

(2015) 07 P&H CK 0228

In the Punjab And Haryana At Chandigarh

Case No : Income Tax Appeal Nos. 207, 208 and 227 of 2014

Commissioner of Income Tax

APPELLANT

Vs

ITW India Ltd.

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Income Tax Act, 1961 — Section 143, 143(1)(a), 143(3), 147, 148

Citation : (2015) 377 ITR 195

Hon'ble Judges : S.J. Vazifdar, A.C.J.; Gurmeet Singh Sandhawalia, J

Bench : Division Bench

Advocate : Tajender K. Joshi, for the Appellant; Rohit Jain, Advocates for the Respondent

Judgement

Gurmeet Singh Sandhawalia, J—The present judgment shall dispose of three appeals which are directed against the order dated April 5, 2013, passed by the Income-tax Appellate Tribunal pertaining to the assessment years 2002-03, 2003-04 and 2004-05. For decision of the appeals, the facts are being taken from Income-tax Appeal No. 208 of 2014 pertaining to the assessment year 2002-03. The Revenue has raised the following substantial questions of law for consideration of this court:

"(i) Whether Income-tax Appellate Tribunal was right in holding that reopening beyond four years from the assessment year was bad in law as the assessee has not failed to disclose truly and fully all material facts necessary for assessment, despite the fact that the treatment of service income for the purpose of calculation of deduction under section 80HHC was not discussed at any prior stage and the assessee had made no clear submission in this regard in earlier proceedings?

(ii) Whether the Income-tax Appellate Tribunal was right in holding that Explanation 1 to section 147 is not applicable to the facts of the present case, despite the fact that excessive deduction was given to the assessee under section 80HHC due to failure on its part to exclude service income from export

profits?

(iii) Whether the Income-tax Appellate Tribunal was right in ignoring the Supreme Court's decisions in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, AIR 1961 SC 372 : (1961) 41 ITR 191 : (1961) 2 SCR 241 , *Commissioner of Income Tax, Madras Vs. T.S.Pl.P. Chidambaram Chettiar (Dead) through Legal Representatives*, AIR 1971 SC 2074 : (1971) 80 ITR 467 : (1971) 1 SCC 417 : (1971) 3 SCR 428 , *Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay*, AIR 1986 SC 1857 : (1986) 58 CTR 9 : (1986) 159 ITR 624 : (1986) 1 JT 642 : (1986) 1 SCALE 555 : (1986) 1 SCC 279 Supp : (1986) SCC 279 Supp : (1986) 1 SCR 627 : (1986) 2 UJ 480

(iv) Whether the Income-tax Appellate Tribunal was right in ignoring the hon'ble Supreme Court's decision in the case of *Commissioner of Income Tax, Madras Vs. T.S.Pl.P. Chidambaram Chettiar (Dead) through Legal Representatives*, AIR 1971 SC 2074 : (1971) 80 ITR 467 : (1971) 1 SCC 417 : (1971) 3 SCR 428 that states "if some material for assessment is embedded in the evidence or submission which the Revenue could have uncovered but did not so, it is the duty of the assessee to bring it to the notice of the assessing authority. The assessee knows all material and relevant facts, the assessing authority might not. If there are primary facts from which reasonable belief could be formed that there was some non-disclosure or failure to disclose fully and truly all material facts, reopening is attracted"?

(v) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in ignoring the provisions of clause (c)(iii) of Explanation 2 to section 147 of the Income-tax Act?"

2. The undisputed facts are that the respondent-assessee-company had filed its return for the year in question on October 31, 2002, for returned income of Rs. 24,49,94,815 after taking benefit of deduction of Rs. 1,11,83,170 under section 80HHC of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). The said deductions pertaining to service income of Rs. 52,86,87,813 were claimed in the duly supported Form No. 10CCAC which was filed along with the return of income and the detailed working computation of deduction had been given along with the auditor's report. The claim of benefit was reduced to Rs. 1,02,01,403 after excluding the excise duty and the sales tax from the turnover and that point was within the knowledge of the Assessing Officer that the assessee had received the said service income and the claim of deduction was related to such service income and the income was then assessed at a sum of Rs. 24,86,85,407 on March 31, 2005.

3. Thereafter, the reassessment proceedings were initiated under section 148 of the Act by issuing notice dated March 27, 2006, and the income was reassessed at Rs. 25,30,84,690 on May 8, 2006. The said reassessment was concluded on a different issue and not in connection with section 80HHC. Thereafter, notice

under section 148 was issued on March 31, 2009, admittedly, after the expiry of four years from the end of the relevant assessment year on the ground that the deduction was not admissible on service income. The said notice was issued on the basis of the judgment of the hon"ble apex court rendered in Commissioner, Income Tax, Thiruvananthapuram Vs. K. Ravindranathan Nair, (2007) 213 CTR 227 : (2007) 295 ITR 228 : (2007) 12 JT 504 : (2007) 13 SCALE 134 : (2007) 11 SCR 1097 : (2007) AIRSCW 6390 : (2007) 6 Supreme 214 .

4. Resultantly, the reassessment order was passed by holding that the income derived by the assessee-company pertaining to service income on which the deduction had been claimed could not be allowed. The plea of the assessee that four years time had lapsed from the end of the relevant assessment year and there was no fault on its part to disclose fully and truly all material facts necessary for reassessment was answered against it in order dated November 30, 2009. Accordingly, the income was reassessed at Rs. 25,99,14,093. The assessee filed an appeal before the concerned Commissioner taking various pleas, which was accepted by holding that the reassessment proceedings initiated by way of issue of notice under section 148 of the Act on March 31, 2009, was not sustainable in law and the subsequent order passed under section 143(3) read with section 147 of the Act on November 30, 2009, was accordingly held to be bad. While recording the finding, it was held that the primary facts had been disclosed and the factum of service income was separately shown along with the return of income. The reasoning that the Assessing Officer had to go through the voluminous material was rejected since he had dealt with the said issue and reduced the admissible deductions. In the notice, it had been stated that the reassessment proceedings were initiated for the failure on the part of the assessee to disclose fully and truly all material facts in respect of the claim of deduction under section 80HHC. Accordingly, it was held that there was no information or any tangible material before the Assessing Officer to initiate the reassessment proceedings and it would amount to review of the original assessment based on change in the opinion on the appreciation of the facts, which was not permissible.

5. The matter was taken in appeal before the Tribunal by both the sides since the assessee was also aggrieved on the validity of the proceedings initiated under section 148 of the Act. The Tribunal dismissed the appeal filed by the Revenue by recording the finding that separate schedule had been appended with the profit and loss statement showing the service income separately and it had been duly certified by the auditor's certificate in the requisite form. The interest on excise duty and the sales tax has been reduced from the said claim and the deduction had been modified and, therefore, all the facts had been disclosed and there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. It was further held that the reopening was done in view of the judgment rendered in K. Ravindranathan Nair's case (supra). It was, accordingly, held that the assessee had done his duties and it was for the Assessing Officer to draw the correct inference from the primary facts and not

the responsibility of the assessee and there was no default on its part and the appeal filed by the Revenue was dismissed. The cross-appeal filed by the assessee, pertaining to the validity of the proceedings, was allowed by noticing that the reassessment proceedings were initiated under section 148 of the Act beyond the four years from the end of the relevant financial year and it was held invalid and unsustainable.

6. The issue of initiating proceedings under section 147 was considered by this court in *Duli Chand Singhania Vs. Assistant Commissioner of Income Tax*, (2004) 188 CTR 90 : (2004) 269 ITR 192, wherein, it was held that in the absence of valid assumption of jurisdiction under section 147, the notice after four years from the end of the assessment year in question could not be initiated in the absence of any allegation that there was failure on the part of the assessee to disclose fully and truly all material facts. In the absence of any such reasons, the assumption of jurisdiction under section 147 was not justified. The relevant portion of the reasoning given, reads as under (page 199):

"The entire thrust of the findings recorded by the Assessing Officer in his order dated March 13, 2003, is to justify his satisfaction about escapement of income. According to him, it was a clear case of escapement of income as defined in Explanation 2 to section 147 as the assessee had been allowed excessive relief under section 80-O of the Act. However, it is not necessary for us to go into the merits of this finding as the second requirement of the proviso has not been satisfied obviously. The reasons recorded by the Assessing Officer for initiation of proceedings under section 147 of the Act have already been reproduced above. A bare perusal of the same shows that the satisfaction recorded therein is merely about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Absence of this finding, which is a "sine qua non" for assuming jurisdiction under section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the Assessing Officer wholly without jurisdiction. As already observed, the learned counsel for the Revenue has conceded that neither in the reasons recorded nor in the order dated March 13, 2003, has the assessee been charged with failure to disclose, fully and truly all material facts necessary for his assessment."

7. The said view was followed in *Mahavir Spinning Mills Ltd. Vs. Commissioner of Income Tax and Another*, (2005) 193 CTR 90 : (2004) 270 ITR 290 and the objections raised by the Revenue that the writ was not maintainable against the notice was rejected. Relevant portion of the judgment reads as under (page 295):

"A bare perusal of the above shows that the entire thrust of the observations recorded by the Assessing Officer is to justify his satisfaction about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. As held in *Duli Chand*

Singhania's case, absence of this finding makes the action of the Assessing Officer wholly without jurisdiction. Since the illegality of notice under section 148 of the Act is apparent from the reasons recorded for initiation of proceedings under section 147 of the Act, it is a fit case for interference in the exercise of our writ jurisdiction. Sending the petitioner back to the Assessing Officer to raise these objections and requiring him to pass an order thereon would be prolonging the proceedings unnecessarily."

8. Similarly, in *Winsome Textiles Industries Ltd. Vs. Union of India (UOI) and Others*, (2005) 199 CTR 466 : (2005) 278 ITR 470 , it was held that once the assessment had been made under section 143(3), the genuineness of the claims made in the return had to be examined and the failure of the Assessing Officer to do so would not permit him to reopen the assessment which had already been completed and had become barred by limitation. Accordingly, the notices issued under section 148 were quashed. Relevant portion of the judgment reads as under (page 489):

"The limitation of four years provided in the proviso to section 147 has been made applicable only to cases where assessments have already been completed under sub-section (3) of section 143 or under section 147. There is a specific purpose behind it. Where the return is processed under section 143(1)(a), the Assessing Officer has no jurisdiction to examine the genuineness of the claims made in the return of income. He has only limited power of making adjustments on the basis of information available in the return. However, when an assessment is made under section 143(3) of the Act the Assessing Officer has very wide power to examine the genuineness of the claims made in the return and require the assessee to furnish whatever information the Assessing Officer deems necessary. In the present case, the assessment had been made under section 143(3) of the Act and if the Assessing Officer was of the view that he required profit and loss account and depreciation charts of the assessment years 1995-96 and 1996-97 for examining the correctness of the claim under section 80-IA of the Act, he could have required the assessee to produce the same. Failure of the Assessing Officer to do so, cannot be treated at par with the failure of the assessee to disclose fully and truly all material facts necessary for its assessment."

9. The Commissioner of Income-tax and the Appellate Tribunal have noticed the detailed facts and recorded the finding as noticed above that the reassessment was on the basis of the subsequent judgment of the hon"ble apex court. Thus, apparently on the change of the opinion and in view of the principles of law laid down by the hon"ble apex court in *Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited*, (2010) 228 CTR 488 : (2010) 320 ITR 561 : (2010) 1 JT 385 : (2010) 1 SCALE 484 : (2010) 2 SCC 723 : (2010) 1 SCR 768 : (2010) 187 TAXMAN 312 : (2010) 1 UJ 344 wherein it has been held that jurisdiction could not be conferred on the basis of mere change of opinion and it could not be a reason per se to reopen assessments which had been finalized and change of

opinion was not relevant ground for reason to believe for issuance of notice under section 147. The relevant observations read as under (page 564):

"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment but in section 147 of the Act, with effect from April 1, 1989, they are given a goby and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-April 1, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 : , dated October 31, 1989, which reads as follows (see [1990] 182 ITR (St.) 1, 29):

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression "reason to believe" in section 147.--A number of representations were received against the omission of the words "reason to believe" from section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression "has reason to believe" in place of the words "for reasons to be recorded by him in writing, is of the opinion". Other provisions of the new section 147, however, remain the

same."

5. For the aforestated reasons, we see no merit in these civil appeals filed by the Department, (hence, dismissed with no order as to costs."

10. The reason for reopening, thus, being merely a change of opinion on account of the subsequent judgment of the hon"ble apex court would not give the Assessing Officer the jurisdiction to reopen as he would, thus, be reviewing his earlier decision which has been held not to be permissible. Similarly, in the absence of allegations that the assessee failed to disclose fully and truly all material facts, the assumption of jurisdiction was not justified. Resultantly, in view of the above discussion, the questions of law framed are answered against the Revenue by holding that the Income-tax Officer had applied his mind earlier on the said issue and there was no non-disclosure of the facts by the assessee. Resultantly, the present appeals are dismissed.