

(2011) 11 CHH CK 0063
In the Chhattisgarh High Court
Case No : Income Tax Appeal No 04 of 2006

Assistant Commissioner Income Tax Raipur	APPELLANT
Vs	
Major Deepak Mehta	RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Finance Act, 2002 — Section 153(2)
Finance Act, 2009 — Section 147(3)
Income Tax Act, 1961 — Section 139, 142(1), 143(2), 143(3), 147

Citation : (2011) 2 CGBCLJ 456 : (2012) 246 CTR 255 : (2012) 344 ITR 641 :
(2012) 210 TAXMAN 176

Hon'ble Judges : Satish K. Agnihotri, J; R.S. Sharma, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Satish K. Agnihotri, J.—The instant appeal filed by the Revenue u/s 260A of the Income Tax Act, 1961 (for short "the Act, 1961") is against the order dated 7-10-2005 passed by the Income Tax Appellate Tribunal (for short "the Tribunal") wherein the Tribunal has dismissed the appeal filed by the Revenue and partly allowed the cross objection filed by the assessee.

2. This Court vide order dated 18-8-2011 admitted the appeal on the following substantial question of law :

Whether on facts and in the circumstances of the case the Tribunal was justified in annulling the assessment framed u/s 143(3)/147 by the assessing officer.

3. The facts, in brief, are that the assessee was engaged in the business of poultry farming in the name & style of Royal Poultry Farm. The assessee filed the income return for the AY 1997 - 98 on 22-12-1997 declaring its income of Rs.1,49,854/-. The return was processed u/s 143(1) on the finding that the capital work in progress under the head building as per scheduled 'c' shown in the balance sheet as on 31-3-1996 for a sum of Rs.15,35,551/- was not carried forward to the balance sheet as on 1-4-1996. The total fixed assets on closing

balance as on 31-3-1996 was Rs.52,51,629/- whereas the opening balance as on 1-4-1996 was shown at Rs.31,35,246/-, showing the difference of Rs.20,16,383/- (sic Rs.21,16,383/-).

4. With regard to validity of the notice, as reasons were not informed to the assessee a notice u/s 143(2)(i) of the Act, 1961 was served on the assessee on 28-2-2001. As projected by the Revenue, none appeared on behalf of the assessee in compliance with the said notice. The assessee along with its Chartered Accountant appeared before the Assessing Officer (for short "the AO") on 12-3-2001 wherein the assessee was directed to file reply on the basis of the return. Thereafter, several notices were issued. The assessee failed to appear and, as such, a detailed enquiry was conducted and it was found that there was the total income of Rs.12,13,240/- and accordingly the order u/s 143(3) read with Section 147 was passed on 28-3-2002 by the AO.

5. Being aggrieved, the assessee preferred an appeal before the Commissioner, Income Tax (Appeals) {for short "the CIT (A)"} wherein it was contended that notice u/s 148 was bad in law and the proceedings so initiated against the assessee be dropped under sub-section (2) Section 152 of the IT Act, 1961.

6. The CIT (A) held that "taking the whole view of the case, if the appellant is able to prove that there was no under assessment, then alone provisions of Section 152(2) will come into play and the AO will be obliged to drop the proceedings. In the present case, the AO found items of under assessment other than the one for which he had issued notice. Therefore, he could not take action u/s 152(2) of the Act. I hold that the action of the AO in issuing notice u/s 148 and continuing with the re-assessment proceedings there- after is valid and well within his jurisdiction. This ground of appeal is, accordingly, dismissed."

7. The appeal was partly allowed, as on the question of preparation of demand notice u/s 156 of the Act, 1961 the AO was directed to recompute the interest under Sections 234-A, 234-B and 234-C after giving relief of Rs.7,83,047/-.

8. The Revenue preferred the appeal before the Tribunal wherein the assessee also filed a cross objection. The main question raised by the assessee was that the CIT (A) has considered the provisions of Section 152(2) of the Act, 1961 but without assigning any reason considered that the AO was right in continuing with the proceedings u/s 148 of the Act, 1961 as valid and within his jurisdiction. Under the notice issued u/s 148 the reasons supplied, which are as under :

During the A.Yr. 97-98 the assessee has filed return by Dec. 1997. This return the `a" has enclosed audit report. In this audit report particulars of fixed assets has been mentioned in the schedule `D" Dherain head of Bldg. shown is 20,37,781/- as opening. Whereas the details of fixed assets for A.Yr. 96-97 closing was Rs.2037781/- which is shown in fixed assets in schedule `c" of audit report for A.Yr.96-97.

It is seen that bldg. (work-in- progress) was Rs.15,35,551/- in above schedule

`c" for A.Yr. 96-97. This work-in-progress is not carried forward in schedule `D" of fixed assets for A.Yr. 97-98.

The total of fixed assets closing for A.Yr. 96-97 was Rs.52,51,629/- which should be obviously carried forward for next year but in A.Yr. 97-98 the total net block assets (opening) was Rs.31,35,246/-. So there is a difference of Rs.20,16,383/-.

On the above facts I have reason to believe that the above discrepancies of fixed assets at Rs.20,16,383/- is escaped from taxation. Hence, notice u/s 148 should be issued.

9. The Tribunal held that "the assessee, therefore, rightly proceeded to invoke the provisions of Section 152(2) in so far as having been confronted with the notice u/s 147 to resist the AO to reopen the whole assessment and show that income alleged to have escaped assessment has in truth and in fact not escaped assessment but has been brought in under some inappropriate head." It was further held that the AO proceeded in framing assessment u/s 143(3) read with Section 147 beyond the provisions of law. The CIT (A) was also not able to adjudicate as to how the provisions of Section 152(2) of the Act, 1961 were not applicable to the case of the assessee. In any case the addition to the building shown as work in progress has been disposed of in the impugned assessment year, which fact was noted otherwise by the AO as net block indicating the same in assessment year 1996-97 not forming part of the block having been disposed of was not in pursuance of records for assessment year 1996-97 not available to the AO but total of fixed assets remaining the same. The objection was accepted declaring the proceedings of reopening of the assessment as invalid. Thus, this appeal.

10. Shri Rajeev Shrivastava appearing with Shri Sameer Shrivastava, learned counsel for the appellant, would submit that Explanation 2 to Section 147 provides that the following shall also be deemed to be cases where the income chargeable to tax has escaped assessment :

Firstly; where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount, which is not chargeable to income tax;

Secondly; where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

Thirdly; where an assessment has been made, but

(i) income chargeable to tax has been under assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed."

11. Shri Shrivastava would further submit that the Income Tax Officer may bring to charge items of income which had escaped assessment other than or in addition to that item or items which have led to the issuance of notice u/s 148. The jurisdiction of the AO is not confined to only such income, but other incomes also, which have escaped tax. Thus, reopening or reconsidering the whole assessment was just and proper.

12. In support of his contention, Shri Shrivastava placed reliance upon the decision of the Supreme Court in Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.¹.

13. On the other hand, Shri Shashank Dubey, learned senior counsel appearing with Shri Neelabh Dubey, learned counsel for the respondent, would submit that in the present case the department issued notice u/s 148 against the assessee for income under a particular head. The notice did not pertain to income under different heads, but which were discovered in the course of reassessment proceedings. The original ground for issuing reassessment notice was nowhere taken up and was in effect dropped.

14. Shri Dubey would further submit that in the case on hand the case was reopened on the basis of a belief that income 'x' had escaped assessment. But in the reassessment order passed u/s 147 by the AO no addition was made in respect of the 'x' income, but an addition was made for 'y' income, which was said to have escaped assessment. Such addition of 'y' income cannot be sustained when no addition was made for 'x' income. There is indeed a power with for AO to assess escaped income other than those on the basis of which notice u/s 148 is issued.

15. Shri Dubey would next submit that as per the assessment order, notice u/s 148 dated 4-1- 2001 was issued because in the audit report of the years 1996-97 & 1997-98 there was a difference in figures relating to work in progress. However, the assessment order does not point out that reply to this was already submitted on 12-3-2001. Nowhere in the assessment order has any mention being made about this head of income nor has any assessment been made or any addition made on this count and, as such, the assessment order is totally silent on this issue. Thus, it is clear that it did not constitute reason to believe. The reassessment was bad since it related to all other items except those on the basis of which the reassessment notice was issued.

16. Shri Dubey would next submit that Tribunal was right in holding that the AO had the jurisdiction to reassess the issues other than the issues in respect of which proceedings are initiated but he was not so justified when the reasons for initiation of those proceedings ceased to survive. Learned counsel placed reliance upon the decision of the Supreme Court rendered in S. Sundaram Pillai and Others v. V.R. Pattabiraman and Others² and upon the decision of Bombay High

Court in Commissioner of income tax v. Jet Airways (I) Ltd.³ & upon the decision of High Court of Delhi in Ranbaxy Laboratories Limited v. Commissioner of Income Tax⁴.

17. We have heard learned counsel appearing for the parties, perused the pleadings and the documents appended thereto.

18. Sections 147, 148 & 152(2) of the Act, 1961 read as under :

147. Income escaping assessment.-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 and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the

assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3.-For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub- section (2) of Section 148.

148. Issue of notice where income has escaped assessment.-(1) Before making the assessment, reassessment or recomputation u/s 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139:

Provided that in a case

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub- section (2) of Section 143 after the expiry of twelve months specified in the proviso to sub- section (2) of Section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of Section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of Section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of Section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of Section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.-For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

152. Other provisions.

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(2) Where an assessment is reopened u/s 147, the assessee may, if he has not impugned any part of the original assessment order for that year either under Sections 246 to 248 or u/s 264, claim that the proceedings u/s 147 shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made:

Provided that in so doing he shall not be entitled to reopen matters concluded by an order under Sections 154, 155, 260, 262 or 263.

19. Provisions of Section 147 of the Act, 1961 makes it clear that the AO may reassess any income chargeable to tax, which has escaped assessment for any assessment or there was under assessment or the claimed excessive loss, deduction, allowance or relief in the return, subject to provisions of Sections 148 to 153. The pre- condition to reopen the assessment or recomputation is that the AO should have reason to believe that no income chargeable tax has escaped assessment or under assessment or the claimed excessive loss, deduction, allowance or relief in the return. Thereafter, a notice u/s 148 shall be served on the assessee requiring him to furnish return of the income or income of any other person in respect of which he is assessable under this Act.

20. Sub-section (2) Section 148 provides that before issuing any notice u/s 148(1), the AO shall record his reasons for doing so. Section 152(2) provides that the assessee may claim that the proceedings u/s 147 should be dropped on his showing that he had been assessed not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken

into account, or the assessment or computation had been properly made.

21. Explanation 3 to Section 147, which was inserted by Finance (No.2) Act, 2009, w.e.r.f. 1-4-1989, provides that the AO may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings u/s 147 of the Act, 1961, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section 148.

22. From bare perusal of the entire provisions, it is clear that the AO should have reason to believe to reopen assessment under the provisions of Section 147 before making the assessment, reassessment or recomputation.

23. The assessee has a right to inform the AO that the income which has allegedly escaped assessment was shown and had been taken into account and the assessment had been properly made. In that event the AO has an obligation to drop the proceedings of the said income, under the provisions of Section 152(2) of the Act, 1961.

24. Explanation 3 to Section 147 of the Act, 1961 provides that if the proceedings on the basis of reasons recorded under sub-section (2) Section 148 in the course of proceedings of the income reasons have been recorded u/s 148(2), the other income may also be included, which has escaped assessment for the purpose of assessment or re-assessment u/s 147 of the Act, 1961, in the same proceeding.

25. The Supreme Court in Sun Engineering Works (P) Ltd. (supra) held as under :

41....we find that in proceedings u/s 147 of the Act, the Income Tax Officer may bring to charge items of income which had escaped assessment other than or in addition to that item or items which have led to the issuance of notice u/s 148 and where reassessment is made u/s 147 in respect of income which has escaped tax, the Income Tax Officer's jurisdiction is confined to only such income which has escaped tax or has been under- assessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to reagitate questions which had been decided in the original assessment proceedings. It is only the under-assessment which is set aside and not the entire assessment when reassessment proceedings are initiated. The Income Tax Officer cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which are not the subject-matter of proceedings u/s 147. An assessee cannot resist validly initiated reassessment proceedings under this section merely by showing that other income which had been assessed originally was at too high a figure except in cases u/s 152(2). The words `such income" in Section 147 clearly refer to the income which is chargeable to tax but has "escaped assessment" and the Income Tax Officers" jurisdiction under the section is confined only to such income which has escaped assessment....

26. In *S. Sundaram Pillai* (supra), relied on by the learned counsel appearing for the respondent, the Supreme Court has dealt with the Explanation to a statutory provision as under :

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
- (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

27. The Bombay High Court in *Jet Airways* (supra) observed that after issuing a notice u/s 148, the income which has initially formed a reason to believe that the income has escaped assessment, but as a matter of fact has not escaped assessment. The AO cannot proceed to assess some other income independently, however, it was observed that it is open for the AO to issue a fresh notice u/s 148 and proceed thereafter.

28. The High Court of Delhi in *Ranbaxy Laboratories Limited* (supra), has taken the similar view.

29. In the facts of the case, the income in respect of building to the tune of Rs.20,16,383/- (sic Rs.21,16,383/-) formed reason to believe that the same had escaped assessment, as in the notice issued u/s 148, as aforesaid, in the preceding para 8. In the course of proceeding other incomes were also found to have escaped assessment.

30. The assessee filed his reply u/s 152(2) stating therein that the said income which had formed reasons in the notice u/s 148 had not escaped assessment, as the same was disposed of in the same assessment year itself and for that no details were given.

31. The Tribunal has also come to the conclusion that, in fact, there was no escapement of assessment or no assessment in respect of the said head, which formed the reason to believe in the notice. In respect of other incomes no notice was issued and the assessee had no opportunity to put forward his case u/s 152(2) of the Act, 1961, to avail benefit of the said Section for dropping the proceedings. Thus, the Revenue cannot take advantage of the Explanation 3 to

Section 147, as the same is not available in the facts of the case.

32. Explanation 3 is applicable only in the event the income was formed opinion in the notice has been found correct and the proceeding in the respect of the said income was not dropped u/s 152(2) of the Act, 1961.

33. The Supreme Court in *Sun Engineering Works (P) Ltd.* (supra) held that the issue was in respect of inclusion of other incomes in addition to that item or items which have led to the issuance of notice u/s 148 and it was found that the AO was right in including other incomes. On the issue asto when the item or items which have led to the issuance of notice u/s 148 has been dropped u/s 152(2), what would be the stand of the AO was not in issue in the said case. It was further held that the AO cannot reopen the entire assessment except the unescaped income for which the proceedings have been initiated.

34. The Supreme Court in *S. Sundaram Pillai* (supra), had held, inter alia, that an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment.

35. In the case on hand, the main object and purpose of Section 147 read with Section 148 is that if there is any escaped assessment and the AO has reason to form the opinion a notice must be given to the assessee to file returns or to show that there was no escaped income and u/s 152(2) the proceedings may be dropped. In that context, explanation provides that along with the proceedings for the escaped income which had formed reason to believe and the assessee has been properly intimated to show his case, proceedings of the other incomes may also be examined along with the said income.

36. We are in respectful agreement with the view taken by the Bombay High Court in *Jet Airways* (supra) and the High Court of Delhi in *Ranbaxy Laboratories Limited* (supra).

37. Applying the well settled principles of law to the facts of the present case and for the reasons mentioned hereinabove, the question raised herein is answered in affirmation.

38. As an upshot, the appeal, being bereft of merit, is liable to be and is hereby dismissed.

39. There shall be no order asto costs.