

W.P.Nos.15804, 15809, 15813 & 15818 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2024

CORAM :

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P. Nos.15804, 15809, 15813 & 15818 of 2023

and

W.M.P. Nos. 16314, 16315, 16316, 16322, 16327, 16328, 16330, 16331,
16333, 16344, 16348 & 16350 of 2023;

and

W.M.P. Nos.15249, 15250, 15254, 15256, 15261, 15264, 15269 & 15270
of 2023

FIVES India Engineering & Projects
Private Limited rep.by its Managing Director,
7, VTB Centre, 3rd Floor, South Boag Road,
T.Nagar, Chennai – 600 017.
Tamil Nadu.

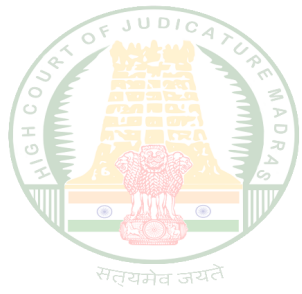
... Petitioner
(in all W.Ps.)

Versus

1.The Income Tax Officer,
Corporate Ward 2(1), Chennai,
Wanaparthi Block,
No.121, Mahatma Gandhi Road,
Nugambakkam, Chennai – 600 034.

2.National Faceless Assessment Centre,
Assessment Unit, Income Tax Department,
Central Board of Direct Taxes,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi – 110 001.

... Respondents
(in all W.Ps.)

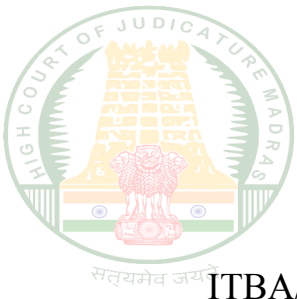


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Prayer in W.P.No.15804 of 2023: Writ Petition filed under Article 226 of the Constitution of India, pleaded to issue a Writ of Certiorari, to call for the records on the file of the 1st respondent pertaining to the order under Section 148A(d) of the Income Tax Act, 1961 dated 29.07.2022 bearing DIN and Order No.ITBA/COM/F/17/2022-23/1044276662(1) respondent No.1 and consequential notice issued under Section 148 of the Income Tax Act, 1961 dated 29.07.2022 Act bearing DIN: ITBA/AST/M/148_1/2022-23/1044278088(1) (“Impugned Notice”) issued by respondent No.1 and the show-cause notice dated 29.04.2023 bearing DIN: ITBA/AST/F/147/(SCN)/2023-24/1052450130(1) (“Impugned SCN”) issued by the respondent No.2 for AY 2014-15, and all actions in furtherance thereof, and to quash the same as arbitrary, unjust and illegal.

Prayer in W.P.No.15809 of 2023: Writ Petition filed under Article 226 of the Constitution of India, pleaded to issue a Writ of Certiorari, to call for the records on the file of the 1st respondent pertaining to the order under Section 148A(d) of the Income Tax Act, 1961 dated 28.07.2022 bearing DIN and Order No.ITBA/COM/F/17/2022-23/1044246035(1) respondent No.1 and consequential notice issued under Section 148 of the Income Tax Act, 1961 dated 28.07.2022 Act, bearing DIN: ITBA/AST.M/148_1/2022-23/1044247608(1) (“Impugned Notice”) issued by respondent No.1 and the show-cause notice dated 29.04.2023 bearing DIN:



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ITBA/AST/F/147/(SCN)/2023-24/1052450116(1) (“Impugned SCN”) issued by the respondent No.2 for AY 2017-18, and all actions in furtherance thereof, and to quash the same as arbitrary, unjust and illegal.

Prayer in W.P.No.15813 of 2023: Writ Petition filed under Article 226 of the Constitution of India, pleaded to issue a Writ of Certiorari, to call for the records on the file of the 1st respondent pertaining to the order under Section 148A(d) of the Income Tax Act, 1961 dated 28.07.2022 bearing DIN and Order No.ITBA/COM/F/17/2022-23/1044247648(1) respondent No.1 and consequential notice issued under Section 148 of the Income Tax Act, 1961 dated 28.07.2022 bearing DIN: ITBA/AST.M/148_1/2022-23/1044248653(1) (“Impugned Notice”) issued by respondent No.1 and the show-cause notice dated 29.04.2023 bearing DIN: ITBA/AST/F/147/(SCN)/2023-24/1052450049(1) (“Impugned SCN”) issued by the respondent No.2 for AY 2016-17, and all actions in furtherance thereof, and to quash the same as arbitrary, unjust and illegal.

Prayer in W.P.No.15818 of 2023: Writ Petition filed under Article 226 of the Constitution of India, pleaded to issue a Writ of Certiorari, to call for the records on the file of the 1st respondent pertaining to the order under Section 148A(d) of the Income Tax Act, 1961 dated 29.07.2022 bearing DIN and Order No.ITBA/COM/F/17/2022-23/1044277108(1) by respondent No.1 and



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consequential notice issued under Section 148 of the Income Tax Act, 1961 dated 29.07.2022 bearing DIN: ITBA/AST.M/148_1/2022-23/1044279204(1) (“Impugned Notice”) issued by respondent No.1 and the show-cause notice dated 29.04.2023 bearing DIN: ITBA/AST/F/147/(SCN)/2023-24/1052450070(1) (“Impugned SCN”) issued by the respondent No.2 for AY 2015-16, and all actions in furtherance thereof, and to quash the same as arbitrary, unjust and illegal.

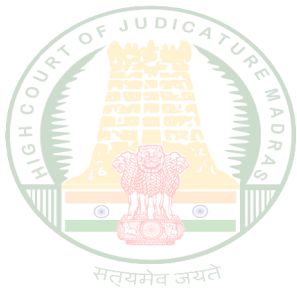
In all W.Ps.

For Petitioner : Mr. Yatin Sharma

For Respondents : Mr. B. Ramana Kumar,
Senior Standing Counsel.

COMMON ORDER

In all these writ petitions, the petitioner assails the order under Section 148 A(d) of the Income-tax Act, 1961 (the I-T Act), the subsequent notice under Section 148 thereof and a later show cause notice in respect of four assessment years running from assessment year (AY) 2014-2015 to AY 2017-2018 [the Relevant AY or AYs (collectively), as the case may be].

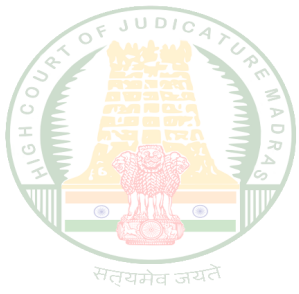


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2. In respect of transactions between the petitioner and Fives France (PAN AABCF6803G) under the Assistance Service Agreement between said parties, the petitioner had filed AAR No.1482 of 2013 under Section 245Q(1) of the I-T Act before the Authority for Advance Ruling (Income tax) (the AAR) seeking a ruling on about 7 questions and, most importantly, on whether payments received by Fives France would be subject to withholding tax under Section 195 of the I-T Act. By order dated 01.02.2021, the AAR declined to answer the questions.

3. Meanwhile, the petitioner had filed its returns of income for the Relevant AYs. Such returns were accepted by the Income Tax authorities and, therefore, assessment orders were not issued under Section 143(3) of the I-T Act. Subsequently, the petitioner received a notice in respect of each Relevant AY alleging that the Assessing Officer had reason to believe that the petitioner's income had escaped assessment. Such notices were assailed successfully in proceedings before this Court by relying on the changed legal regime for reassessment.



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4. Eventually, on the basis of the judgment of the Supreme Court in *Union of India v. Ashish Agarwal*, (2023) 1 SCC 617, the respondents issued a communication for each Relevant AY to treat the notice under Section 148 as a notice under Section 148A(b) and reply thereto. The petitioner replied thereto in June 2022 and asserted that the respective notices were based on gross factual errors inasmuch as the application before the AAR was only in respect of the Assistance and Service Agreement between the petitioner and Fives France, which was in operation until 31.12.2014. The petitioner also raised the plea of limitation. In those circumstances, the impugned order under Section 148 A(d) and notice under Section 148 thereof were issued in respect of each Relevant AY. After requesting for and obtaining copies of the purported sanction letters in respect of reassessment, these writ petitions were filed.

5. Learned counsel for the petitioner assailed the orders under Section 148A(d) on multiple grounds. The first ground of challenge was that such orders were issued on the basis of a gross factual error. This contention was raised in respect of the reasons for reopening assessment set out in the communication of June 2022. Learned counsel submitted

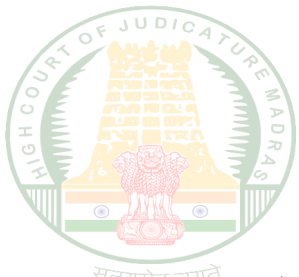


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that re-assessment proceedings were initiated on the basis of the payment of Rs.56,09,216/- to Fives Solios SA and about three transactions for an aggregate value of Rs.43,52,744/- with Fives France. By relying on paragraph No.1.2 of the reply dated 07.06.2022 to the above communication at page No.93 of the paper book of the writ petition for AY 2016-2017, learned counsel pointed out that the above transactions were not within the scope of the application made by the petitioner before the AAR. Since the proceedings to reopen assessment were initiated on the grossly erroneous foundation that the transactions referred to above were within the scope of proceedings before the AAR, learned counsel submitted that the order under Section 148A(d) and the notice issued on that basis are liable to be interfered with.

6. The next contention of learned counsel was that approval was granted by the Chief Commissioner of Income Tax (OST), Chennai, for the proposed draft order under Section 148A(d) to the effect that the assessments for AYs 2016-2017 and 2017-2018 were fit for reassessment. By referring to Section 151 of the I-T Act, learned counsel submitted that the Chief Commissioner of Income Tax is not a specified authority to



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grant approval.

7. In support of these contentions, learned counsel referred to and relied upon the judgments set out and discussed below:

(i) *Rajiv Agarwal v. ACIT & Ors. (Rajiv Agarwal)*, (2017) 395 ITR 255 (Delhi), particularly paragraphs 6, 7 & 12 thereof, wherein the Delhi High Court concluded that the re-assessment proceedings were initiated without application of mind to the facts and material on record and, therefore, such proceedings were liable to be interfered with.

(ii) *Chhugamal Rajpal v. S.P.Chalina & Ors. (Chugumal Rajpal)*, (1971) 1 SCC 453, especially paragraphs 3 & 4 thereof, wherein the Supreme Court concluded that approval was granted mechanically and that such approval would not have been granted if the Commissioner had actually considered the report and satisfied himself as to whether there were clear reasons to believe that income escaped assessment.

(iii) *CIT v. S. Goyanka Lime & Chemicals Ltd.*, (2014) SCC OnLine MP 4550, particularly paragraphs 3 & 7 thereof, where the MP High Court held that interference is warranted when notice is issued under Section 148 of the I-T Act in mechanical fashion without the



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officer concerned applying his mind to the materials on record.

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(iv) *Central India Electricity Supply Co. Ltd. v. Income Tax Officer, (2011) 333 ITR 237 (Delhi)*, where the Delhi High Court held that two conditions should be satisfied before notice under Section 148 is issued, i.e. there must be a reason to believe that income chargeable to tax had escaped assessment and the Income Tax officer should also have reason to believe that such escapement of income from assessment is on account of the omission or failure of the assessee to fully and truly disclose the material facts necessary for assessment.

8. In the cases on hand, learned counsel submitted that the petitioner/assessee had deducted withholding tax while making payments to Fives France in respect of all transactions that formed the subject of the applications before the AAR. Therefore, it was submitted that the petitioner did not proceed on the assumption that the ruling of the AAR would be in its favour. Thus, both on the ground of violation of the requirements of Section 148 r/w Section 151 of the I-T Act, and on the merits, learned counsel submitted that the impugned order and the notice are liable to be quashed. Learned counsel further submitted that other

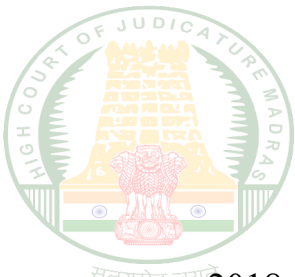


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grounds of challenge were raised in the writ petitions, such as limitation, and that he reserves the right to substantiate the same, if necessary.

9. Mr. B. Ramana Kumar, learned senior standing counsel, made submissions in response. At the outset, he submitted that the petitioner had approached the Court after the assessment orders were issued. Once assessment orders are issued, he contended that the petitioner should have filed statutory appeals, if aggrieved. He further submitted that the petitioner had failed to deduct withholding tax on the assumption that the AAR would issue a favourable ruling. Therefore, he contended that the proceedings to reopen the assessments were justified because the reasons to believe that income escaped assessment were founded on tangible material. As regards sanction, learned senior standing counsel submits that sanction was obtained from the Principal Chief Commissioner both for AY 2014-2015 and 2015-2016. As regards AY 2016-2017 and 2017-2018, he submitted that sanction was granted by the Chief Commissioner of Income Tax and that the question of sanction may have an impact only with regard to AY 2016-2017 since AY 2017-



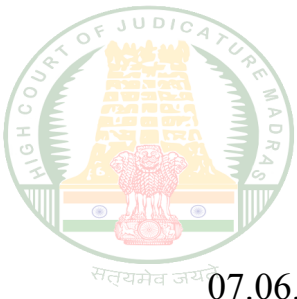
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2018 falls within clause (i) of Section 151.

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10. At the outset, it should be noticed that the petitioner has placed on record a communication dated 16.07.2022 to the jurisdictional assessing officer which states that the assessee/petitioner had duly withheld and deposited taxes as required by the I-T Act in respect of payments made to Fives France for AYs 2014-2015 to 2017-2018 under transactions forming the subject of the AAR application. The particulars of such payment, including the taxes deducted therefrom, were appended to the said letter. The validity of these re-assessment proceedings should be examined against this backdrop.

11. The communication issued in May 2022 setting out the reasons for reopening the assessments makes reference to Form 3CD and the alleged payments to Fives Solios SA and Fives France under specific transactions. The communication also states expressly that a reference was made by the petitioner to the AAR in respect of the above transactions. On receipt of this communication, by reply dated

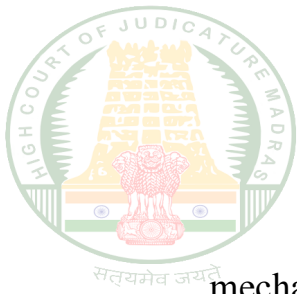


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07.06.2022, the petitioner explained that there was a gross factual error in the aforesaid communication. In particular, the petitioner pointed out that the application before the AAR was only in respect of services provided under the “Assistance and Service Agreement” between the assessee and Fives France, which was operated until 31.12.2024. The petitioner stated categorically that the transactions of Rs.56,09,216/- between the assessee and Fives Solios SA and the three transactions cited therein of an aggregate value of Rs.43,52,744/- with Fives France were not covered within the scope of the AAR application. In these circumstances, it was contended that the notice was issued on a completely erroneous factual basis. In spite of the issuance of this reply, the respondents proceeded to issue the impugned order under Section 148A(d) of the I-T Act.

12. The satisfaction of the assessing officer that there are reasons to believe that income has escaped assessment for the purpose of reassessment is required to be reached upon objective satisfaction of the officer on the basis of tangible materials. As contended by learned counsel for the petitioner, if re-assessment proceedings are initiated



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mechanically or on the wrong factual foundation, such orders may warrant interference. In this connection, the principles laid down in the judgment of the Delhi High Court in *Rajiv Agarwal* are clearly applicable to this case. The Delhi High Court concluded therein that the assessing officer had ignored the objections of the assessee and failed to apply his mind to the material presented by the assessee. Likewise, in *Chhugamal Rajpal*, the Supreme Court concluded that approval under Section 148 should be provided after examining the material on record and not in mechanical fashion. Both on account of the reasons for reopening being based on a grossly erroneous factual foundation and by also taking into account that the petitioner actually withheld and remitted taxes in respect of transactions with Fives France that formed the subject of the application before the AAR, the impugned order under Section 148A(d) of the I-T Act and the notice under Section 148 thereof are vitiated. All that remains is to briefly consider the other ground of challenge.

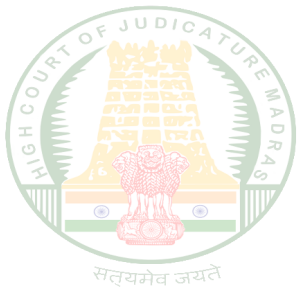
13. By referring to the letter of approval with regard to AYs 2016-



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2017 and 2017-2018, learned counsel for the petitioner pointed out that such approval was granted by the Chief Commissioner of Income Tax. In clauses (i) and (ii) of Section 151 of the I-T Act, the specified authorities for purposes of issuing notice under Section 148 are prescribed. The rank of the specified authority changes depending on the amount of time which has elapsed from the end of the relevant assessment year. If less than 3 years have elapsed, clause (i) is applicable; otherwise, clause (ii) applies. As regards each Relevant AY, even the first notice under Section 148 was issued in June 2021. Thus, more than 3 years had lapsed. For AYs 2014-2015 and 2015-2016, the approval was granted by the Principal Chief Commissioner of Income Tax, who is a specified authority under clause (ii), but the approval for AYs 2016-2017 and 2017-2018 was granted by the Chief Commissioner of Income Tax, who was not a specified authority under clause (ii) of Section 151 at the relevant time unless there was no Principal Chief Commissioner or Principal Director General. The admitted position is that there was a Principal Chief Commissioner. Therefore, the reassessment proceedings in respect of AY 2016-2017 and 2017-2018 are vitiated on this count too.



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14. For reasons adverted to above, the impugned order under Section 148A(d) and the notice under Section 148 call for interference. Consequently, the order and the notice impugned in these Writ Petitions are quashed. As a corollary, the assessment orders issued thereafter will not survive. These Writ Petitions are, therefore, allowed. Consequently, the connected miscellaneous petitions are closed. No costs.

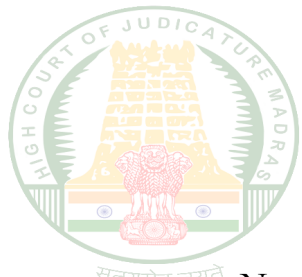
27.02.2024

Index : Yes
Speaking Order : Yes
Neutral Case Citation: Yes

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To

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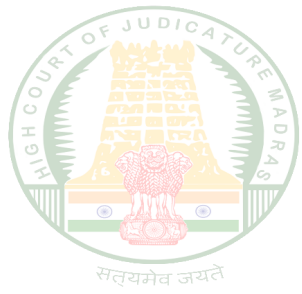
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