12-2018 was issued rejecting the objections raised by the petitioner.

16. The petitioner do have other alternatives such as appeals before the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal. This Court in the case of *Jt. CIT v. Kalanithi Maran* [2014] 366 ITR 453 dismissed the writ petition regarding reopening under section 147 and held as under:-

"A challenged made to an order passed on the objections of the assessee would in effect is a challenge made to a notice under section 148 of the Act. Such an order passed by the Assessing Officer is only at the stage of process of determination and not a determination by itself. The process of assessment is not required to be challenged before Court of law, as it is a still born child. Therefore, the petitioner cannot have a legal right as there is no legal injury suffered by them at that stage."

17. During the course of original assessment proceedings, the Assessing Officer has not examined the issue of retention money. The principle, that a mere change of opinion cannot be a basis for reopening completed assessments, would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter. In this case, the Assessing Officer has recorded reasons for reopening on two issues one in respect of retention money and the other in respect of difference in profits admitted in the P & L account. In respect of retention money, the petitioner is not following a consistent policy in accounting the retention money. The assessee is offering retention money on some completed projects and has not offered retention money on ongoing projects. In respect of difference in the profit admitted, the petitioner could not reconcile the loss worked out as per the profit and loss account and the revenue recognised on completed projects and ongoing projects as per percentage completion method.

18. In the reasons recorded by the Assessing Officer, it is clearly brought on record that there is failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment. While recording reasons, all the replies of petitioner in response to various notices were considered and it was noted that the petitioner has failed to disclose material facts necessary for assessment. As there is finding of failure on the part of the petitioner and also income chargeable to tax has escaped assessment, the reassessment proceedings are valid.

19. As there was no opinion formed on the issues on the basis of which reasons for reopening was done, there is no change of opinion. There is tangible material in the form of financial documents, replies of the petitioner *etc.*, on record to come to a conclusion that there is escapement of income. The objections filed for reasons were disposed by way of a speaking order. After considering all the submissions of the petitioner, the objections were rejected. The petitioner is not following a consistent policy in accounting the retention money. Hence, the ratio of case laws relied on by the petitioner were not applicable to the facts of the present case. Hence, the respondent after considering all these facts and circumstances

rejected the objections raised by the petitioner. There is a clear finding that there is failure on the part of the petitioner to disclose all material facts. There is no change of opinion in the instant case. The petitioner has not furnished all the material facts necessary for assessment.

20. The primary facts of reconciliation of difference in gross profit and the reason for not following a consistent policy in accounting the retention money were not available before the Assessing Officer.

21. In the original assessment, there is no opinion formed on the issues raised recorded in the reasons for reopening the assessment. The petitioner claimed that the Accounting Policy for retention money for recognition of retention money on completed projects is that it has accounted retention money on completed projects on accrual basis where the company is confident of receiving the retention money. The petitioner is offering only a part of the income and not offering the other part. In the relevant year, the petitioner chose to offer part of the retention money on completed projects and has not offered retention money on on-going projects. Thus, the petitioner is offering only part of the retention money accrued during the year. There is inconsistency in the accounting treatment followed by the assessee. As there is no consistent policy in accounting the retention money, the ratio of the case laws relied upon by the petitioner cannot be applied to the facts of the present case.

22. Relying on the contentions raised in the counter affidavit filed by the respondent, the learned Senior Standing Counsel reiterated that the clarifications sought for from the assessee in proceedings dated 17-1-2018 itself would reveal that in view of the discrepancies and the new materials found by the authorities competent, they have instituted action under section 147 of the IT Act. The reasons for reopening of the case of the writ petitioner were communicated in proceedings dated 14-12-2018 wherein, it is categorically stated that "there are new materials made available, which were not adjudicated by the Assessing Officer during the course of assessment and at the time of passing the assessment order under section 143(3) of the IT Act". The informations collected by the Income-tax Department were analysed and based on the analysis, the reasons are furnished to the petitioner/assessee. The reasons communicated in the impugned proceedings dated 18-12-2018 would reveal that "the Assessing Officer was in possession of material in the form of audited balance sheet, computation of total income *etc.*," but the Assessing Officer has verified the information available on record, analysed the provision of the IT Act and arrived at the conclusion that the assessee has made incorrect claim and reduced income. The Assessing Officer has applied his mind, drawn reasons to form an inference and recorded reasons. In the assessment order or during the course of the assessment proceedings, the Assessing Officer has not formed any opinion on the issue of retention money of Rs. 5,87,61,168/-. Hence there is no change of opinion by the Assessing Officer.

23. This Court is of the considered opinion that the reasons furnished for reopening of the assessment dated 18-12-2018 would clearly reveal that incorrect claim and reduced income were identified. Further, it is stated that the issue of retention money of Rs. 5,87,61,168/- was not considered by the Assessing Officer in the original assessment order. Thus, the reopening of assessment cannot be construed as change of opinion.

24. This Court is of the considered opinion that once the Department could able to establish that reopening of assessment is made based on the new materials or with reference to the informations which were not truly and correctly provided by the assessee at the time of original assessment, then power under section 147 of the IT Act can be invoked. Amended provision of section 147 of the IT Act provides wider power to the Assessing Officer to reopen the assessment. Only when the adjudicated issues are sought to be reopened, then alone the Court can form an opinion that the case would fall under change of opinion and not otherwise.

25. Regarding the sufficiency of material, the High Court would not substitute any opinion and it is for the competent authority to conduct an enquiry, adjudicate the issues by affording opportunity to the

assessee and pass appropriate orders by following the procedures contemplated. Thus, the High Court is empowered to scrutinise the process through which the decision is taken and the validity of the reasons provided in the order impugned and certainly not the decision itself. Thus, the sufficiency of the reasons cannot be gone into by the High Court in writ proceedings. Once the High Court is able to form an opinion that the issues raised in the reopening proceedings are not adjudicated in the original assessment order, then it is sufficient to confer power on the Assessing Officer to reopen the assessment and the Department must be allowed to proceed with further action as contemplated under the statute.

26. These being the principles to be followed in the present case, the non-adjudication of retention money of Rs. 5,87,61,168/- is unable to be disputed by the petitioner/assessee in the present case. In other words, the petitioner could not be able to establish that the retention money stated above was adjudicated by the Assessing Officer during the original assessment. This being the factum established, there is no reason to consider the case of the writ petitioner and accordingly, the writ petition fails and stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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*In favour of revenue.