

(2011) 07 OHC CK 0004
In the Orissa High Court
Case No : Writ Petition (C) No. 12684 of 2004

B. Engineers and Builders Ltd.	Vs	APPELLANT
The Assistant Commissioner of Income Tax and Another		RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Constitution of India, 1950 — Article 19(1)
Income Tax Act, 1961 — Section 132A, 139, 142(1), 143(1), 143(3)

Citation : (2011) 243 CTR 252

Hon'ble Judges : V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—This writ petition has been filed with a prayer to quash the notice issued u/s 148 of the I.T. Act, 1961 (for short, the "Act") and the order of assessment dated 28.02.2003 passed under Sections 147/143(3) of the Act for the assessment year 1989-90 (Annexure-1 series) on the ground that action taken u/s 147 and notice issued u/s 148 dated 13.01.1997 are barred by limitation and bad in law.

2. The facts and circumstances giving rise to the present writ petition are that the Petitioner is a Limited Company incorporated under the Companies Act, 1956. For the assessment year 1989-90, the Petitioner filed its return of income on 29.12.1989 disclosing loss of Rs. 7,34,490/-. The said return was processed u/s 143(1) on 30.03.1990. Subsequently, the assessment was completed u/s 143(3) of the Act on 31.03.1992 on total income of Rs. 8,61,270/- Thereafter, notice u/s 148 of the Act was issued on 13.01.1997 and the same was served upon the Petitioner on 16.01.1997. On receipt of the aforesaid notice, on 05.02.1997 the Petitioner requested the Assistant Commissioner Income Tax to inform the reasons for re-opening of the assessment. In response to notice u/s 148 of the Act the Assessee filed its return on 28.10.1997 disclosing total loss at Rs. 7,34,489/-. On 18.11.1998 the Deputy Commissioner of Income Tax, Special Range, Bhubaneswar communicated the reasons for re-opening the assessment on the grounds that the assessment was completed u/s 143(3) on the total

income of Rs. 8,61,270/-for the assessment year 1989-90, after allowing deduction of Rs. 29,09,632/-for investment allowance u/s 32-A of the Act. As the Assessee company is not engaged in the activities of manufacturing and not producing any article or things, it is not entitled to any deduction on investment allowances and therefore, an amount of Rs. 29,09,632/-for the assessment year 1989-90 has escaped assessment. In the said order the Petitioner was asked to explain as to why the deductions allowed u/s 32-A of the I.T. Act for the assessment year shall not be withdrawn and the reassessment shall not be completed accordingly. While the matter stood thus, the Petitioner filed O.J.C. No. 16437 of 1998 with a prayer to quash the re-assessment proceeding initiated for the assessment year 1989-90 on several grounds including validity of the action taken u/s 147 and issuance of notice u/s 148 of the Act. This Court vide order dated 26.06.2001 disposed of the said writ petition directing the Petitioner to file objection within 30 days from the date of the order. This Court further directed that on receipt of the objection, the authority concerned shall hear the parties and pass final order within 30 days thereafter. On 17.12.2002 notice u/s 142(1) of the Act was issued to the Petitioner to show cause as to why the investment allowance claimed by it should not be withdrawn in the light of the ratio laid down by the Hon''ble Supreme Court in the case of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . The Assessee filed its show cause reply dated 26.12.2002 stating therein that the proposal to withdraw the benefit already granted u/s 32A and to complete the reassessment are not legally valid as the same constitute pure change of opinion. Section 147 applies only where there was a reason to believe that any income chargeable to tax has escaped assessment for any assessment year and where an assessment u/s 143(3) or u/s 147 of the Act has been made No. action u/s 147 shall be taken after expiry of four years from the end of the relevant assessment year by reason of failure on the part of the Assessee to make a return u/s 139 or in response to a notice issued u/s 142(1) or Section 148 to disclose fully and truly all the material facts necessary for his assessment for that assessment year. So far as the claim made u/s 32A was concerned, the Petitioner has disclosed fully and truly all material facts necessary which were duly considered by the Assessing Officer and he has consciously allowed the deduction u/s 132A of the Act. The decision of the Supreme Court in N.C. Budharaja (supra) does not constitute the opinion contemplated in Section 147. The Assessing Officer applying its mind having allowed the deduction claimed u/s 32A cannot reopen the assessment by changing his opinion as the same is not permissible under the law. The time limit to take action u/s 263 seems to have expired and the Department is trying to take action u/s 147 of the Act. The notice of reassessment u/s 148 having been issued after four years, the same is bad in law. The decision of the apex Court in N.C. Budharaja (supra) is not applicable to the Petitioner's case. There is procedural infirmity to the notice issued u/s 148 of the Act. The Petitioner also relied on certain judicial pronouncements before the Assessing Officer. The Assessing Officer rejected Petitioner's show-cause reply and passed the assessment order holding that in

the instant case new information came to the possession of the Assessing Officer in the form of judicial pronouncements as laid down by the apex Court in N.C. Budharaja's case in the year 1993. The opinion of the Assessing Officer was consequence of the judgment delivered by the Hon''ble Supreme Court; therefore it cannot be said that it is a change of opinion. The Assessing Officer further held that the Petitioner is not entitled to get any deduction in view of the apex Court judgment in N.C. Budharaja (supra) under the head of investment allowance and assessed the Petitioner at a total income of Rs. 28,70,900/-. Hence, the present writ petition.

3. Mr. B. Panda, learned Counsel appearing for the Petitioner submits that the impugned order of assessment has been passed in gross violation of the direction of this Court in O.J.C. No. 16437 of 1998 wherein vide order dated 26.01.2001, liberty was given to the Petitioner to file objection before the authorities and the authorities were directed to pass the final order after considering the Petitioner's objection and keeping in mind the direction given in the earlier writ petition in O.J.C. No. 1769 of 1999 disposed of on 13.07.2000 for the assessment year 1993-94. Issuance of notice u/s 148 of the Act is invalid as the same was issued beyond the statutory period of four years provided under the statute. Consequently, the order of assessment passed on the basis of the said notice is illegal. The Assessing Officer has not considered the reply of the Petitioner dated 26.12.2002 filed pursuant to notice dated 07.12.2002 issued u/s 142(1) of the Act. The impugned order of assessment was passed contrary to the direction of this Court. The Petitioner is deprived of his legitimate/constitutional right of carrying on his business under Article 19(1)(g) of the Constitution. The claim of deduction u/s 32-A of the Act towards investment allowances have been allowed by the Department initially u/s 143(1)(a) and subsequently order passed u/s 143(3) of the Act, after due application of mind, reopening of assessment taking action u/s 147 of the Act and issuing notice u/s 148 is nothing but change of opinion which is not permissible under the law. The principle decided in the case of N.C. Budharaja (supra) is not applicable as the same has No. nexus to the case of the Petitioner. Placing reliance in the case of (1) Simplex Concrete Piles (India) Ltd. and Geo Miller and Co. Ltd. Vs. Deputy Commissioner of Income Tax and Others, , Mr. Panda submitted that issuance of notice u/s 148 of the Act after a lapse of 4 years from the end of the relevant assessment year is totally invalid in law. The Assessing Officer is not correct to hold that O.J.C. No. 16437 of 1998 was dismissed. Mr. Panda, prayed for quashing of the notice u/s 148 and order of re-assessment.

4. Mr. A. Mohapatra, learned Senior Standing Counsel appearing for the Income Tax Department submitted that the Petitioner-Assessee earlier had challenged the validity of the notice u/s 148 of the Act in O.J.C. No. 16437 of 1998 and the said writ petition was dismissed by this Court. Therefore, it is not open to the Petitioner to challenge again the validity of the said notice in the present writ petition. Moreover, the writ petition is not maintainable as the Assessee has alternative remedy to file an appeal u/s 246-A of the Act before the

Commissioner of Income Tax (Appeals). The direction of this Court in O.J.C. No. 16347 of 1998 dated 26.06.2001 has been duly complied with. Due opportunity was given to the Petitioner during the proceeding u/s 147 of the Act and issuance of notice u/s 148 is permissible in law as per the settled position of law.

5. It was further argued that notice u/s 148 was issued after obtaining due approval of the CIT, Bhubaneswar as per the provisions of law in force on the date of approval granted by the CIT and also on the date of issue of notice u/s 148 of the Act. The assessment of any Assessee can be reopened upto a period of 10 years. Therefore, the contention of the Petitioner that the assessment cannot be reopened after 4 years is not correct and the same is contrary to the provisions of law as per letter dated 14.11.2002 received from the Standing Counsel. Concluding his argument, Mr. Mohapatra, prayed for dismissal of the writ petition.

6. On the rival contentions of the parties, the only question that falls for consideration by this Court is as to whether after dismissal of O.J.C. No. 16437 of 1998 in which the validity of the notice issued u/s 148 of the Act was challenged by the Petitioner, the present writ petition is maintainable ?

7. To deal with the above question, it is necessary to know what was the subject matter of challenge in O.J.C. No. 16437 of 1998 and what order was passed in that case. According to the Department, in the said writ petition, the Petitioner had challenged the validity of the notice issued u/s 148 of the Act and this Court dismissed the said writ petition. Therefore, the Petitioner is estopped from challenging the same relief in the present writ petition. The Petitioner-Assessee does not dispute that it had challenged the validity of the notice issued u/s 148 of the Act in O.J.C. No. 16437 of 1998 on the question of limitation and on other grounds. According to Mr. Panda, that issue was not adjudicated by this Court in the previous writ petition (O.J.C. No. 16437 of 1998). This Court had remanded the matter to the Assessing Officer with a liberty to the Petitioner to file objection before the Assessing Officer and the Assessing Officer was directed to pass final order after hearing the parties. Therefore, the Income Tax Department is wholly unjustified to say that since O.J.C. No. 16437 of 1998 in which notice issued u/s 148 had been challenged was dismissed, the Petitioner is estopped from challenging the validity of the said notice in the present writ petition.

8. For proper adjudication of the rival contentions, it is felt necessary to extract hereunder the order dated 26.06.2001 passed in OJC No. 16437 of 1998.

15.26.06.2001 Petitioner has filed this writ petition challenging the notice issued to it u/s 148 of the Income Tax Act, 1961.

2. Heard the learned Counsel for the Petitioner, and the learned Standing Counsel (income tax). Without expressing any opinion on the rival contentions as to the correctness or otherwise of the reassessment notice issued, it is directed that the Petitioner may file objection to the same within thirty days from today. On receipt of the objection, the authority concerned shall hear the parties and pass

final order within thirty days thereafter.

3. It is submitted that earlier similar matter relating to re-assessment for the assessment year 1993-94 was challenged before this Court in OJC No. 1769 of 1999 and the said writ petition was disposed of on 13.07.2000. It is open to the Petitioner to bring the same to the notice of the authority considering the matter. We make it clear that if the Petitioner feels aggrieved by the order to be passed by the Assistant Commissioner, it is at liberty to prefer appeal before the appellate authority. All other contentions are kept open.

With the above observation, the writ petition is disposed of.

9. On perusal of the above order of this Court, it is amply clear that the issue relating to validity of notice issued u/s 148 of the Act has not been adjudicated by this Court in OJC No. 16437 of 1998. The said writ petition was disposed of giving liberty to the Petitioner to file objection before the Assessing Officer and the Assessing Officer was directed to pass final order after hearing the parties. Therefore, the learned Assessing Officer as well as the learned Senior Standing Counsel is not correct to say that the writ petition (O.J.C. No. 16347 of 1998) in which the Petitioner had challenged the validity of the notice issued u/s 148 of the Act was dismissed.

10. The next question that would arise for consideration by this Court whether the Assessee is right in approaching this Court in the present writ petition challenging the validity of the notice issued u/s 148 of the Act as well as the reassessment proceedings. Perusal of the order dated 26.06.2001 passed in O.J.C. No. 16437 of 1998 reveals that in case the Petitioner feels aggrieved by the order passed by the Asst. Commissioner, it was given liberty to prefer appeal before the appellate authority.

11. In view of the above, the proper course open to the Petitioner was to approach the appellate authority in terms of order dated 26.06.2001 passed in O.J.C. No. 16437 of 1998. Therefore, the present writ petition is not entertained. We make it clear that this Court has not expressed any opinion on various points urged by the Petitioner either in earlier writ petition (O.J.C. No. 16437 of 1998) or in the present writ petition. If the Petitioner is so advised it may approach the appellate authority by way of filing an appeal within four weeks from today. If such an appeal is filed, the appellate authority shall decide the appeal on its own merit in accordance with law. 12. With the aforesaid observations/directions, the writ petition is disposed of.