
(2011) 08 MP CK 0017

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 5900 and 5901 of 2011

Dewas Soya Ltd.

APPELLANT

Vs

Additional Commissioner of Income Tax, Range-1

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Income Tax Act, 1961 — Section 139, 142, 143, 143(2), 143(3)

Citation : (2012) 349 ITR 676 : (2012) 205 TAXMAN 117

Hon'ble Judges : Shantanu Kemkar, J; Satish Chandra Sharma, J

Bench : Division Bench

Advocate : P.M. Choudhary, for the Appellant;

Judgement

Satish Chandra Sharma, J.—Regard being had to the similar controversy involved in these two cases, they were heard analogously together with the consent of the learned counsel for the petitioner, a common order is being passed in the matter. Facts of writ petition No. 5900/2011 are narrated as under:- Present writ petition has been filed challenging the legality and validity of notice dated 04-01-2011 issued u/s 148 of the Income Tax Act, 1961, for the Assessment Year 2006-2007 for initiating reassessment u/s 147 of the Income Tax Act, 1961.

2. Petitioner Company is also aggrieved by order dated 09-05-2011 passed by the Additional Commissioner of Income Tax, Range-1, Ujjain, by which the objections raised by the petitioner Company have been rejected.

3. Petitioner Company before this court is a Company incorporated and registered under the provisions of Companies Act, 1956 and Income Tax Return for the assessment year 2006-2007 was submitted on 13-11-2006 declaring a total loss of Rs. 1,56,51,326/-. It has been further stated that the petitioner Company's case was selected for scrutiny by the then Assessing Officer and a notice was issued u/s 143(2) of the Income Tax Act on 13-11-2007. The petitioner further stated that the Assessing Officer raised, various queries for making inquiries on various issues and a specific query was made i.e., query No.

12 by the Assessing Officer requiring the petitioner to supply information regarding names and address of the parties to whom sales exceeding Rs. 5 lacs were made during the financial Year 2005-2006. The petitioner further stated that he has furnished the details of the parties to whom sales exceeding Rs. 5 lacs were made, which included M/s Pravin Trading Company, M/s Mohan Traders and M/s Maa Bhagvati Traders. The petitioner further stated that in respect of the assessment for the assessment year 2006-2007, proceedings were completed vide order dated 22-12-1998 by passing a reasoned order. Petitioner further stated that in respect of petitioner's assessment for the subsequent years i.e., assessment year 2008-2009, proceedings were completed on 31-12-2010 and certain additions u/s 68 of Income Tax Act in respect of the sales effected to three parties i.e., M/s Pravin Trading Company, M/s Mohan Traders and M/s Maa Bhagvati Traders were made on the ground that the parties were not traceable on their address and notices sent to them were returned as unserved. Petitioner Company further stated that inquiries by the department were conducted between September, 2010 to December, 2010 i.e. almost after three years, after the completion of the assessment year 2006-2007. Petitioner further stated that First appeal has been preferred against the order of assessment of the assessment year 2008-2009 and the same is pending. Petitioner's grievance is that after completion of assessment u/s 143(3) for the assessment year 2008-2009, vide order dated 31-12-2010, the respondent Assessing authority has issued a notice u/s 148 of the Income Tax Act, 1961 on 04-01-2011 on the ground that he has reason to believe the petitioner's income chargeable to tax has escaped assessment within the meaning of Section 147 of Income Tax Act. Petitioner further stated that a reply was filed to the aforesaid show-cause notice and Assistant Commissioner of Income Tax has turned down his objection, vide order dated 09-05-2011. Petitioner has raised various grounds before this court and his contention is that the Assessing Authority must have reason to believe that any income chargeable to tax has escaped assessment and a mere difference of opinion will not result into reason to believe and the assessment cannot be reopened provided there is a tangible material to come to the conclusion that there was escapement of income from assessment.

4. Learned counsel for the petitioner has placed reliance upon the judgment delivered by the Apex Court in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, . He has brought to the notice of this court towards the judgment delivered by the Full Bench of the Delhi High Court in the same case reported in Commissioner of Income Tax Vs. Kalvinator of India Ltd.,

5. Heard learned counsel for the petitioner at length, perused the records and the judgments relied upon by the learned counsel for the petitioner.

6. In the present case it is an admitted fact that the assessment order was passed in respect of the assessment year 2006-2007 on 22-12-2008. It is also an admitted fact that in respect of the subsequent assessment year 2008-2009, an assessment order has been passed u/s 143(3) of the Income Tax Act on

31-12-2012.

7. A show-cause notice was issued by the department on 04-01-2011 u/s 148 of the Income Tax Act, 1961. Section 147 and 148 of the Income Tax Act reads as under:-

Section 147 and 148

"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 provision 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 proceeding 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 (hereinafter 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 re-computation 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 subsection by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or re-computation 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 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 re-computation 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.

8. Petitioner Company did submit a detailed and exhaustive reply to the show cause notice and the objections raised by the petitioner Company have been turned down. The Additional Commissioner of Income Tax, Ujjain has passed a detailed and exhaustive order, which reads as under:-

The argument that the provisions of section 68 are not applicable to the trading transactions is not sustainable in law. There is no bar in section 68 to applicability of amounts received in respect of the so-called trading transactions. In this context, it is relevant to reproduce observations of the Full Bench of Delhi High Court in the case of Commissioner of Income Tax Vs. Sophia Finance Ltd.,). Although, in the case before the Delhi High Court the issue involved was regarding share application money but the Hon"ble Full Bench of Delhi High Court has while passing the verdict mentioned that "it is immaterial as to whether the amount credit is given the colour of a loan or a sum representing sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in section 68 indicates that the section is very widely worded and the AO is not precluded from making an enquiry as to the true nature and source of a sum credited in the account books.

The Hon"ble Supreme Court has held in the case of A. Govindarajulu Mudaliar Vs. Commissioner of Income Tax, Hyderabad, that it is well-established that the onus of proving the source of sum of money found to have been received by the assessee is on him. If he disputes liability of tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the income tax Act. In the absence of such proof, the income tax Officer is entitled to treat it as taxable income.

Since identity of the three parties from whom assessee has shown credits is not proved, therefore section 68 is clearly applicable in respect of credits appearing in the said accounts. Therefore, income chargeable to tax has escaped assessment.

2. Further, the assessee has contended that the expression "reason to believe" has been subject matter of judicial interpretation in various courts and the

phrase "reason to believe" is much stronger than the phrase "is satisfied". The belief entertained by the AO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material and must have a bearing on the matters in regard to which the AO is required to entertain the belief before he can issue notice u/s 148."

Comments:

As narrated in the foregoing, income has escaped assessment and reasons of escapement have been mentioned in the aforesaid. It is quite clear that the belief has been formed on the basis of relevant material and is not irrational as sought to be contended by the assessee.

3. The assessee has contended that a change of opinion on the basis of material which was already available at the time of assessment, cannot constitute a reason for formation of belief and proceedings initiated on the basis of mere change of opinion on the basis of material which was already available at the time of original assessment or without jurisdiction.

3.1 Assessee has stated that proceedings have been initiated on the basis of mere change of opinion on the basis of reappraisal of material which was already before the AO at the time of original assessment.

Comments:

Proviso to Section 147 stated that if an assessment has been framed u/s 143(3), then no action shall be taken u/s 148 after expiry of four years from the end of the assessment year unless income chargeable to tax has escaped assessment due to failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Expl. 1 to Section 147 clarifies that production before the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure within the meaning of the foregoing proviso.

In the present case although the original assessment has been framed u/s 143(3) but notice u/s 148 has been issued before the expiry of four years from the end of the assessment year. Therefore proviso to section 147 does not come to rescue of the assessee.

Expl. 2 to Section 147 states that where an assessment has been made but income chargeable to tax has been under assessed shall also be deemed to be a case where income chargeable to tax has escaped assessment.

4. Assessee has further contended that credits which are sought to have been treated as unexplained cash credits are in nature of payments received in cash against sales affected which have already been included in the trading and P&L A/c. On the basis of which income has been derived and that since the income in respect of the said credits has been already offered for taxation. Therefore no

further income is left to be taxed.

Comments:

The assessee has on the basis of Mercantile System of Accounting adopted by him offered the sales in the P&L A/c. Section 68 is a special provision of the Act which empowers the AO to tax any cash credit found in the books of assessee if nature and source thereof are not established by the assessee. In the present case the identity of the three parties from whom the assessee has received case is doubtful since they do not exist at the address given and TIN number mentioned in respect of them are fictitious as per information received from the State Government. Therefore, provisions of section 68 can be applied in respect of the credits appearing in their accounts in the books of the assessee. The Hon"ble Delhi High Court has held in CIT v. Sophia Finance Ltd. [(205 ITR 90 (Delhi))] that "it is immaterial as to whether the amount so credited is given the colour of a loan or a sum representing sale proceeds or even receipt of share application money". This judgment has been delivered by Full Bench, of Delhi High Court.

Section 68 is a specialized provision and a deeming fiction enacted by the legislature. The assessee has not been able to prove or establish the identity of the said parties though it was given sufficient opportunity to do so vide various show-cause notices which were issued during the course of assessment proceeding for A.Y. 2008-2009. The assessee could not establish the nature and source of the credits appearing in account of the said parties. Therefore, they are required to be taxed as unexplained cash credits u/s 68 even if debits appearing in these accounts have been offered as sales by the assessee.

The objection filed by the assessee are accordingly disposed off vide this order.

9. The aforesaid order clearly reveals that the Petitioner Company has furnished information in respect of three parties from whom the Assessee has received cash and the identity of the three parties from whom" cash has been received is doubtful as they do not exist at the address given by the assessee and the TIN numbers mentioned in respect of the parties are fictitious as informed by the State Government. The aforesaid fact came to the notice to the Assessing Authority while conducting assessment proceedings for the assessment year 2008-2009 and therefore there was a reason to believe in the matter that the income chargeable to tax has escaped assessment in the peculiar facts and circumstances of the case. This court has also carefully gone through the judgment delivered by the Division Bench in the case of Kelvinator of India Ltd. (supra) and the judgment delivered by the Full Bench of the Delhi High Court in the same case reported in Kelvinator of India Ltd. case (supra), wherein it has been held, that reassessment proceeding cannot be initiated only upon the mere change of opinion. The aforesaid judgment delivered by the Delhi High Court has been affirmed by the Hon"ble Apex Court. However, the facts remains that in the present case reassessment has not been done only upon the mere change of

opinion and therefore the judgments relied upon the learned counsel are of no help to the petitioner. Not only this, the petitioner Company is having an alternate remedy in the matter as per the provisions of Income Tax Act, 1961 and therefore this court does not find any reason to interfere with the order passed by the Assessing Officer.

Resultantly, no case for interference is made out in the matter. Admission is declined.