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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **W.P. (C) No. 815/2017**

SAHEB RAM OM PRAKASH MARKETING PVT LTD ...Petitioner
Through: Mr. Nipun Goel, Mr. Pankaj Bhatia, Mr. Ashish Choudhary, and Mr. Dhruv Surana, Advocates.

versus

COMMISSIONER OF INCOME TAX & ORS ...Respondents
Through: Mr. Rahul Kaushik, Senior Standing Counsel for Revenue

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRA THIBA M. SINGH

% **O R D E R**
08.09.2017

Dr. S. Muralidhar, J.:

1. The challenge in this petition under Article 226 of the Constitution of India by Saheb Ram Om Prakash Marketing Pvt. Ltd. (hereafter 'Assessee') is to an assessment order dated 30th January 2017 passed by the Income Tax Officer, Ward-22 (2), New Delhi (hereafter Assessing Officer- 'AO') for Assessment Year ('AY') 2006–07. The challenge is also to the consequential notice of demand dated 30th January 2017 and the penalty order dated 26th July 2017, passed by the AO under Section 271 (1) (c) of the Income Tax Act, 1961 ('Act').

2. When the writ petition was first filed, the impugned assessment order dated 30th January 2017 had not been passed. The writ petition came up for

hearing on 30th January 2017 when notice was issued in the petition. Thereafter passed, the Assessee filed C.M. No. 7418/2017 seeking to amend the writ petition to challenge the said final assessment order. This application was allowed by the Court by an order dated 22nd February 2017. It was further directed that, "if the assessment is finalized during the pendency of the proceedings, the respondents are directed not to take any coercive measures to enforce the demand till the next date of hearing."

3. During the pendency of the above interim order, the AO passed the penalty order dated 22nd August 2017, as a result of which, a second application being C.M. No. 30034/2017 was filed, seeking a further amendment to the writ petition. This application is being allowed by this order.

4. The facts, in brief, are that the Assessee filed its return of income for AY 2006-07 on 24th November 2006. The return was picked up for scrutiny. On 22nd August 2007, the AO issued a notice to the Assessee under Section 142 (1) of the Act asking the Assessee to furnish certain particulars and documents. A detailed questionnaire was issued in regard to the share application money-cum-share premium received from Karishma Industries Limited ('KIL') and Pelicon Finance & Leasing Limited ('PFLL'). On the basis of the reply filed by the Assessee, the AO issued notice dated 28th January 2008 under Section 133 (6) of the Act to KIL, PFLL, V.R.N. Securities Limited ('VSL') and Bhawani Portfolio Industries ('BPI'). The notices were again issued by the AO on 28th March 2008 to VSL, BPI, KIL, PFLL and Tejasvi Investment (Pvt.) Limited ('TIPL'). It is stated that, in

reply to the said notices, VSL, BPL, KIL and PFLL filed their respective responses and confirmed that they had subscribed to the share capital of the Assessee. Thereafter the AO passed a final assessment order on 26th August 2008.

5. Around three years thereafter, on 27th March 2012, the AO issued a notice under Section 148 of the Act proposing to reopen the assessment for AY 2006-07. On 10th December 2012, at the request of the Assessee, the reasons for reopening the assessment were furnished. In the reasons, it was stated as under:

> "DIT (lnv.) during the course of investigation in the case of Tarun Goel Group, found that the Group have operated multiple Accounts in various Branches to plough back unaccounted black money for purposes of the disclosed or for personal need as such the purchase of assets etc. in the form of Gift/s, Share Application Money, Land etc. During the course of investigation by the DIT (lnv.) it was discovered that the assessee have un-accounted money (hereinafter called as Entry Takers or Beneficiaries) and wanted to introduce the same in the Books of Account without paying tax approached another person (Entry Operator) and handover the cash (plus Commission) and take cheque/DDs/POs. The cash deposited by the Entry Operator in a Bank's Account either in his own name or in the name of relative/friends or other person/s hired by him, for purposes of opening Bank Account. The Entry Operator thereafter issue cheque/DD/PO in the name of the beneficiary from the same Account (in which the cash is deposited) or another Account in which the funds are transferred· through Clearing in two or more stages. The beneficiary in turn deposits these instruments in his Bank's Account and money comes to his regular books of account in the form of Gift, Share Application money, Loan etc. through banking channels and transactions look genuine."

6. The Assessee filed objections to the reopening of assessment on 10th December 2012. These objections were rejected by the AO by an order dated 13th December 2012.

7. The Assessee then filed a writ petition, being W.P. (C) No. 1738 of 2013, in this Court seeking the quashing of the notice dated 27th March 2012 under Section 148 of the Act as also the order dated 13th December 2012 passed by the AO rejecting the Assessee's objections to the reopening of the assessment. On 18th March 2013, an interim order was passed by this Court staying all further proceedings pursuant to the notice dated 27th March 2012.

8. W.P. (C) No. 1738 of 2013 was ultimately dismissed as withdrawn on 9th December 2016 with liberty to the Assessee to urge the grounds raised in the petition on merits in the re-assessment proceedings.

9. Consequently, in relation to the re-assessment proceedings that commenced with the issuance of the notice dated 27th March 2012 under Section 148 of the Act, the stay granted by this Court in W.P. (C) No. 1738 of 2013 in favour of the Assessee continued during the period between 18th March, 2013 and 9th November 2016.

10. According to the Assessee, on the date of the stay order being vacated, there were only 13 days left for expiry of the limitation period within which the AO was to complete the re-assessment in terms of Section 153 (2) of the Act. However, under the first proviso to Explanation 1 to Section 153 read with Section 153 (2) of the Act, the period of 13 days got extended to 60 days from 9th November 2016. Consequently the re-assessment had to be

completed and an order passed on or before 9th January 2017.

11. However, the AO passed the assessment order in the re-assessment proceedings only on 30th January 2017, assessing the total income of the Assessee at Rs. 40 lakhs. On the same date, i.e. 30th January 2017, the AO issued to the Assessee a demand notice where a sum of Rs. 31,64,715/- which included interest of Rs. 17,50,320/- under Section 234B and interest of Rs.67,995 under Section 234C of the Act. A notice under Section 274 read with Section 271 of the Act was also issued on the same date for initiation of penalty proceedings under Section 271(1) (c) of the Act. Thereafter, on 26th July 2017, a penalty order was passed by the AO under Section 271 (1) (c) of the Act.

12. In the counter-affidavit the stand taken by the Revenue is that the order of this Court dated 9th November 2016 dismissing the Assessee's writ petition W.P. (C) No. 1738 of 2013 was received in the office of Principal CIT-8 only on 2nd December 2016. Thereafter notice was issued to the Assessee on 6th December 2016 under Section 142 (1) of the Act. Within 60 days of the date of the receipt of the order of the High Court, the impugned assessment order under Section 147 read with Section 143 (3) of the Act was passed on 30th January 2017. It is accordingly submitted that the assessment order was not issued beyond the period stipulated under Section 153 (2) of the Act read with the proviso to Explanation 1 thereof.

13. Mr. Nipun Goel, learned counsel appearing for the Assessee, submitted that under Section 153 (2) of the Act, as it then stood, the re-assessment proceedings had to be completed within one year from the end of the

financial year in which the notice under Section 148 of the Act was served. Admittedly, the notice was served on the Assessee only on 27th March 2012. This meant that, in terms of Section 153 (1) of the Act, the re-assessment proceedings had to be completed by 31st March 2013. In terms of Explanation 1 to Section 153, in computing the period of limitation "the period during which the assessment proceedings stayed by an order or injunction by the Court" shall be excluded. In terms of first proviso to Explanation 1, where, after the vacation of stay, the period available to the AO to complete the re-assessment proceedings is less than 60 days, then "such remaining period shall be extended to 60 days and the aforesaid period of limitation shall be deemed to be extended accordingly." It is submitted that if 60 days were to be calculated from 9th November 2016 then clearly the assessment order under Section 147 read with Section 143 (3) of the Act had to be passed by the AO on or before 8th January 2017. However, the order was passed only on 30th January 2017.

14. Mr. Goel disputed the statement in the counter affidavit filed in terms of the order dated 9th November 2016, was received in the office of the Principal CIT-8 only on 2nd December 2016. There was no document to substantiate this assertion. That apart, the said assertion stood belied with the fact that, on 30th November 2016, the AO issued a notice to the Assessee under Section 142 (1) of the Act. A copy of the said notice has been enclosed in the Assessee's rejoinder affidavit as Annexure R-1. It is thus obvious that the AO was aware of the order dated 9th November 2016 of this Court which is why the notice was issued on that date. Mr. Goel submitted that even if 30th November 2016 was to be taken as day that the Revenue

knew of the order dated 9th November 2016 of the High Court, then the 60 days period thereafter would end on 29th January 2017. Even by that yardstick, therefore, the re-assessment order was time barred.

15. Mr. Goel placed reliance on the decision of Allahabad High Court in ***Commissioner of Income-tax-1, Agra v. Chandra Bhan Bansal (2015) 273 CTR (All) 450*** and the decisions of the ITAT in ***Income Tax Officer v. Mahesh Chandra Agrawal [2011] 43 SOT 9 (Luck); Income-tax Officer-I, Bijnor v. Atul Agarwal [2008] 172 Taxmann 170 (Del)*** and ***Deputy Commissioner of Income-tax, Circle-Tinsukia v. Steels Worth (P.) Ltd. [2015] 58 taxmann.com 262 (Guwahati - Trib)***.

16. On the other hand, Mr. Rahul Kaushik, learned Senior Standing Counsel appearing for the Revenue, relied on the decision of the Calcutta High Court in ***India Ferro Alloy Industry Pvt. Ltd. v. Commissioner of Income-Tax [1993] 202 ITR 671 (Cal)*** and of the Madras High Court in ***Thanthi Trust v. Income Tax Officer [1989] 177 ITR 307 (Mad)*** and urged that the period of limitation of one year in terms of Section 153 (2) of the Act should be reckoned only after the vacation of the stay by this Court, in which case the impugned order of assessment would be within time. He submitted alternatively that, in terms of the first proviso to Explanation 1 to Section 153 of the Act, the period of limitation got extended by 60 days from 2nd December, 2016, i.e. the date of receipt by the Revenue of the certified copy of the order of this Court.

17. At the outset, it requires to be noticed that although it is asserted in the counter-affidavit by the Revenue that a copy of the order of the High Court

dated 9th November 2016 was received in the office of the Principal CIT-8 only on 2nd December 2016, there is no document placed on record to substantiate the assertion. This could have been substantiated by producing the relevant extract from the dispatch and receipt register maintained in the said office or even a copy of the order of the High Court with the date stamp of the receipt of such order in the office of the Principal CIT-8.

18. In any event, clause (ii) to Explanation 1 only excludes from the computation of limitation "the period during which the assessment proceeding is stayed by an order or an injunction of any court." It does not exclude the period between the date of the order of vacation of stay by the Court and the date of receipt of such order by the Department. Therefore, in the present case, the Revenue cannot take advantage of the fact that it received a copy of the order dated 9th November 2016 of this Court only on 2nd December 2016.

19. Even otherwise, the assertion that the Revenue was aware of the order only on 2nd December 2016 does not appear to be correct. The Revenue has been unable to dispute the fact that, on 30th November 2016, a notice was issued by the AO to the Assessee under Section 142 (1) of the Act and this was pursuant to the order passed by this Court on 9th November 2016. Clearly, therefore, on the date that such notice was issued, the AO was aware of the order dated 9th November 2016 of this Court. Also, the order dated 9th November 2016 was passed in the presence of counsel for the Revenue and, therefore, the Revenue clearly was aware of the said order on that date itself.

20. For all of the aforementioned reasons, the Court is unable to accept the plea of the Revenue that, since it became aware of the order of this Court only on 2nd December2016, the period of 60 days in terms of the first proviso to Explanation 1 to Section 153 of the Act should begin to run from that date.

21. The Court is also unable to accept the submission that the 60 day period in terms of the first proviso to Explanation 1 to Section 153 of the Act should begin to run from the date on which the Revenue received a copy of the order of vacation of stay. Such an interpretation is not supported by the plain language of the proviso to Explanation 1. In fact, Circular No. 621 dated 19th December 1991 issued by the Central Board of Direct Taxes, while explaining the reasons for introduction of the proviso under Explanation 1, acknowledged that the time remaining after vacation of stay in terms of Section 153 (2) of the Act may not be sufficient to complete the re-assessment proceedings which is why the language used in the first proviso is that the period "shall be extended to 60 days" for passing the assessment order in terms of Section 153 (2) of the Act if the period remaining within limitation after the excluded period has elapsed is less than 60 days.

22. In the present case, on the date that the stay order stood vacated only 13 days were left for completion of the proceedings. Since this period was less than 60 days, the period of limitation got extended to 60 days from the date of such vacation of stay, i.e. 60 days from 9th November 2016. This, therefore, meant that the order in the re-assessment proceedings had to be

necessarily passed on or before 8th January 2017. This is the only interpretation that is possible on a collective reading of Section 153 (2), Explanation 1, clause (ii) and the first proviso thereto.

23. The decision of the Madras High Court in ***Thanthi Trust*** *(supra)* turned on the fact that the Madras High Court narrowly interpreted that the word 'assessment' occurring in Explanation 1 (ii) to not take within its ambit re-assessment proceedings. Yet, there appears to be a contradiction in terms because the Madras High Court proceeded to exclude the period during which there was stay of the proceedings in terms of that very Explanation. Further, no reference was made to the proviso below Explanation 1. The Madras High Court proceeded on the assumption that there was a time of period of 4 years from the last date of the assessment year in which the notice was served. Going by that yardstick in the present case, the re-assessment order would still be time-barred.

24. The decision of the Calcutta High Court in ***India Ferro Alloy*** *(supra)* is distinguishable on facts. The Calcutta High Court too did not take into account the purpose for the introduction of the proviso to Explanation 1. However, the essential approach of exclusion of period during which the period during which the stay was operating is the same in all these cases. The interpretation placed by this Court on the above provision finds support from the decision of the Allahabad High Court in ***Chandra Bhan Bansal*** *(supra)* where it was held:

> "10. The above statutory scheme clearly indicates that for computing the period of limitation the period during which the assessment proceedings is stayed shall be excluded. In

> excluding the above period, the concept of communication of the order of the Court cannot be imported. The exclusion of the period has been provided because of stay or injunction by any Court during which the assessment proceedings are stayed. The intention is clear that when the limitation for assessment has started it can be stayed only by an order or injunction of any Court and as soon as the order or injunction of the Court is vacated, the period of limitation shall re-start since after the vacation of the order of the Court, there is no embargo on the authorities to proceed with the assessment."
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> 13. The provisions of Section 153 (3) (ii) of the Act, 1961 are clear and explicit. The said provision provides that where the assessment, reassessment or re-computation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act, the provisions of sub-section (1) (la) and (lb) of the Act, shall not apply. Thus, where the assessment, reassessment or re-computation is made on the assessee or any person in consequence of or to give effect to any finding or direction in an order of any Court in a proceeding otherwise than by way of appeal or reference under this Act, the period of limitation as provided under Section 153 (2) of the Act, 1961 shall not be attracted."

25. For all of the aforementioned reasons, the Court holds that in the present case the impugned assessment order dated 30th January 2017 was time barred and it is accordingly hereby set aside. Consequently, demand notice dated 30th January 2017 and the penalty order dated 26th July 2017, passed by the AO under Section 271(1) (c) of the Act, are also hereby set aside.

26. The writ petition is allowed but, in the circumstances, with no orders as

to costs.

C.M. No. 30034/2017 (amendment of the writ petition)

27. For the reasons stated therein, the application for amendment of the writ petition is allowed and the amended petition is taken on record.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 08, 2017
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