BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **01.02.2022**

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

W.P(MD)No.1862 of 2022
and
W.M.P.(MD)No.1616 of 2022

Tamilnad Mercantile Bank Ltd.,
No.57, V.E.Road,
Thoothukudi – 628 002.
PAN: AAACT 5558K
though its Managing Director.....Petitioner

-Vs-

1. The Assistant Commissioner of Income Tax,
   National e-Assessment Centre,
   Delhi, 2nd Floor,
   E-Ramp, Jawaharlar Nehru Stadium,
   Delhi – 110 003.

2. The Assistant Commissioner of Income Tax,
   Circle – 1, Tirunelveli,
   Income Tax Department,
   Nellai City Centre,
   Tiruchendur Road,
   Rahmath Nagar,
   Tirunelveli – 627 011.

3.The Principal Commissioner of Income Tax,
Madurai – 1,
Income Tax Department,
CR BLDG, 2, V.P.V.P. Rathinasamy Nadar Road,
Bibikulam, Madurai – 625 002.....Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, calling for the records of the writ petitioner on the file of the second respondent and to quash the impugned notice issued u/s. 148 of the Act dated 31.03.2021 in DIN and Notice No.ITBA/AST/S/148/2020-21/1032067512(1) for the Assessment Year2014-15.

For Petitioner : Mr.A.S.Sriraman
For Respondents : Mr.N.Dilipkumar,
Senior Standing Counsel.

O R D E R

In the captioned main writ petition a notice dated 31.03.2021 being a notice under Section 148 of the 'Income Tax Act, 1961' [hereinafter 'IT Act' for the sake of convenience and clarity] issued by the second respondent regarding 'assessment year 2014-15' [hereinafter 'said AY' for the sake of convenience and clarity] qua writ petitioner has been assailed.

2. This Court, with the consent of learned counsel for writ petitioner and Mr.N.Dilip Kumar, learned Senior Standing Counsel for Income Tax (Revenue Counsel), who accepted notice on behalf of all the three respondents, took up and heard out the main writ petition owing to the narrow compass on which the captioned main matter turns.

3. Short facts shorn of elaboration or in other words, facts that are imperative for appreciating this order are that the writ petitioner filed return of income qua said AY on 25.09.2014 under Section 139(1) of IT Act; that the original assessment order (based on such return) was made by the Assessing Officer vide an order dated 22.12.2016; that thereafter the impugned notice under Section 148 of IT Act came to be issued; that impugned notice reverted the matter to the earlier part of Chapter XIV of IT Act and therefore a notice dated 23.11.2021 being a notice under Section 142(1) of IT Act with an annexure came to be issued; that the writ petitioner on 07.12.2021 filed return of income in response to the impugned notice; that the writ petitioner also sent in its electronic response on 13.12.2021; that a speaking order came to be made by the first respondent on 24.12.2021; that another notice under Section 142(1) of IT Act came to be

issued by the first respondent for continuing the reassessment; that the writ petitioner uploaded an e-response on 04.01.2022 *inter alia* seeking to stopthe proceedings of re-assessment and also taking exceptions to the speaking order dated 24.12.2021 made by the first respondent; that the reassessmentis pursuant to impugned notice and therefore, the captioned writ petition has been presented in this Court on 27.01.2022 assailing the impugned notice.

4. This Court, having set out the factual matrix in a nutshell containing facts that are imperative for appreciating this order and the trajectory the matter has taken thus far now proceeds to set out the rival contentions.

5. Learned counsel for writ petitioner in his campaign against the impugned notice, notwithstanding very many averments in the writ affidavit and notwithstanding very many grounds raised in the writ affidavit made pointed submissions, a summation of which is as follows:

a) the impugned notice is hit by limitation as it has been issued after four years had elapsed from the end ofthe said AY;

b) absent fresh / tangible material impugned notice is bad;

c) the impugned notice is based on audit objection and this cannot be construed as valid information for assuming jurisdiction under Section 148 of IT Act;

d) the objections raised by the writ petitioner have not been considered;

e) the second respondent has not chosen to examine the applicability of Rule 8 of 'Income Tax Rules, 1962' (hereinafter 'IT Rules' for the sake of convenience and clarity) to examine the possibility of disallowance under Section 14-A of IT Act qua computation of total taxable income while completing the original scrutiny assessment and therefore, the impugned notice cannot now resort to the explanation qua this provision of law.

6. In support of some of the aforementioned points, learned counsel for writ petitioner pressed into service certain case laws and the same will be discussed infra elsewhere in the latter portion of this order.

7. Learned Revenue Counsel, who accepted notice on behalf of respondents, on the basis of papers which has been served on him made three simple submissions and the same are as follows:

a) 'full disclosure' is always a matter turning on facts and therefore the impugned notice turning on full disclosure disputation does not warrant interference in writjurisdiction;

b) the impugned notice is only for reassessment and the writ petitioner is not really 'aggrieved' in any sense of the term;

c) the assumption of jurisdiction under Section 148 of IT Act by the second respondent is not bad and the same

is sustainable in the light of the reasons adumbrated in the annexure to the notice dated 23.11.2021 made under Section 142(1) of the IT Act.

8. Learned Revenue Counsel also pressed into service two case laws and the same will be discussed elsewhere infra in the latter part of this order.

9. In response to the submissions of learned Revenue Counsel by way of reply, learned counsel for writ petitioner reiterated the submissions made in his opening arguments.

10. This Court now embarks upon the exercise of discussion and dispositive reasoning qua the points that have been urged in the hearing.

11. The arguments predicated on non-availability of tangible material, in the considered view of this Court does not really hold water at this stage in a challenge to a notice under Section 148 of IT Act in the light of the annexure to Section 142(1) dated 23.11.2021, a scanned reproduction of which is as follows:

AAACT5568R- TAMILNAD MERCANTILE BANK LIMITED
A.Y. 2014-15
ITBA/AST/F/147(1)/2021-22/1037129863(1)

9

ANNEXURE

"On verification of the balance sheet for the A.Y. 2014-15, the assessee had made an investments, which would earn exempt income of Rs.20,52,58,457/- u/s 10(34) of the I.T. Act. Further, it was noticed that the assessee Bank itself made the disallowance of Rs. 69,23,904/- u/s 14 A. However, the disallowance u/s 14 A should be made as per the methodology prescribed in the Rule 8 D of the I.T. Rules, 1962. Whereas, it was seen that the disallowance u/s 14A read with rule 8 D was not adhered by the assessee in the computation of income. Moreover, the observation as pointed out in audit was already raised and addition made by the Assessing Officer in the earlier A.Y. 2012-13 u/s 143(3) read with section 147 on 05/12/2017 except this A.Y. 2014-15. The working of Section 14 A read with rule 8 D for the A.Y. 2014-15 had worked out as 10,75,96,409/-.

As such, the total disallowance of interest expenditure needs to be arrived as Rs. 10,75,96,409/- whereas, the assessee bank was disallowed an amount of Rs. 69,23,904/- only. Hence, the difference of Rs. 10,06,72,505/- (107596409 - 6923904) need to be disallowed under section 14A read with rule 8D. Therefore such income has escaped assessment.

Hence, I have reason to believe that the income chargeable to tax greater than Rs 1 Lakh has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961 for the assessment year 2014-15.

You are requested to file the return of income in response to 148 notice dated 31/03/2021 on or before 08/12/2021

INCOME TAX DEPARTMENT

PARAMAGURUSAMY RAVEENDRAN
CIRCLE 1, TIRUNELVELI

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

This document is digitally signed
Signer: PARAMAGUR[illegible]AMY RAVEENDRAN
Date: Tuesday, Nov[illegible]er 23, 2021 12:15 PM
Location: CHENNAI, India

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12. Before proceeding further, though several case laws have been annexed to the paper book, learned counsel made it clear that he is not relying on ***Kelvinator India case law [****Commissioner of Income-Tax Delhi Vs. Kelvinator of India Ltd.]* reported in ***[2010] 187 Taxman 312*** in this case. To be noted, ***Kelvinator India case*** has been annexed to the paper book but as the same has not been pressed into service, a discussion in this regard is not necessary. Learned counsel for writ petitioner pressed into service a judgment of Hon'ble Delhi High Court made in ***Oracle case [Oracle Systems Corporation Vs. Assistant Director of Income-tax]*** reported in ***[2015] 62 Taxmann.com 291*** in support of the above argument. The facts of ***Oracle case*** are very different as it turns on Double Taxation Avoidance Agreement between India and USA and more particularly it turnson Article 7 of the DTAA which deals with 'Business profits' besides being aquestion on whether royalty should have been taxed under Article 7 of DTAA. This Court also reminds itself that the judgment of the Delhi High Court is of persuasive value and nonetheless in difference to the judgment placed before this Court, the same has been discussed. As alluded to earlier as it is clearly distinguishable on facts it does not help the case of the writ petitioner. The next case law pressed into service is ***Madhukar Khosla***

case [Madhukar Khosla Vs. Assistant commissioner of Income-tax] reported in ***[2015] 55 taxmann.com 391***. This is also a judgment of Delhi High Court but here again the facts are completely different as that is a case where there was nothing to show what triggered issuance of notice of reassessment. In other words, no information or no new facts which led the Assessing Officer to believe that full disclosure had not been made has been set out. This is captured in paragraph 11 of the judgment as reported in taxmann.com. The last case law pressed into service by the learned counsel for writ petitioner is ***Indi-Aen salt case [Indi-Aden Salt Mfg. & Trading Co. (P) Ltd. Vs. Commissioner of Income-tax]*** reported in ***[1986] 25 Taxman 356***. In the considered and respectful view of this Court, the Indi- Aden ratio is in favour of the Revenue in the case on hand. In Indi-Aden case where the assessee claimed depreciation at 6 per cent on masonry works qua what actually comprised of substantial portion relating to earth work was considered and the Court held that the non disclosure of such primary facts caused escapement of income in the assessment and these are all clearly questions of fact. This supports the first argument raised by learned Revenue Counsel which has been captured supra.

13. Before proceeding further, this Court makes it clear that in discussing the case laws supra, the law declared by a Constitution Bench of Hon'ble Supreme Court in the celebrated and oft quoted ***Padma Sundara Rao case*** [Padma Sundara Rao Vs. State of Tamil Nadu reported in (2002) 3SCC 533] has been respectfully followed and the relevant paragraph in***Padma Sundara Rao*** case law is paragraph 9 and the same reads as follows:

> *'**9.**Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'*

14. To be fair to the learned counsel for writ petitioner, who argued with specificity, this Court deems it appropriate to make it clear that learned counsel for writ petitioner very fairly said he would not press into service ***Kelvinator case*** only when ***Padma Sundara Rao declaration*** of law was

brought to the notice of the learned counsel and when the learned counsel was faced with the situation of setting out the facts in ***Kelvinator case*** before this Court.

15. ***M/s.SUN Direct TV Private Ltd. case [M/s.SUN Direct TV Private Ltd. Vs. The Assistant Commissioner of Income Tax]*** reported in ***2018 SCC OnLine Mad 3160*** and ***Honda Siel Power Products case [Honda Siel Power Products Limited Vs. Deputy Commissioner of Income Tax]*** reported in ***(2012) 12 SCC 762*** were pressed into service by learned counsel for Revenue Counsel. ***Honda Siel Power Products case*** isa Judgment of Delhi High Court which was carried to the Supreme Court,for the purpose of facts, learned Revenue Counsel relied on the Judgmentof a Division Bench of Delhi High Court (which was carrried to the Supreme Court). To be noted, Delhi High Court ***Honda Siel Power Products case*** is vide W.P.(C)No.9036 of 2007 and the order is dated 14.02.2011. Learned counsel drew the attention of this Court to paragraph 11 which reads as follows:

> *'11. The contention of the petitioner is that the assessing officer seeks to invoke Section 14-A of the Act to*

disallow deduction of such expenses which were incurred for earning tax- free income which is exempt. It is submitted that Section 14-A was introduced in the statute by the Finance Act, 2001 with retrospective effect from 1-4-1962. It is stated that the petitioner had filed their return of income for Assessment Year 2000 – 2001 on 30.11.2000 and, therefore, it was not obligatory on the part of the petitioner to disclose any fact in respect of the expenditure incurred to earn exempt / tax – free income. It is accordingly submitted that there was no failure on the part of the petitioner assessee to disclose fully and trulyall material facts in respect of the expenditure incurred for earning tax-free income. It is pointed out that in the present case the reassessment notice has been issued beyond fouryears from the end of relevant assessment year and, therefore,the assessing officer was required to record and form a prima facie opinion that there was failure or omission on the part of the assessee to disclose fully and truly all material facts.'

16. In the case on hand, this Court finds that the facts in ***Honda Siel Power Products*** have similarity qua case on hand as the reasons recorded by the Assessing Officer for reopening assessment as captured in paragraph 5 are as follows:

'5.The reasons recorded by the assessing officer for reopening of assessment for Assessment Year 2000 – 2001 are

as under :

'The assessee company filed return of income on 30.11.2000 declaring income of Rs.14,35,73,320. Assessment in this case was completed under Section 143 (3) at an income of Rs.15,73,66,280.

It has come to the notice that as per Clause 20 of Form 3CD, the profit amounting to Rs.107.70 lakhs has been shown in Annexure VIII under Section 41 of the Income Tax Act, 1961. Out of this, the assessee has credited a sum of Rs.9.23 lakhs on account of provision for warranties no longer required written back underthe head 'Other Income' in the P & L Account leaving a balance of Rs.98.46 lakhs which has not been shown under the head 'Other Income'. Therefore, this amount of Rs.98.46 lakhs has not been offered for taxation by the assessee and the income of the assessee has been under assessed by Rs.98.46 lakhs.

Further, it is seen that the assessee has earned dividend income of Rs.188.73 lakhs on long-term non-trade investments which is claimed as exempt under Section 10(33) of the Income Tax Act, 1961. However, there are various administrative expenses for earning the dividend income like the expenses on the personnel involved in taking the decision of investment, expenses related to purchase / sale of the investment like the DMAT fee, collection expenses, telephone expenses, etc. and other administrative expenses and only the net

dividend income is exempt from taxation, therefore, these expenses relating to earning of dividend income are not allowable and the income of the assessee has been under assessed as these expenses have wrongly been allowed.

I, therefore, have reasons to believe that income chargeable to tax has escaped assessment amounting to Rs.98.46 lakhs on account of amount not offered for tax under Section 41 of the Income Tax Act, 1961. Further, the assessee has reduced gross dividend income from its income for computing the taxable income instead of reducing the net dividend income after accounting for the expenses related to earning the dividend income and therefore, the income of the assessee is also under assessed on this account. The above income has escaped taxation by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for Assessment Year 2000-2001. It is therefore, proposed to reopen the assessment by issue of notice under Section – 148 after seeking necessary sanction.'

17. In the light of the annexure to Section 142 (1) notice dated 23.11.2021 (scanned and reproduced supra) owing to the facts and circumstances of the case on hand, it does come to the help of the Revenue

Counsel. Learned Revenue Counsel also drew the attention of this Court to ***M/s.SUN Direct TV Private Ltd case***. This was rendered by a Hon'ble Single Judge of this Court. Learned Revenue Counsel drew the attention of this Court to paragraph 91, wherein another Hon'ble Single Judge of this Court has taken the view that the assessing officer is bound to furnishreasons when the same was raised by an assessee, it should be held infavour of the Revenue and not in favour of the tax payer. This Court deems it appropriate to not to express any opinion on this view of another Hon'ble Single Judge as the facts in ***M/s.SUN Direct TV Private Ltd case*** are very different as that is a case where the Assessing Officer had not disclosed the details qua share premium being derived. The facts being different, this Court deems it appropriate to leave it at that.

18. This takes us to the argument on limitation. This was predicated on first proviso to Section 147 of IT Act, which reads as follows:

> ***Section 147: Income escaping assessment:***
>
> **.....**
>
> *'Provided that where an assessment under sub-section (3) of section 143or 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:'

A careful perusal of the first proviso makes it clear that the four years embargo has three exceptions and one of the exceptions is failure to disclose fully and truly all material facts necessary for assessment. That is the bone of contention in the writ petitioner's campaign against the impugned order and therefore it tantamounts to begging the question. Therefore, the limitation point is clearly a non-starter. Turning to the argument on Section 14-A read with Rule 8D which has been captured supra as well as the argument on non-consideration of objections besides audit objections not being a valid piece of information, all these three points can be answered in one go and that one answer is the annexure to Section 142(1) notice (extracted and reproduced supra). The annexure speaks for itself. It has been articulated in the annexure that disallowance under 14A of IT Act

should be made as per the methodology prescribed in Rule 8D of the IT Rules and it is seen that Section 14-A read with Rule 8D was not adhered to by the assessee in computation of income. Therefore, this matter turns on facts. To be noted, annexure also makes it clear that the writ petitioner assessee bank itself made disallowance to the tune of over 69.23 lakhs under Section 14A and it is in that context that there is a reference to Section 14A read with Rule 8D. The second paragraph of the annexure also deals with this aspect of the matter and makes it clear that disallowance of interest / expenditure ought to have been computed at a particular quantum where as the assessee bank has disallowed an amount of only 69.23 lakhs and odd. These need to be disallowed is the point raised. All this turns heavily on facts. In other words, these are all questions of fact. Therefore, it cannot be gainsaid that Section 14 A and Rule 8D have not been applied. The argument that the objections have not been considered may not hold wateras the annexure does deal with the crux of the objections but it may be too early a stage in the proceedings to express any opinion on this aspect of the mater. As rightly pointed out by learned Revenue Counsel, reassessment notice under Section 148 of IT Act i.e, impugned notice if carried to its logical end, in the facts and circumstances of the case, will clearly neutralize

all these arguments and the writ petitioner assessee bank will not be aggrieved in any manner. This Court has taken into account all the facts and circumstances of the case and has also noticed that the writ petitioner assessee itself is a bank and this Court is unable to persuade itself to believe that the impugned notice is either bad calling for interference in writ jurisdiction (much less demanding to be a situation of being dislodged under writ jurisdiction) or a notice which causes undue hardship having the writ petitioner aggrieved.

19. Ergo, captioned writ petition fails and the same is dismissed. Consequently, captioned WMP is also dismissed. There shall be no order as to costs.

01.02.2022

Index : Yes/No
Internet : Yes /No
vsm

Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

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vsm

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