

(1996) 11 MAD CK 0097

In the Madras High Court

Case No : Tax Case No"s. 1074 and 1075 of 1983

Commissioner of Income Tax

APPELLANT

Vs

E.I.D. Parry (India) Ltd.

RESPONDENT

Date of Decision : 07-11-1996

Acts Referred:

Income Tax Act, 1961 — Section 147, 256(2), 28, 37(3), 40

Citation : (1996) 134 CTR 222 : (1996) 218 ITR 713

Hon'ble Judges : N.V. Balasubramanian, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

Thanikkachalam, J.—Pursuant to the directions dt. 20th April, 1982 of this Court in TC Nos. 370 and 371 of 1981, the Tribunal referred the following two questions for opinion of this Court under s. 256(2) of the IT Act, 1961 (hereinafter referred to as "the Act") :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the reassessment was invalid ?

2. Whether the Tribunal is justified in not proceeding to enter into the merits of the reassessment ?"

2. In the asst. yr. 1968-69, the original assessment was made on 29th February, 1972. Later on, the basis of the information available from the audit that excessive relief was granted to the assessee in respect of soda ash project, that the income under s. 41(1) was underassessed and that the disallowance under s. 40(c)(iii) was not correctly computed, the assessment was reopened under s. 147(b) of the Act. The ITO passed reassessment order on 30th March, 1974, adding the following :

Rs. (1) Disallowance in respect of soda ash project 1,45,948 (2) Further deemed income under s. 41(1) 16,99,967 (3) Further disallowance under s. 40(c)(iii)

34,185

3. On appeal, the AAC overruled the assessee's contention that the reassessment based upon audit report was invalid on the basis of the decision of the Supreme Court in the case of R.K. Malhotra, ITO, Group Circle II(1), Ahmedabad Vs. Kasturbhai Lalbhai (Huf), . The AAC deleted the addition of Rs. 1,45,948 for the reasons mentioned in paragraph 3 of his order. He also deleted the other addition of Rs. 16,99,967 for the reasons mentioned in paragraphs 7 to 12 of his order. As regards the disallowance of Rs. 34,185 under s. 40(c)(iii) of the Act, the AAC directed the ITO to rework the disallowance to be made on the lines suggested by him in paragraphs 16 to 18 of his order. Before the AAC, the ITO had requested for enhancement of the assessment for some more disallowance under s. 40(c)(iii) of the Act. The AAC went into that question and held that a sum of Rs. 1,42,659 has to be disallowed under s. 37(3) and it was not done in the original assessment. He also held that another sum of Rs. 9,423 also should be disallowed under s. 37(3). The AAC thus directed disallowance of Rs. 1,52,082 on the enhancement request made by the ITO.

4. On appeal before the Tribunal, the assessee challenged the legality of the reassessment and also questioned the enhancement of assessment made by the AAC at the request made by the ITO, whereas the Revenue contested the deletions and disallowances set aside by the AAC. The Tribunal, after hearing the parties, considering the Revenue audit note in the light of the decision of the Supreme Court in Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, , held that the information furnished by the internal audit party is leading to pointing out a question of law. Therefore, the Tribunal came to the conclusion that the reassessment under s. 147(b) of the Act is bad in law. Accordingly the reassessment made by the ITO under s. 147(b) of the Act was set aside and the original assessment order passed by the ITO was restored. In the result, the Tribunal did not deal with the appeals on merit.

5. Before us, learned Standing counsel for the Department submitted that a plain reading of the Revenue audit report would go to show that the audit party pointed out only the facts which were not considered by the ITO. There is no mention of any legal point, which was omitted to be considered by the ITO. According to the learned Standing Counsel, pointing out that the expenses involved in the new unit for production of soda ash and ammonium chloride would amount to primary expenses, not liable as deduction would not amount to pointing out any law. Therefore, according to learned Standing Counsel, reopening was done on the basis of the audit note relating to omission of facts done by the ITO.

6. We have heard learned Standing Counsel appearing for the Department and perused the records carefully. The Tribunal has extracted the opinion expressed by the Revenue audit report. The Revenue audit objection is common to the assessee as well as the other companies. The remarks made in the case of M/s Buckingham Carnatic Co. Ltd., Madras in respect of the assessment for 1968-69

and 1969-70 as under are made applicable to the assessee in the present case for the assessment year under consideration :

"M/s Buckingham and Carnatic Co. Ltd. Madras company/GT No. 11-B/68-69 & 69-70.

Total Income : Rs. 6,71,410 and loss Rs. 4,13,070 Date of assessment 21st January, 1972 and 31st January, 1972.

In computing the business income of the company for the asst. yr. 1968-69 and 69-70 the value of perquisites and amenities provided by the company to its directors/employees to the extent it exceeds one-fifth of their salary, has been disallowed and added to the income returned, as required under s. 40(a)(v) of the IT Act. It is seen from the statement prepared by the assessee and accepted by the ITO for this purpose that evaluating the perquisites/amenities by way of provision of accommodation, car servants, etc., the value as computed and adopted for the individual assessment of the respective directors/employees has been adopted. This is not in accordance with the provisions of s. 40(a)(v). What is to be reckoned for purposes of s. 40(a)(v) is the expenditure actually incurred by the employer in providing the perquisites/amenities and not their notional value adopted in the individual assessment of the directors/employers".

7. Another Revenue audit objection dt. 16th October, 1972 related to alleged underassessment of business income arising from grant of deduction for preliminary expenses not admissible is as under :

"M/s E. I. D. Parry Ltd., Madras company/G.I. No. 17-E/1968-69 and 1969-70 Total Income - 1,75,05,620 Date of assessment 29th February, 1972 and in computing its business income for the asst. yrs. 1968-69 & 1969-70, the company has claimed and has been allowed deduction for Rs. 1,45,948 and Rs. 45,802 respectively denoted as "soda ash project expenses". As the company's existing business does not include manufacture of soda ash, the "project expenses" mentioned above would be in the nature of preliminary expenses not admissible for deduction in computing the income of the company. The correctness of the deduction allowed for the two sums as above, requires to be examined. If the two assessments are revised to disallow the preliminary expenses there will be further tax due from the company to the extent of Rs. 1,05,450".

8. These are all Revenue audit notes, on the basis of which, the assessment was completed for the assessment years under consideration, under s. 147(b) of the Act. According to learned Standing Counsel for the Department, the above audit notes do not relate to any matter of law, but only relate to a matter of fact. The Revenue audit party has pointed out the various figures furnished by the assessee, which were omitted to be considered by the ITO. Therefore, according to learned Standing Counsel, the Revenue audit would not be governed by the latest ruling of the Supreme Court in the case of Indian & Eastern Newspaper Society vs. CIT (supra). However, the Tribunal pointed out that a plain reading of

the Revenue audit notes would go to show that the ITO was directed to assess the income returned by the assessee under various heads in accordance with the provisions of law mentioned in the report. Therefore, according to the Tribunal, the Revenue audit reports would definitely go to show that the audit party has pointed out the law to be applied by the ITO, while making reassessment.

9. We have also seen the Revenue audit reports. Even according to us, a plain reading of the above Revenue audit notes would go to show that directing ITO to assess the value of perquisites and amenities provided by the company to its directors/employees under s. 40(a) of the Act instead of under s. 40(a)(v) of the Act is definitely pointing out the law to the ITO to be followed in the reassessment proceedings. So also, while considering the soda ash project expenses, the audit party pointed out that the deduction allowed for Rs. 1,45,948 and Rs. 45,802 are in the nature of preliminary expenses and therefore according to the audit party, these expenses should not be allowed. According to the audit party, if all these disallowances are made, the extent of the tax payable by the assessee would get enhanced.

10. If the pointing out of the Revenue audit party is only with regard to omission of facts made by the assessee while making the original assessment, that would be permissible, as constituting information for reopening the assessment under s. 147(b) of the Act. If the Revenue Audit party points out the law and the legal position to be followed by the ITO in the reassessment proceedings, then that would not constitute information under s. 147(b) of the Act. The Supreme Court in the case of *Indian & Eastern Newspaper Society vs. CIT* (supra) has held as follows :

"The opinion of an internal audit party of the IT Department on a point of law cannot be regarded as "information" within the meaning of s. 147(b) of the IT Act, 1961 for the purpose of reopening an assessment. But although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communication of the law is carefully maintained, the confusion which often results in applying s. 147(b) may be avoided".

In view of the pronouncement of the decision in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, the decision in *R.K. Malhotra, ITO, Group Circle II(1), Ahmedabad Vs. Kasturbhai Lalbhai (Huf)*, would no longer be a good law. Thus, considering the facts arising in this case in the light of the decision of the Supreme Court cited supra, we hold that the Tribunal was correct in setting aside the reassessment made in pursuance of the audit note and restoring the original assessment made by the ITO. The Tribunal was also correct in not disposing of the appeal on merits.

11. In that view of the matter, we answer the questions referred to us in the affirmative and against the Department. No costs.