IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.08.2021

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN
and
THE HON'BLE MR.JUSTICE P.VELMURUGAN

Writ Appeal No.1616 of 2018

1.Deputy Commissioner of Income Tax,
Corporate Circle-1(1), Room No.511, Wanaparthy Block,
121, M.G.Road, Nungambakkam, Chennai-600 034.

2.Assistant Commissioner of Income Tax (OSD),
Corporate Range-1, Room No.603, 6th floor,
Wanaparthy Block, 121, Mahatma Gandhi Road,
Aaykar Bhavan, Nungambakkam,
Chennai-600 034. ..Appellants /Respondents

-Vs-

M/s.Daimler India Commercial Vehicles Private Ltd.,
SIPCOT Industrial Growth Centre,
Mathur Post, Oragadam, Sriperumbudur,
Kancheepuram, Chennai.
Tamil Nadu 602 105,
Rep. through its authorized Representative,
Mr.Rishab Jain. ..Respondent / Writ Petitioner

Prayer: Writ Appeal filed under Clause 15 of Letters Patent, against the order dated against the final order dated 30.01.2018 in W.P.No.43435 of 2016.

W.P.No.43435 of 2016 Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for the records relating to the impugned notice in PAN:AABCF1590N passed by the 1st respondent dated 24.03.2016 issued under Section 148 of the Income tax Act relating to assessment year 2009-10 and consequential impugned order in PAN:AABCF1590N / 2009-10 passed by the 2nd respondent dated 25.10.2016.

For Appellants : : Mrs.Hema Muralikrishnan,
Senior Standing Counsel

For Respondent : : Mr.Ajay Vohra, Senior counsel
for Mr.N.P.Vijay Kumar.

JUDGMENT

P.VELMURUGAN, J.

This Writ Appeal is filed against the order of the learned Single Judge dated 30.01.2018 passed in W.P.No.43435 of 2016, wherein, the writ

petition was allowed, setting aside the impugned Notice passed by the 1st respondent dated 24.03.2016 and the impugned order passed by the 2nd respondent dated 25.10.2016.

2. The respondent/Writ petitioner filed the writ petition challenging the notice issued by the 1st respondent under Section 148 of the Income Tax Act, 1961 stating that he has reasons to believe that the petitioner's income chargeable to tax for the assessment year 2009-10 has escaped assessment within the meaning of Section 147 of the Act. The other order which is challenged by the writ petitioner is the order passed by the 2nd respondent dated 25.10.2016 rejecting the writ petitioner's objection for reopening.

3. During the assessment proceedings in respect of the return of income filed by the writ petitioner for the assessment year 2009-10, the case of the writ petitioner was referred to the Transfer Pricing Officer under Section 92 CA (1) of the Act, for determination of arm's length price of international transaction done by the petitioner with its associated enterprises.

4. The petitioner participated in the assessment proceedings as well as in the proceedings before the Transfer Pricing Officer (TPO). The TPO vide order dated 27.12.2012 under Section 92 CA (3) of the Act accepted arm's length price of the international transactions done by the petitioner with the associated enterprises.

5. After considering the order of the TPO, the assessing officer independently examined the submissions/documents placed on record by the writ petitioner, completed the assessment vide order dated 25.02.2013 passed under 143(3) of the Act and assessed the total loss of the writ petitioner, after making disallowances. The 1st appellant, by the impugned notice dated 24.03.2016, sought to reopen the assessment for the relevant year.

6. Pursuant to such notice, the writ petitioner vide letter dated 03.05.2016, reiterated the stand taken in the return dated 20.04.2016. The writ petitioner/1st respondent sought for reasons recorded by the 1st appellant under Section 148 of the Act. The 1st appellant vide letter dated 04.05.2016 provided the reasons for reopening. The writ petitioner/1st

respondent filed objections to the initiation of re-assessment proceedings. The 2nd appellant, by impugned order dated 25.10.2016 rejected the objections raised to reopening and stated that the reopening initiated by issue of notice u/s.148 is valid in law and the merits of the case will be analyzed in the light of various case laws and the facts which will be done during the proceedings by giving due opportunity for hearing the assessee and the same will be addressed in the assessment order after finalization of discussions.

7. The above said impugned notice proposing to re-assess the income for the said assessment year dated 24.03.2016 and the order dated 25.10.2016 of the 2nd appellant rejecting the objections raised by the 1st respondent were challenged by the writ petitioner.

8. The contentions raised by the 1st respondent/writ petitioner before the learned Single Judge was that the writ petitioner was in the process of setting up a plant for manufacture of commercial vehicles and the project developmental expenditure includes Rs.805,450,136/- towards research and development and it is shown in the financial statements. Further, Form No.3CEB report from the Accountant of the writ petitioner furnished under

Section 92E relating to international transaction, shows that during the previous year ended 31.03.2010 there has been no production. It is also stated that the Company has signed a Memorandum of Understanding with the Government of Tamil Nadu to set up a Truck Manufacturing facility at SIPCOT, Oragadam over 398 acres of land. The order passed by Transfer Pricing Officer dated 27.12.2012, noted that the writ petitioner proposes to start commercial production in the year 2012.

9. The assessing officer took note of the referral made to the TPO, stand taken by the assessee that they are approaching ICICI bank for obtaining loan of Rs.2,200 crores for the purpose of setting up the facility for manufacture of commercial vehicles and the assessing officer further noted that the assessee company has not commenced production and during the pre-production period, expenditure incurred by the assessee such as interest on loans, commitment charges, project appraisal fee, loan processing fees, formed part of capital employed in industrial undertaking. Further the Assessing Officer noted the submission of the assessee that after the Hero group exited from the joint venture in 2009 and the Company became a wholly owned subsidiary of Daimler AG, it started its commercial

production only in the financial year 2008-09, relevant to the assessment year 2009-10.

10. The Assessing Officer examined the case and found that disallowances under Section 14A requires to be made in accordance with 3rd limb of Rule 8 and accordingly computed the same. Therefore, while completing the scrutiny assessment, all materials were available with the Assessing Officer and they were considered and order was passed and the impugned proceedings is a clear case of change of opinion.

11. The reasons for reopening are that the assessee has not fully and truly disclosed the material fact and that they had not commenced its business during the year and mere production of the account books or other evidence before the Assessing Officer will not necessarily amount to disclosure within the meaning of the explanation (1) of Section 147 of the Act.

12. The writ petitioner/respondent vide reply dated 17.05.2016 stated that they disclosed truly and fully all material fact necessary for assessment and hence reopening is without jurisdiction.

13. The reasons for reopening is purely based on the existing information which was provided during the course of original assessment proceedings and based on the return of income filed for the subject assessment year. The assessee referred to several decisions to support their contention that reassessment of income beyond four years is bad in law where the cumulative conditions stipulated under Section 147 of the Act are not satisfied; in the absence of fresh tangible material on record, reassessment is invalid; the mere change of opinion does not constitute reason to believe that income chargeable to tax has escaped assessment and reassessment merely on the basis of denial of deduction claimed in the subsequent year is invalid, as no fresh tangible material is available.

14. The appellants, after considering the reply, vide impugned order dated 25.10.2016 has rejected the writ petitioner's objections stating that there has been no discussion about the reasons for which the case has been reopened now in the original assessment order, Hence no opinion has been formed in this regard which may not amount to change of opinion. Further in the original assessment, there is no discussion, no details were called for, no finding, either positive or negative was arrived at during the course of

original assessment. Hence there is no question of change of opinion. That mere production of books of account by assessee before the Assessing Officer, there can be no presumption that all books were seen by the Assessing Officer and it is the duty of the assessee to show all the relevant particulars in books of accounts, not mere production of books. The 1st respondent observed that the merits of the case will be analysed during the assessment proceedings by giving due opportunity of hearing to the assessee and so rejected the petitioner's objections.

15. The argument put forth by the learned Senior counsel for the respondent/writ petitioner before the learned Single Judge was that there is no failure on the part of the assessee to make full and true disclosure of all particulars relevant for assessment and the Assessing Officer on consideration of the materials placed before him had completed scrutiny assessment under Section 143 of the Act and present attempt of the 1st respondent is to reopen the same solely on account of change of opinion. The Assessing Officer in the course of regular assessment proceedings formed an opinion that the factory was under construction, commercial production had not commenced not withstanding that the business of the

petitioner being a composite one had been set up, expenses for setting up of the plant for manufacturing operations had been capitalized. Reassessment proceedings is merely an attempt to reappraise the materials and evidences already on record, predicated on mere change of opinion, which is impermissible.

16. On the side of Revenue, it was argued that there is a clear failure on the part of the assessee in making full and true disclosure and while completing the scrutiny assessment, the assessing officer will not go into the details contained in Form III CEV, which will be looked into only by Transfer Pricing Officer and only in this document, the assessee has stated that production activity has not commenced during the relevant year. The Assessing Officer was of the view that commercial production was commenced in the assessment year 2009-10, thus, in the absence of any opinion being formed with regard to commencement of business, it is not a case of change of opinion.

17. The learned Single Judge after hearing arguments put forth on either side, referred to the decision of the Hon'ble Supreme Court in

Calcutta Discount Company Limited Vs. ITO, reported in 1961 (41) ITR 191 (SC). The said appeal was against the decision of the Division Bench of the Calcutta High Court, which reversed the order passed by the Single Bench under Article 226 of the Constitution of India, pertaining to reopening of the assessment under Section 34 of the Income Tax Act, 1948. The legal principles laid down in the said decisions are as hereunder:

(i)Duty of disclosing of primary facts relevant to the decision of the question before the Assessing Authority lies on the assessee.

(ii)When some account books or other evidences has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the income tax officer might have discovered.

(iii) Duty on the assessee does not extend beyond the full and truthful disclosure of all primary facts.

(iv)Once all primary facts are before the Assessing Authority, he requires no further assistance by way of disclosure.

(v)It is for the Assessing Authority to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn.

(vi)It is not for somebody else-far less the assessee - to tell the Assessing Authority what inferences, whether of facts or law, should be

drawn.

(vii)It is meaningless to demand that the assessee must disclose what inferences - whether of facts or law, the Assessing Officer would drawn from the primary facts.

(viii)If from primary facts, more than one inference could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the Assessing Authority. Therefore, the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

(ix)If there were in fact, some reasonable grounds for thinking that there had been any non disclosure as regards any primary fact, which could have a material barring on the question of under assessment, that would be sufficient to give the income tax officer to issue notices for reopening.

(x)Whether, these grounds were adequate or not for arriving at the conclusion that there was a non disclosure of material facts would not be open for the Courts investigation.

(xi)It is the duty of the assessee, who wants the Court to hold that the jurisdiction was lagging, to establish that the ITO had no material at all before him for believing that there has been such non disclosure.

18. The legal principle from the decision of this Court in ***Fenner (India) Limited Vs. Deputy Commissioner of Income Tax, reported in 241 ITR 672 (Madras)*** was also drawn for reference wherein it is stated that when power is invoked under Section 147 after the expiry of four years from the end of the assessment year, further pre-condition for such exercise is imposed by the proviso namely that there has been failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. Mere escape of income is insufficient to justify the initiation of action after the expiry of four years. Such escapement must be by reason of the failure on the part of the assessee to truly and fully disclose the material facts necessary for the assessment. The duty of an assesee is limited to fully and truly disclosing all the material facts and is not required to prepare a draft assessment order.

19. The learned Single Judge also elaborately gone into factual scenario in the case that the Assessing Officer would admit that he has referred to the details mentioned in the annexure to the return filed by the assessee for the assessment year 2009-10 and referred to the operative

portion of the Judgment of the Hon'ble Supreme Court of India in Kelvinator of India Limited, reported in 256 ITR 1 (Delhi), which reads as under:-

> "6. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening 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, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a 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 reintroduced the said expression and deleted."

20. The learned Single Judge pointed out that there was no tangible material available with the Assessing Officer except that which was disclosed in the return of income filed by the petitioner for the relevant assessment year. This has been held to be not a sound foundation for exercising power under Section 147 read with Section 148 of the Act and so this would be sufficient to set aside the impugned proceedings.

21. The learned Single Judge also discussed about the financial statements filed by the assessee/respondent which forms part of the return of income and held that the TPO specifically recorded that the commercial production proposes to start in the year 2012 and that this material was available and considered by the Assessing Officer as could be seen from para 2 of the scrutiny assessment order dated 24.01.2013.

22. While rejecting the arguments raised by the learned senior standing counsel for the Revenue, learned Single Judge held that assessment proceedings are not a one way proceedings and there is sufficient indication to show that the Assessing Officer considered the order passed by the TPO

and the order passed by the TPO is binding on the Assessing Officer.

23. Pointing out that the writ petitioner placed the profit and loss account and the balance sheet and the relevant annexures and notes to the financial statements before the Assessing Officer, in the absence of any new material in the hands of the Assessing Officer or discovery of some materials or a new insight after the completion of the original assessment, the question of reopening does not arise. The learned Single Judge observed that the impugned reopening proceedings is a clear case of change of opinion as there has been full and true disclosure by the assessee at the time of scrutiny assessment/original assessment. The Assessing Officer had no tangible material to come to a conclusion that there was no full and true disclosure and the reopening is based on the materials available on record i.e., in the return of income filed by the assessee for the relevant assessment year and based on such material, reopening could not have been done as it has been held that information received by the Assessing Officer, after the completion of the assessment alone is sound foundation for exercising power under Section 147 read with Section 148 of the Act. Holding so, the Writ Petition has been allowed and the impugned proceedings are quashed.

24. Aggrieved by the order of the learned Single Judge, this writ appeal is filed by the appellant/Revenue.

25. The grounds taken by the appellants in the Writ Appeal are that the assessee had not given true and full disclosure and therefore, the learned Single Judge is wrong in concluding that reassessment is bad in law. There is absolutely no mention by the assessee that it has not commenced the manufacturing activity in the Financial Year 2008-09. In the light of answers and responses given by the assessee at the time of original scrutiny assessment, prima facie it appears that there has been an escapement of assessment and therefore, the assessing officer is empowered to issue notice u/s.148 and reopen the assessment u/s.147. The assessing officer has no reason whatsoever to peruse the Form 3CEB as the determination of Arms Length Price is undertaken by a specific officer, namely the Transfer Pricing Officer. It is stated that if the assessee had not commenced the manufacturing activity in the FY.2008-09, it is still open to the assessee to prove the issue on merits before the assessing officer. At the present stage, it is not necessary for the assessing officer to decide the merits of the issue.

The learned Single Judge erred in not following the judgment of the Supreme Court in the case of ***A.L.A.Firm Vs. CIT reported in (1991) 55 Taxman 497***, where the Supreme Court had affirmed the judgment of this Court and this court held that nothing can be found in the record of the assessment, which itself would show escape of assessment or under-assessment, can be viewed as information which led to the belief that there has been escape from assessment or under-assessment. The learned Single Judge ought to have seen that the Supreme Court in the case of Kelvinator of India Ltd., held that there must be tangible material with the assessing officer to make a reassessment and the Supreme Court did not render any finding on whether such tangible material must be an independent material or a material that can be discovered from the books of accounts submitted at the time of original assessment.

26. Learned Senior Standing counsel for the appellant would submit that the appellant-Department had prima facie reason to believe that the assessee's income chargeable to tax for the assessment year 2009-10 had escaped assessment, within the meaning of Section 147 of the Income Tax Act, 1961. The learned counsel also drawn the attention of this court to the

reasons recorded by the Joint Commissioner of Income Tax stating that the assessee company has not commenced its business during the year and therefore, the expense claimed needs to be capitalised. Further, during the year the assessee company has received other income of Rs.4,14,99,995/- and the same has to be treated as 'income from other sources' as per the Apex Court's decision in the case of ***M/s.Tuticorin Alkali Chemicals and Fertilizers Limited Vs. CIT 227 ITR 172***. That material fact has not been disclosed fully and truly during the course of assessment proceedings. The learned counsel in support of her submissions placed reliance on the following decisions:-

(1) [1976] 102 ITR 287 (SC) [Kalyanji Mavji & Co., Vs. Commissioner of Income tax].

(2) [1996] 86 Taxman 37 (Delhi) [Rakesh Agarwal Vs. Assistant Commissioner of Income Tax]

(3) [2001] 252 ITR 673 (Bombay) [Dr.Amin's Pathology Laboratory Vs. P.N.Prasad, Joint Commissioner of Income Tax (No.1).

(4) [2016] 75 taxmann.com 172 (SC) Girilal & Co. Vs. Income-tax Officer, Mumbai.

27. Relying on the decision reported in ***[1976] 102 ITR 287 (SC)***, supporting reopening of the assessment, the learned Standing counsel submitted that information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law. Learned counsel by relying on the decision reported in ***(1996) 86 Taxman 37 (Delhi)***, pointed out that the Assessing Officer was under no obligation to peruse every minute details and scrutinise TPO proceedings and point out the observation made therein in paragraph 11 of the said decision, wherein, it is held that Explanation 2 to Section 147 only indicates that whether there is a disclosure or not within the meaning of section 147(a) will depend on the facts and circumstances of each case. To put it differently, it will be the nature of documents and the circumstances in which these are produced before the Assessing Officer that will determine the question. For instance, if material evidence is not writ large on the document but is embedded in some voluminous records/books of account requiring a carefuly scrutiny into it to notice the necessary material, it is quite possible that having regard to the nature of the documents, material evidence cannot be discovered from such records despite due diligence and

the case will attract application of Explanation 2 to hold that mere production of the books of account or the documents, etc., without pointing out the relevant entries therein, does not amount to disclosure within the meaning of section 147(a).

28. Per contra, the learned Senior counsel appearing for the assessee/respondent would reiterate the factual submissions and laid emphasis on the notes to the accounts, stating that it is a very important document which was considered by the Assessing Officer, while completing the scrutiny assessment. There is no failure on the part of the assessee to make full and true disclosure of all particulars relevant for assessment. The Assessing Officer had completed scrutiny assessment under Section 143 of the Act and therefore, the impugned order passed by the 1st respondent, to reopen the same solely on account of change of opinion, cannot be sustainable. The assessee disclosed clearly the manner of computation of income under the Head Profits and Gains from Business or Profession. Apart from adjustment in respect of expenditure incurred prior to the set up of the business, there can be no reopening.

29. Heard both sides and perused the records carefully.

30. The respondent is the assessee, doing business of manufacture of commercial vehicles. They filed the returns for assessment year 2009-2010. The assessee involved in the business of designing, manufacturing, distributing, selling, sourcing, after sales, engineering services and research and development of commercial vehicles and related products and components for India and Overseas market. The assessee's returns was selected for detailed scrutiny and subsequently notice under Section 143(2) and 142(1) of the Act were issued. During the assessment proceedings, the case of the assessee was also referred to Transfer Pricing Officer (TPO) u/s.92CA(1) of the Act for determination of arm's length price of the international transactions entered into by the assessee with associated enterprises. The assessee also appeared before the Transfer Pricing Officer as well as before the Assessing Officer and submitted all requisite documents and information. After examining such documents placed on record by the assessee, the Transfer Pricing Officer vide order dated 27.12.2012 passed under Section 92CA(3) of the Act, fixed arm's length price entered into by the Associated enterprises. Thereafter the Assessing

Officer, after considering the order of the Transfer Pricing Officer, also independently examined the documents and passed the order dated 25.02.2013 under Section 143(3) of the Act. Subsequently, on 24.03.2016, the assessing officer issued notice under Section 148 of the Act to the assessee/the respondent herein and directed to file its return of income in the prescribed form for the said assessment year 2009-10 stating that the appellant has reasons to believe that the assessee's income chargeable to tax for the assessment year 2009-10 has escaped assessment within the meaning of Section 147 of the Act. For the said notice, assessee/respondent herein sent a letter dated 03.05.2016 seeking the reasons for reopening of the assessment. The appellant/Revenue sent a reply dated 04.05.2016 stating the reasons for reopening of the assessment that the assessee company has not commenced its business during the year, the expenses claimed needs to be capitalised, during the year, the assessee conpany has received other income of Rs.4,14,99,995/- and the same has been written as 'Income from other sources' and this material fact has not been disclosed fully and truly during the course of assessment proceedings and therefore, reopening the assessment is based on definite reason to believe that income to the tune of Rs.4,14,99,995/- escaped assessment. In this regard, the assessee was asked

to file its objections. The assessee/respondent herein filed objections dated 17.05.2016 raising the following objections:-

(i) Re-assessment of income beyond four years is bad in law where the cumulative conditions stipulated under Section 147 of the Act are not satisfied;

(ii) the assessing officer must also have reason to believe that such income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year.

(iii) Once the assessee has made full and true disclosure of primary facts, the Assessing Officer would not be empowered to reopen the assessment after a period of four years from the end of the relevant assessment year, having regard of the first proviso to Section 147 of the Act.

(iv) the assessing officer cannot reopen the assessment order by mere change of opinion or by drawing a different inference from the same facts as were earlier available. In the instant case, there was no change of law and no fresh material had come on record enabling the Assessing officer to invoke the powers under Section 147.

(v) Reassessment merely on the basis of denial of deduction claimed in

subsequent assessment year invalid as no fresh tangible material is available.

(vi) There is no escaped assessment and there is no tangible fresh materials found for reopening. Further after four years of the assessment year, unless discover the fresh tangible materials, the assessment cannot be reopened.

31. Considering the said objections made by the assessee, the appellant/Revenue rejected the objections and the 2nd appellant passed the impugned order dated 25.10.2016, disposing the objections and stated the reasons for reopening as follows:-

(i) There has been no discussion about the reasons for which the case has been reopened now in the original assessment order, hence, no opinion has been formed in this regard which may amount to change of opinion.

(ii) When there is no discussion on the issue in the assessment order and no details were called for by the Assessing Officer or filed by the assessee on the issue, no finding either positive or negative was arrived at during the course of the original assessment proceedings. Hence there is no question of change of opinion.

(iii) Where the reason given for effecting reassessment were not the matters considered by the assessing authority while passing assessment order and no

opinion was formed in this regard, the contention that no new material have been brought to light to invoke the power and proceedings under section 147 or that it is proposed by way of 'change of opinion' does not contain any pith or substance'.

(iv) So long as conditions of Section 147 are fulfilled, the Assessing Officer is free to initiate proceedings under Section 147 and failure to take steps under Section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings, even when intimation under section 143(1) has been issued.

(v) On the mere production of books of accounts by assessee before Assessing Officer, there should be no presumption that all books seen by the Assessing Officer, it is duty of assessee to show all relevant particulars in books of accounts, not mere production of books.

(vi) The assessee knows all the material and relevant facts, the assessing authority might not. In respect of the material failure, the omission to disclose may be deliberate or inadvertent. That was immaterial. But if there is omission to disclose material facts, then subject to the other conditions, jurisdiction to reopen is attracted. If there are some primary facts from which reasonable belief could be formed that there was some non disclosure

or failure to disclose fully and truly all material facts, the ITO has jurisdiction to reopen the assessment.

(vii) In the instant case, the officer has applied his mind and has recorded the opinion with the belief that there lies an income that has escaped the assessment. When an income liable to tax has escaped assessment in the original assessment proceedings due to oversight or a mistake committed by the ITO, he has jurisdiction to reopen the assessment-Reassessment is permissible even if the information is obtained after proper investigation from the material on record or from any enquiry or research into facts or law. Information need not be from external source.

(viii) The merits of the case will be analysed in the light of various case laws and the facts which will be done during the proceedings by giving due opportunity for hearing for the assessee. The same will be addressed in the assessment order after finalization of discussions.

(ix) The reopening initiated by issue of notice u/s.148 is valid in law and therefore, objections raised for reopening is disposed off.

32. Challenging the said order, the assessee filed Writ Petition before this court. The learned Single Judge allowed the writ petition and quashed

the impugned order by observations referred to earlier in this Judgment. Challenging the same, the Revenue is before this court by way of this appeal.

33. According to the respondent herein/assessee, already the respondent/assessee submitted the returns for the assessment year 2009-10. Since the assessee is involved in the business in India and overseas, for the overseas transaction also, produced materials before the Transfer Pricing Officer to decide arm's length price and the assessee also appeared before the Transfer Pricing Officer as well as the Assessing Officer and submitted all its records and submissions. The assessing officer after scrutinising the entire records, accepted the returns submitted by the appellant and passed the assessment order. Subsequently, all of sudden in the year 2014, dated 24.03.2016, the respondent/assessee received the notice under Section 148 of the Act from the 1st appellant and for which, he sought for reasons for reopening dated 03.05.2016.

34. According to the learned counsel for the respondent/assessee, though the Joint Commissioner of Income Tax, sent the reasons dated 04.05.2016, it is not acceptable. Therefore, the assessee filed objections on

17.5.2016, stating that appellants failed to consider the legal provisions and decisions of the Honourable Supreme Court and this court. Considering the objections raised, 2nd appellant passed the impugned order on 25.10.2016. Therefore, the respondent/assessee has no other option except to file writ petition. Therefore, filed the writ petition. The learned Single Judge considered entire factual as well as legal aspects and passed detailed order and given a finding that the impugned order passed by the 2nd appellant is not sustainable and set aside the impugned orders. In such circumstances, there is no merit in the present writ appeal. Already, the learned Single Judge discussed elaborately the grounds raised by the appellants/Revenue in the grounds of appeal and therefore there is no merit in the appeal and the appeal is liable to be dismissed.

35. A perusal of the records would go to show that the respondent is the assessee and it was engaged in manufacturing and sale of commercial vehicles and for the assessment year 2009-10, they filed the returns. Since the business of the respondent/assessee is in India and also overseas. For the overseas transaction, to fix the Arm's Length Price, after getting report from the Transfer Pricing Officer, after completing the formalities, the assessing

officer passed the assessment order under Section 143(3) of the Act dated 25.02.2013. It is also not in dispute that on 24.03.2016, the 1st appellant sent a notice under Section 148 of the Act to the respondent/assessee to submit the returns in the prescribed form stating that he has reasons to believe that the respondent income chargeable to tax for the assessment year 2009-10, escaped assessment within the meaning of Section 147 of the Act. The respondent sent a letter seeking reason for reopening on 04.05.2016 for which the respondent sent objection on 17.05.2016. After considering the objection, 2nd appellant rejected the objection and passed the impugned order on 25.10.2016. Challenging the orders passed by the 1st and 2nd appellants, assessee filed Writ Petition and the writ petition was allowed by the learned Single Judge of this Court setting aside the impugned orders dated 24.03.2016 and 25.10.2016.

36. Aggrieved by the order dated 30.01.2018 passed by the learned Single Judge, the appellants/Revenue filed appeal raising grounds that

(i) it cannot be said that there had been a full and true disclosure by the assesee at the time of original scrutiny assessment that it had not commenced manufacturing activity in the Financial Year 2008-09.

(ii) in the light of answers and responses given by the assessee at the time of original scrutiny assessment, prima facie it appears that there has been an escapement of assessment and therefore the assessing officer is empowered to issue notice u/s.148 and reopen the assessment u/s.147.

(iii) If the assessee had not commenced the manufacturing activity in the F.Y.2008-09, it is still open to the assessee to prove the issue on merits before the assessing officer. At the present stage, it is not necessary for the assessing officer to decide the merits of the issue.

(iv) there must be tangible material with the assessing officer to make a reassessment and such tangible material must be an independent material or a material that can be discovered from the books of account submitted at the time of original assessment. So material already available on records could also be treated as "information" for the purpose of reassessment.

37. The core questions that arise for consideration in this writ appeal are:

(i) whether the notice sent by the 1st appellant for reopening of the assessment in respect of returns submitted by the assessee for the assessment year 2009-10, is right or wrong?

(ii) Whether the power exercised by the assessing officer to reopen the assessment for the assessment year 2009-10, is correct or not.

(iii) Whether the reasons stated in the notice u/s.148 of the Act dated 24.03.2016 and in the letter recording the reasons dated 04.05.2016 are valid in law?

(iv)Whether the respondent/assessee can challenge the said reasons by way of writ petition?

38. As far as the first question is concerned, the appellants issued notice u/s.148 of the Act and on the request by the respondent herein/assesee seeking reason for reopening, reasons recorded was provided to assessee. Again the assessee raised objections and after considering the objections, 2nd appellant passed the order dated 25.10.2016 disposing the objections. So the answer is, each case shall be examined on its own merits keeping in view the scope of the judicial review while entertaining such matters. When a notice under Section 148 of the Act has been issued to the assessee for reopening the assessment, it shows it involved complex facts and

circumstances and the same are to be adjudicated by producing documents and by adducing evidence by the assessee.

39. As far as the 2nd and 3rd questions that arise in this Writ Appeal are concerned, there is no dispute that the assessee who is doing business of Designing, manufacturing and selling of commercial vehicles, filed its returns for the assessment year 2009-10 and the assessment order also passed on 25.02.2013 under Section 143(3) of the Act by the Assessing Officer. There is no quarrel with proposition of law that the assessment can be reopened but the only question is whether the reason stated by the appellants for reopening the assessment is valid or not. In this case, the appellants clearly stated that there is escapement of assessment and also stated the reason by its letter dated 04.05.2016, pointing out that the assessee company has not commenced its business during the year, therefore, the expense claimed needs to be capitalised. During the year, the assessee company has received other income of Rs.4,14,99,995/- and the same has to be treated as 'income from other sources'. The material fact has not been disclosed fully and truly during the course of assessment proceedings. Therefore, there are definite reasons to believe that income to the tune of Rs.4,14,99,995/- has escaped assessment.

40. No doubt, the assessment cannot be reopened on the ground of change of opinion and it cannot be reopened unless fresh tangible material are found out and assessment cannot be reopened after four years. But whereas in this case, the assessing officer has clearly stated the reason for reopening that the assessee had not disclosed fully and truly the material fact during the course of assessment proceedings. The assessee had claimed expenditure to the extent of Rs.38,96,57,499/- and arrived at a net loss of Rs.33,24,42,101/- and in the income computation statement, the assessee had arrived a total loss of Rs.11,58,27,924/- after making some adjustments and the assessee company has not specifically stated as to whether it has commenced its business or not and as per the record, the assessee company has not commenced its business during the assessment year 2009-10 and therefore, the expenses claimed need to be capitalised. During the assessment year, the assessee company earned other income of Rs.4,14,99,995/- and the said material fact was not fully disclosed by the assessee during the assessment proceedings. Therefore, when the appellants/Revenue given the reasons for reopening and the respondent/assesee has given objections for that and that was not accepted

by the assessing officer/2nd appellant and it was rejected. So, the assessee must cooperate for the scrutiny and for completion of the reassessment process.

41. On the last question referred by us, regarding the challenge of the impugned order by way of writ is concerned, there is no quarrel with the proposition of law laid down by the Honourable Supreme Court and various decisions of this Court, referred to by the learned counsel on both sides. The legal principles settled in this regard is that writ petition is maintainable in exercising the extra ordinary jurisdiction under Article 226 of the Constitution of India, in challenging the order, inter alia, either on the ground that it is malafide or arbitrary or that it is passed on irrelevant and extraneous consideration or if the same is in violation of any Statutory Rules in force. However, the point for consideration is as to whether the the respondent/assessee established its legally acceptable ground in seeking to quash the rejection order passed by the 2nd appellant and whether the reasons set out in the order passed by the learned Single Judge in quashing the impugned rejection order, is sustainable or not. We are of the considered view that the mixed question of law and facts, in respect of the reopening of

the assessment are to be adjudicated and appreciated by the competent statutory authority contemplated under the Act. So, the details with regard to scrutiny of materials are all available with the Assessing Officer and so objections in respect of the reasons raised by the assessee has to be discussed only by the statutory authority and the assessee is bound to respond to the Assessing Officer for the purpose of arriving at a just conclusion and taking a decision. In the event of respondent/assessee filing its returns in the prescribed form as requested by the appellants and also by submitting all required documents and substantiating its stand and if the assessing officer passed the order on such reassessment, and if the appellants not considered the submissions raised by the assessee or it assessed the income under wrong head, then, the respondent/assessee is entitled to prefer statutory appeal.

42. Therefore, when there is hierarchy of appeals provided under the statute, the assessee must exhaust the statutory remedies. When there is an alternative statutory remedy, writ jurisdiction of this court under Article 226 of the Constitution of India ought not to be invoked. There is no bar to entertain the writ petition when alternative remedy is available if it is the case that the order passed by the concerned authority is prejudicially

affecting their rights or interest.

43. There are statutory remedies available and the statutory authorities are provided under the Act itself and the assessee is provided the opportunity to challenge the same before the statutory authority and further the appellants have not passed any order without giving any opportunity to the assessee. The 1st appellant had sent a notice dated 24.03.2016 to the respondent and the respondent sought reasons for reopening and the appellants also sent the reason dated 04.05.2016. The assessee filed its objections on 17.05.2016. Considering the said objections, the 2nd appellant has given observations to each and every objection raised by the assessee and passed the order dated 25.10.2016 pointing out that the merits of the case will be analyzed in the light of various case laws and the facts, which will be done during the proceedings, under Section 147 of the Act, by giving due opportunity for hearing for the assessee; the same will be addressed in the assessment order after finalization of discussions. Therefore, the entire issue can be decided only at the time of re-assessment.

44. The Income Tax Officer is assessing the tax based on the returns

filed by the assessee and the Officer scrutinise the returns filed by the assessee. So, to deal with the cases, where there is evasion or suppression or otherwise by the Assessee, reassessment may arise on several grounds. There is no bar to reopen the assessment and the authority has invoked that power of reopening, after giving the opportunities to the assessee. Therefore, the questions raised as to whether the same is based on the change of opinion or not, whether the reopen is based on the available materials or not and whether fresh tangible material is available or not and whether the reopening of the assessment is barred by limitation are all matters subject to facts and circumstances of each case. In all the cases, uniform method cannot be adopted. Every case is based on the facts and circumstances depending on the merits of its relevant particulars and the same has to be decided by the fact finding authority. The scope of the writ is very limited. Unless it is shown that there is violation of Fundamental Rights or infringement of rights of citizen, or the order passed is against principles of law or violation of principles of natural justice, the writ court cannot interfere in the case where there is no violation of principles of natural justice or fundamental right or non compliance of statutory requirements in any manner.

45. In the present case on hand, the appellants clearly stated the reason for reopening that particular fact has not been disclosed fully and truly in the assessment proceedings and so whether the assessee had disclosed it or not, can be decided by the authorities concerned. The respondent has got every right to make its submission during the enquiry under the reassessment proceedings and can furnish the required documents in support of its stand and if the statutory authority, not considered all the grounds, the assessee has right of appeal under the statutory provisions. Therefore, these questions cannot be decided in the writ proceedings. Further, there is no prejudice caused to the respondent/assessee. The appellants/Revenue have not passed any final order of reassessment in respect of the tax liability that escaped assessment. They only sought for filing the returns in the prescribed form. The assessee can very well file returns in the prescribed form and make its submissions and objections and the assessing officer can consider the same and pass the re-assessment order. If the respondent/assessee is not satisfied with the order passed by the appellants, they have a right of filing statutory appeal.

46. After a bare perusal of the records, it is found that there is no

violation of procedures since the reopening of the assessment is permitted under law. There is no bar for reopening of the assessment under Section 147 of the Act and that various circumstances are provided under the provisions of Section 147 for reopening of the assessment. Reasons are provided for reopening of the assessment in order to protect the revenue and to ensure that the Assessees are brought under the Taxnet in respect of the entire income. Such circumstances are enumerated in Section 147 to ensure that the Act is implemented in its letter and spirit and the object is achieved. The language employed in Section 147 of the Act is that "If the Assessing Officer 'has reason to believe' that any income may, subject to the provisions of Section 148 to 153 of the Act, assess or reassess such income and also any other income chargeable to tax which as escaped assessment and which comes to his notice". Further, the respondent/assessee has got every chance to raise his objections in reassessment proceedings. Therefore, no prejudice would be caused to the respondent/assessee. The respondent has got statutory remedy after passing the re-assessment order.

47. There are chances and possibilities that the tax payer not filing the returns properly or the taxing authority due to oversight or mistake or

various other reasons at the time of scrutinising the returns, not assessed properly. The tax payer by taking advantage of such error or omission, would evade payment of tax and it may lead to revenue loss. Therefore, the main purpose of reopening the assessment order is that in the original assessment, if the income liable to tax has escaped assessment due to oversight, inadvertence or any other mistake committed by the ITO, as per the provisions contained in **section 147** of the Income Tax Act, 1961, 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. Further, the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently during the course of re-assessment, even though such an issue was not covered under the reasons recorded for reopening the assessment. Therefore, the citations referred to by the learned counsel for the respondent and judgments referred to by the learned Single Judge in the order in writ petition are not applicable to the present case on hand.

48. Every individual or assessee would find a way in which he can avoid tax. Dodging tax, under reporting the income, hiding money by the individual assessee or a business entity is due to save more amount of taxes. Using digitilasation, nowadays mistake committed on the part of taxing authority and misusing the power, would lead to unjust enrichment and legal exploitation of tax laws. Therefore, if this check is properly exercised, then every possibility of mistake in the assessment of income that escaped assessment would come to Revenue's hand. It is the duty of the authorities under the Income Tax Department to get information from external material and various other sources in not allowing the tax evaders to escape from the clutches of law. In the interest of Revenue and public interest, tax payer should not escape from the payment of tax vis-a-vis the Assessing Officer should not misuse his power.

49. In the light of the above findings, we have no hesitation to hold that the correctness of the reasons set out by the Joint Commissioner of Income Tax, dated 04.05.2016 and the rejection of objections raised by the respondent by order dated 25.10.2016 by the 2nd appellant, can be decided

during the re-assessment proceedings and not in the writ. Therefore, the order passed by the learned Single Judge, is liable to be set aside.

50. The respondent/assessee is at liberty to raise all its objections during the re-assessment proceedings before the assessing officer and the assessing officer is directed to consider all its objections while passing re-assessment order. If the respondent is aggrieved, they can always exercise their statutory appeal remedy. Therefore, under these circumstances, this writ appeal is allowed. The order of the learned Single Judge is set aside. No costs.

INDEX:Yes/No [N.K.K.,J] [P.V.,J]
nvsri 19.08.2021

To

1.The Deputy Commissioner of Income Tax,
Corporate Circle-1(1), Room No.511, Wanaparthy Block,
121, M.G.Road, Nungambakkam, Chennai-600 034.

2.The Assistant Commissioner of Income Tax (OSD),
Corporate Range-1, Room No.603, 6th floor,
Wanaparthy Block, 121, Mahatma Gandhi Road,
Aaykar Bhavan, Nungambakkam,
Chennai-600 034.

N.KIRUBAKARAN, J.
and
P.VELMURUGAN, J.

nvsri

W.A.No.1616 of 2018

19.08.2021