Madras HC quashed reopening of assessment initiated on mere change of opinion against 'Karti Chidambaram'

Summary – The High Court of Madras in a recent case of Karti P. Chidambaram, (the Assessee) held that where claim of assessee of exemption under section 10(1) on proceeds from sale of coffee subjected to only pulping and drying was accepted for several years and there were hundreds of coffee growers whose income were also exempted, reopening notice issued only against assessee during relevent assessment year was unjustified

Facts

- The assessee was owner of coffee estates. The assessee grew coffee and after pulping and drying, sells the coffee as raw coffee. The assessee claimed that the process of pulping and drying was completely different from curing and mere pulping and drying the coffee seeds did not result in cured coffee. Thus, Proceeds of sale of raw coffee was an agricultural income exempted under section 10(1). In case of sale of cured coffee, 25 per cent of the income was subjected to tax as business income. The assessee had been assessed under the Act for several years including the subject assessment year, wherein the claim for exemption of income from sale of coffee subjected to only pulping and drying was accepted under section 10(1). There were several hundreds of coffee growers whose income had been exempted. However, the Assistant Commissioner chose to issue notice under section 148 against assessee for the subject assessment year on the ground that the assessee sold the cured coffee and hence 25 per cent of the total receipts from sale of coffee exigible to tax.
- In instant appeal, the assessee contended that the notice was issued without jurisdiction as it had been issued after more than four years of the assessment year especially when the assessee had disclosed fully and truly all the material facts relating to the receipt of income from sale of raw coffee after pulping and drying without curing which income was exempt as agricultural income under section 10(1). The assessment for the year 2009-10 was subjected to scrutiny under section 143(1) and the Assessing Officer accepted the assessee's claim for exemption and completed the assessment which was sought to be reopened. This was a case of change of opinion which was not permissible under section 147. The assessee further submited that he was obliged to disclose only primary facts and not obliged to indicate what factual or legal inference should be properly drawn from the primary facts and mere change of opinion with regard to the inference to be drawn from the disclosed facts could not justified reassessment under section 147. It is further submitted that without disposing of the assessee's objections to the reopening of assessment and without passing a speaking order, the assessment could not have been completed and this was in violation of the law.

Held

- Two conditions are required to be satisfied before the respondent could issue notice under section 148, namely, (1) he must have reason to believe that income chargeable to tax has escaped

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assessment and (2) such income has escaped assessment by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for assessment for the year. The settled legal position is that both these conditions must co-exist in order to confer jurisdiction on the respondent. Further, the respondent should record his reasons before initiating proceedings under section 148(2); before issuing the notice after the expiry of four years from the end of the relevant assessment year. The assessee is expected to make a true and full disclosure of the primary facts. It is thereafter for the respondent to draw an inference from those primary facts. If on a further examination either by the same officer or by a successor, the inference arrived at appears to be erroneous, mere change of opinion would not be a justification to reopen the assessment.

- In the instant case, the petitioner's assessment for the subject assessment year was taken up for scrutiny. All primary facts were available with the Assessing Officer. The Assessing Officer completed the scrutiny assessment. After the expiry of four years, the impugned notice was issued. The petitioner requested for the copy of the reasons for reopening *vide* representation. The respondent by communication furnished the reasons for reopening. On a perusal of the reasons, it is found that the respondent on verification of the assessment records and the order sheet entries inferred that the Assessing Officer on scrutiny had failed to examine and deliberate on the correctness of the income reported under the head agricultural income. Further, the respondent would state that even though the assessee had derived the predominant portion of the agricultural income from sale of coffee seeds, the aspect as to whether the income so derived is completely exempt or is it a case falling under Rule 7B was also omitted to be verified. Added to this, the Assessing Officer was inspired by a direction issued by the Tribunal in the case of one TCA. Thus, on a mere reading on the reasons for reopening clearly show that there was no allegation against the assessee that there had been omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that year. The so called reason to believe that income chargeable to tax has escaped assessment is on the ground that the Assessing Officer at the time of scrutiny assessment did not examine as to whether the entire agricultural income was completely exempted or not. This can hardly be a reason to believe that income chargeable to tax has escaped assessment as it is a clear case of change of opinion by the respondent. The obligation on the part of the assessee does not extend beyond fully and truly disclosing all primary facts. It is for the Assessing Officer to take an inference on facts and law based on such disclosure. If according to the respondent, his predecessor did not come to a proper inference on the facts disclosed, it is no ground to reopen the assessment, as if permitted and it would amount to a clear case of change of opinion. In the light of the above discussion, the first issue framed for consideration is answered in favour of the petitioner and against the revenue.
- The second issue is whether the respondent has complied with the directives in the case of *GKN Driveshafts (India) Ltd.* v. *ITO* [2002] 125 Taxman 963/[2003] 259 ITR 19. The Supreme Court pointed out that if the assessee desires and seeks for reasons for reopening, the Assessing Officer is bound to furnish reasons within a reasonable time and on receipt of the reasons, the assessee was entitled

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to file objections for issuance of notice and the Assessing Officer was bound to dispose of the same by passing a speaking order. The reasons were furnished to the petitioner. The petitioner through their authorized representative submitted objections. The petitioner also sought for an opportunity of personal hearing in case the officer is not satisfied with the explanation. The next step that the respondent should have undertaken is to pass a speaking order on the objections. Unfortunately, the respondent did not do so, but sent a communication to the petitioner terming it as a rebuttal for objections for reopening the assessment.

- The revenue's case is that the communication is an order with reasons and it is a speaking order and the respondent has complied with the directives in the case of *GKN Driveshafts (India) Ltd*. (*supra*). While it may be true that the rebuttal has given certain reasons and the merits of which cannot be gone into at this stage, but the respondent has not rejected the objections outright but afforded further opportunity to the petitioner to make further submissions and fixed the outer time limit to make further submissions. This rebuttal cannot be treated to be an order as required to be passed in terms of the directives in the case of *GKN Driveshafts (India) Ltd*. (*supra*) as the respondent himself did not attach any finality to it. The petitioner sought for extension of time to make further submissions and, accordingly, the same was made on 29-09-2016. This submission appears to be an elaborate submissions bringing out the distinction between pulping and drying of coffee and curing of coffee. Further, it was pointed out that the Assessing Officer erred in referring to the decision of Tribunal in the case of *ITO* v. *T.C. Abraham* [2015] 63 taxmann.com 175/155 ITD 861 (Chennai - Trib.) as one of the reasons for reopening when the said order was modified by the Tribunal and the matter has been remitted for reconsideration by the concerned Assessing Officer. Though the respondent gave an opportunity to the assessee to make further submission which the petitioner had availed and submitted the same, without reference to the said submission, notice was issued under section 143(2) directing the petitioner to attend the office of the respondent on the very next day. Unfortunately, the respondent committed a mistake in the assessment order compelling him to issue a corrigendum. The petitioner through its authorized representative appeared before the respondent and submitted a written request to keep the notice under section 143(3) in abeyance till a speaking order is passed on the petitioner's further representation. However, without any opportunity to the petitioner, the impugned assessment order has been passed. Thus, the facts clearly demonstrate that the respondent has not followed the directives in the case of *GKN Driveshafts (India) Ltd*. (*supra*). The rebuttal cannot taken as an order required to be passed on the objections given by the petitioner for reopening the assessment and the manner in which the impugned assessment order has been passed is wholly illegal and the entire proceedings are flawed. The respondent while issuing the rebuttal did not attach any finality to the proceedings but gave an opportunity to the petitioner to make further submission. On account of this, the petitioner had no opportunity to challenge the rebuttal. This is one more ground to state that the proceedings are in violation of principles of natural justice. Accordingly this issue is answered in favour of the petitioner and against the revenue.

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- The third issue is whether there has been discrimination. The petitioner in the affidavit filed in support of the writ petition in more than one place has indicated that the petitioner had been singled out where several hundreds of coffee growers who were only doing pulping and drying of coffee seeds and not engaged in curing coffee seeds and not in a single case for the assessment year 2009-10, reopening has been done. Though such an averment has been specifically raised by the petitioner, the same has not been controverted in the counter affidavit, thereby deemed to have been accepted. In the reply affidavit filed by the petitioner to the counter affidavit filed by the respondent, the petitioner has referred to an application filed under the Right to Information Act by one MRK who had made an application requesting information as to in how many cases notice under section 148 has been issued for reopening the assessment beyond four years of the relevant assessment years for the reason that sale proceeds of coffee seeds after drying and pulping in effect amounts to sale of cured coffee seeds, in how many cases the Department construed that an assessee who has sold raw coffee after pulping and drying and has disclosed in the return that the coffee was subjected to pulping and drying disclosing the expenditure incurred thereon and claimed exemption under section 10(1) has not disclosed fully and truly all material facts for his/her assessment warranting reassessment and also warrants penalty and in how many cases the department has reopened the assessment relying on the decision of the Tribunal in the case of TCA. Reply for the first question as given by the Information Officer, is "*Nil*". For the second question, it was stated that no case has been reopened under section 148 for the reason mentioned supra and there is no case in the concerned ward where application of rule 7B(1) has been levied by the Assessing Officer. The above facts would clearly establish that the reopening proceedings are clearly discriminatory. Accordingly this issue is answered in favour of the petitioner and against the revenue.
- For all the above reasons, the impugned proceedings, namely, the notice for reopening and the consequential assessment orders are held to be illegal, unsustainable and a clear case of change of opinion.

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