(2011) 08 MP CK 0143

In the Madhya Pradesh High Court

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

Dewas Soya Ltd. APPELLANT

Vs

Additional Commissioner of Income Tax 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(1)

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. The facts of Writ Petition No. 5900 of 2011 are narrated as under: The present writ petition has been filed challenging the legality and validity of the notice dated January 4, 2011, issued u/s 148 of the income tax Act, 1961, for the assessment year 2006-07 for initiating reassessment u/s 147 of the income tax Act, 1961.

2. The petitioner-company is also aggrieved by the order dated May 9, 2011, passed by the Additional Commissioner of income tax, Range-I, Ujjain, by which the objections raised by the petitioner-company have been rejected.

3. The petitioner-company before this court is a company incorporated and registered under the provisions of the Companies Act, 1956, and the income tax return for the assessment year 2006-07 was submitted on November 13, 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 November 13, 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 name''s and addresses of the parties to whom sales exceeding Rs. 5 lakhs were made during the financial year 2005-06. The petitioner further stated that it has furnished the details of the parties to whom the sales exceeding Rs. 5 lakhs were made, which included M/s. Pravin Trading Co., M/s. Mohan Traders and M/s. Maa Bhagvati Traders. The petitioner further stated that in respect of the assessment for the assessment year 2006-07, proceedings were completed, vide order dated December 22, 1998, by passing a reasoned order. The petitioner further stated that in respect of the petitioner''s assessment for the subsequent year, i.e., the assessment year 2008-09, proceedings were completed on December 31, 2010, and certain additions u/s 68 of the income tax Act in respect of the sales effected to the three parties, i.e., M/s. Pravin Trading Co., M/s. Mohan Traders and M/s. Maa Bhagvati Traders were made on the ground that the parties were not traceable on their addresses and notices sent to them were returned as unserved. The 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 2006-07. The petitioner further stated that first appeal has been preferred against the order of assessment of the assessment year 2008-09 and the same is pending. The petitioner''s grievance is that after completion of the assessment u/s 143(3) for the assessment year 2008-09, vide order dated December 31, 2010, the respondent-assessing authority has issued a notice u/s 148 of the income tax Act, 1961, on January 4, 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 the income tax Act. The petitioner further stated that a reply was filed to the aforesaid show-cause notice and the Assistant Commissioner of income tax has turned down his objection, vide order dated May 9, 2011. The 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 2006-07 on. December 22, 2008. It is

also an admitted fact that in respect of the subsequent assessment year 2008-09, an assessment order has been passed u/s 143(3) of the income tax Act on December 31, 2012.

7. A show-cause notice was issued by the Department on January 4, 2011, u/s 148 of the income tax Act, 1961. Sections 147 and 148 of the income tax Act read, as under:

Sections 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 proceedings under this section, or recompute the loss or the depredation 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 deprecation 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 the 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.

8. The 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.

9. 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 the applicability of amounts received in respect of the so called trading transactions. In this context, it is relevant to reproduce the observations of the Full Bench of the 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 the 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 Assessing Officer 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 the 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 the 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 Assessing Officer 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 Assessing Officer is required to entertain the belief before, he can issue notice under section. 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 assess ment, 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 The 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 Assessing Officer at the time of original assessment.

Comments:

The proviso to section 147 stated that if an assessment has been framed u/s 143(3), then ho 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 the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Explanation 1 to section 147 clarifies that 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.

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, the proviso to section 147 does not come to rescue of the assessee.

Explanation 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. The assessee has further contended that credits which are sought to have been treated as unexplained cash credits are in the nature of payments received in cash against sales effected which have already been included in the trading and profit and loss account, 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 the mercantile system of accounting adopted by him offered the sales in the profit and loss account. Section 68 is a special provision of the Act which empowers the Assessing Officer to tax any cash credit found in the books of the assessee if the 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 cash is doubtful since they do not exist at the addresses given and the TIN numbers mentioned in respect of them are fictitious as per the information received from the State Government. Therefore, the 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 Commissioner of Income Tax Vs. Sophia Finance Ltd., (Delhi) [FB] 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 a Full Bench of the 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 the assessment proceeding for the assessment year 2008-09. 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 of vide this order.

10. The aforesaid order clearly reveals that the petitioner-company has furnished information in respect of the 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 addresses 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 2008-09 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.

11. This court has also carefully gone through the judgment delivered by the Division Bench in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator

of India Limited, and 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., 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 fact 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 arte 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 the income tax Act, 1961, and, therefore, this court does not find any reason to interfere with the order passed by the Assessing Officer.

12. Resultantly, no case for interference is made out in the matter. Admission is declined. C.C. as per rules.

