

(2003) 12 P&H CK 0034
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 4516 of 2003

Duli Chand Singhania

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-12-2003

Acts Referred:

Income Tax Act, 1961 — Section 80

Citation : (2004) 188 CTR 90 : (2004) 269 ITR 192

Hon'ble Judges : N.K. Sud, J;J.S. Narang, J

Bench : Division Bench

Advocate : A.K. Mittal, for the Appellant; N.L. Sharda, for the Respondent

Final Decision : Allowed

Judgement

N.K. Sud, J.—Challenge in this writ petition is to the validity of notice u/s 148 of the IT Act, 1961 b3 (for short "the Act"), by which proceedings u/s 147 of the Act have been initiated to reassess the income which is alleged to have escaped assessment.

2. Before advertng to the dispute, the relevant facts may first be noticed.

Petitioner is an advocate and is practising as a legal advisor to various multinational corporations, assisting his clients on negotiations with regard to joint ventures, technology transfer agreements and other related legal/technical matters. His main source of income, therefore, is legal/professional fees received from his foreign clients. He filed his return of income for the asst. yr. 1995-96 on 16th Oct., 1995 declaring an income of Rs. 10,36,147. The return was accompanied by the statutory audit report and the audited statements of account. In the P&L a/c statement, professional income had been declared at Rs. 3,53,08,960. While computing the taxable income, deduction u/s 80-O of the Act was claimed at Rs. 1,76,54,480 i.e., at the rate of 50 per cent of the total professional income of Rs. 3,53,08,960. The return was processed u/s 143(1)(a) of the Act and the necessary intimation dt. 18th July, 1996 issued to the

assessee. Thereafter, the case was selected for scrutiny and requisite notices under Sections 143(2) and 142(1) of the Act, dt. 2nd Aug., 1996, were issued. A questionnaire dt. 2nd Aug., 1996 was also issued requiring the assessee to furnish various details. The assessment was ultimately completed u/s 143(3) of the Act vide order dt. 30th March, 1997 at a total income of Rs: 16,12,230. The difference in the returned income and the assessed income represented various disallowances made by the AO. However, deduction u/s 800 of the Act was allowed as claimed at Rs. 1,76,54,480.

On 22nd March, 2002, the AO issued the impugned notice u/s 148 of the Act observing that income chargeable to tax for the asst. yr. 1995-96 had escaped assessment within the meaning of Section 147 of the Act. The assessee was, therefore, required to furnish a return of income within 30 days from the service of that notice.

The assessee claims that this notice was never served on him. However, he became aware of the initiation of the proceedings u/s 147 of the Act when notice u/s 142 of the Act, dt. 7th Jan., 2003 was affixed at the business premises of M/s Singhania Trading Company. The assessee vide his letter dt. 16th Jan., 2003 denied the receipt of any notice u/s 148 of the Act. However, without prejudice to this objection, he submitted that the Return already filed by him u/s 139(1) of the Act be treated to have been filed in pursuant to the said notice. He also prayed that he may be supplied with a copy of the reasons recorded for initiation of the proceedings u/s 147 of the Act so that he may file his objections against the same.

On receipt of a copy of the reasons recorded, the assessee filed his objections vide letter dt. 24th Jan., 2003. It was contended that in the absence of any allegation of failure on his part to disclose fully and truly all material facts necessary for the assessment, no action u/s 147 of the Act could be taken after the expiry of four years from the end of the assessment year in view of the proviso to Section 147 of the Act. It was also contended that the only ground on which the proceedings u/s 147 of the Act had been initiated was that deduction u/s 800 of the Act was admissible at the rate of 50 per cent of the net receipts and not the gross receipts, as claimed by the assessee. The case of the assessee was that the claim for deduction had duly been examined while making the assessment u/s 143(3) of the Act. Thus, the reassessment proceedings were being initiated merely on a change of opinion on the same facts, which is not permissible under the Act after the expiry of four years from the end of the relevant assessment year. For this purpose, reliance was placed upon the judgment of the Calcutta High Court rendered in Mercury Travels Ltd. Vs. Deputy Commissioner of Income Tax and Another, and of Delhi High Court rendered in Jindal Photo Films Ltd. Vs. The Deputy Commissioner of Income Tax, . Reliance was also placed on various other judicial pronouncements. A copy of the news item published in the Economic Times, New Delhi, dt. 26th Dec., 2002 was also enclosed with this letter, wherein it has been reported that the Bombay High

Court in the case of Asian Cable Corporation [However, this decision stands modified vide subsequent decision in CTT v. Asian Cable Coprn. Ltd., holding that deduction u/s 80O is allowable with reference to net receipts only--Ed.) had held that the deduction u/s 80O of the Act was allowable on the gross income and not on the net income. Assessee addressed a further letter to the AO, dt. 6th March, 2003, requesting him to first dispose of his objections raised against the initiation of proceedings u/s 147 of the Act, in view of the law laid down by the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO and Ors. (2003) 259 ITR 19. He also brought to his notice the judgment of the Delhi High Court rendered in CTT v. Kelvinatoi of India Ltd. (2002) 256 ITR 1 wherein it has been held that the allegation about escapement of income based on a mere change of opinion is outside the scope of Section 148 of the Act.

The AO, vide order dt. 13th March, 2003, overruled the objections of the assessee. He observed that in view of the Circular No. F. 2797156/99-ITJ, dt. 7th Sept., 1999, the C.BDT had circulated the decision of the Mumbai Bench of the Tribunal in ITA No. 9982/Bom/1995, dt. 25th June, 1999 wherein it has been held that the deduction u/s 80O of the Act is not admissible on gross foreign exchange receipt but on income computed after deducting the expenses incurred abroad as well as in India out of foreign exchange receipts from specified sources. The AO also referred to a decision of the Full Bench of the Delhi High Court rendered in Commissioner of Income Tax Vs. Chemical and Metallurgical Design Co. Ltd., wherein a similar view has been expressed, The AO, therefore, held that since the circular of the Board was binding on him, it is clear that excessive deduction u/s 80O had been allowed to the assessee, resulting in escapement of income and, therefore, proceedings u/s 147 of the Act had been rightly initiated. He brushed aside the various citations cited by the assessee by making an observation that the same are "quite distinguishable on the facts of your case" and justified the initiation of proceedings u/s 147 of the Act by placing reliance upon the following citations:

- (i) Ess Ess Kay Engineering Co. P. Ltd. Vs. Commissioner of Income Tax,
- (ii) HIRA LAL SUTWALA Vs. COMMISSIONER OF Income Tax, U.P. and V.P.,
- (iii) IPCA Laboratories Ltd. v. Gajanand Meena, Dy. CTT and Ors. (2001) 251 WR 420
- (iv) Sundaram and Company (P.) Ltd., Madurai Vs. Commissioner of Income Tax, Madras, and
- (v) Punjab Tractors Ltd. Vs. Joint Commissioner of Income Tax, .

The AO also referred to Expln. 2 to Section 147 of the Act to support his conclusion that income has escaped assessment. According to him, the assessee's case was covered under Sub-clause (i) and (iii) of Clause (c) of the aforesaid Explanation, which provides that cases where income chargeable to tax has been underassessed or where such assessed income has been made subject

to excessive relief under this Act, are also deemed to be cases where income chargeable to tax has escaped assessment for the purpose of Section 147 of the Act.

3. Mr. A.K. Mittal, learned counsel for the petitioner, contended that a perusal of the reasons recorded as also the order passed by the AO dt. 13th March, 2003, clearly shows that there is no allegation against the assessee that he had failed to disclose fully and truly all material facts necessary for his assessment. Thus, according to him, in the absence of such a finding, the proceedings u/s 147 of the Act could not be initiated after the expiry of four years from the end of the asst. yr. 1995-96,

4. Dr. N.L. Sharda, learned counsel for the Revenue, supported the order of the AO. He, however, on a pointed query from the Bench fairly conceded that in the reasons recorded by the AO, there was no allegation about failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment nor was such a finding available in the order passed by him on 13th March, 2003.

5. We have heard learned counsel for the parties and have also perused the relevant material. Before issuing the impugned notice u/s 148 of the Act, the AO had recorded the following reasons as required under Sub-section (2) of Section 148 of the Act:

"The examination of assessment records reveal that the assessee has claimed deduction u/s 800 on the gross foreign receipts whereas it is available on the net foreign receipts. Thus the assessee has claimed excess deduction under this section of Rs. 83,61,604. I have therefore reasons to believe that income to the tune of Rs. 83,61,604 has escaped assessment for the asst. yr. 1995-96."

6. In order to appreciate the contentions raised on behalf of the petitioner, it is necessary to refer to the provisions contained in Section 147 of the Act. For the sake of convenience, the same are extracted below:

"147. If the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions 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 depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter 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.

Explanation 1: 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.

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 AO 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 underassessed; 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."

A bare perusal of the above provision shows that the power to assess or reassess the escaped income for any assessment year has been conferred upon the AO subject to the provisions of Sections 148 to 153 of the Act, only, if he has reason(s) to believe that the income chargeable to tax has escaped assessment. However, the proviso places a further restriction on this power in cases where assessments under Sub-section (3) of Section 143 or Section 147 of the Act have been made for the relevant assessment years. It provides that in such cases no action shall be taken u/s 147 after the expiry of four years from the end of the relevant assessment year unless the escapement of income is on account of failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. In other words, in order to assume jurisdiction u/s 147, in a case where assessment has been made under Sub-section (3) of Section 143 of the Act, two conditions are required to be satisfied, viz.:

(i) The AO must have reason to believe that income chargeable to tax has

escaped assessment; and

(ii) He must also have a reason to believe that such escapement occurred by reason of failure on the part of the assessee either:

(a) to make a return of income u/s 139 or in response to notice issued under Sub-section (1) of Section 142 or Section 148; or

(b) to disclose fully and truly all material facts necessary for his assessment for that purpose.

The aforementioned requirements of law must be held to be conditions precedent for invoking the jurisdiction of the AO to reopen the assessment u/s 147 of the Act in cases which are covered by the proviso. Both the conditions are cumulative and must co-exist. Thus, in cases where assessment has been made u/s 143(3) of the Act and action u/s 147 is sought to be taken after the expiry of four years from the end of the relevant assessment year, it is necessary that conditions No. (i) and either of conditions No. (ii)(a) or (ii)(b) must co-exist. In case, any of the said two conditions is not satisfied, the very initiation of proceedings u/s 147 of the act shall be wholly without jurisdiction. This position is also evident from the Departmental Circular No. 549, dt. 31st Oct., 1989 [see G. Padmanabha Chettiar and Sons Vs. Commissioner of Income Tax,], wherein the Board itself has explained the scope of the proviso in para 7.1, which reads as under:

"(iv) A proviso to the new section provides that an assessment, which has been completed u/s 143(3) or 147, i.e., a scrutiny assessment, can be reopened after the expiry of four years from the end of the relevant assessment year only if income has escaped assessment due to the failure on the part of the assessee to file a return of income or to disclose fully and truly all material facts necessary for his assessment."

7. Sec. 148 deals with the requirement of issue of notice: Sees. 149 and 150 deal with the time within which a notice u/s 148 can be issued: Sec. 151 deals with the requirements of sanction of a statutory authority before issue of notice: Sec. 152 provides for rates applicable for levy of tax and Section 153 prescribes the time-limit for completion of assessment and reassessment u/s 147 of the Act. Thus, Sections 148 to 153 come into play only after the AO assumes valid jurisdiction u/s 147 of the Act.

8. The basic question for determination in the present case, therefore, is as to whether the AO had validly assumed jurisdiction u/s 147 of the Act. It is not in dispute that the assessee had duly filed his return of income u/s 139 of the Act on 16th Oct., 1995. It is also not in dispute that the assessment u/s 143(3) of the Act had been completed on 30th March, 1997. It is also clear that the jurisdiction u/s 147 of the Act was invoked by recording reasons and issuing notice u/s 148 of the Act on 22nd March, 2002, i.e., after expiry of four years from the end of the asst. yr. 1995-96. Thus, the validity of proceedings u/s 147

of the Act has to be examined in the light of the proviso to Section 147.

9. The entire thrust of the findings recorded by the AO in his order dt. 13th March, 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 Explan. 2 to Section 147 as the assessee had been allowed excessive relief u/s 800 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 AO for initiation of proceedings u/s 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 quo non" for assuming jurisdiction u/s 147 of the Act in a case falling under the proviso thereto, makes the action taken by the AO wholly without jurisdiction. As already observed, the learned counsel for the Revenue has conceded that neither in the reasons recorded nor in the order dt. 13th March, 2003, has the assessee been charged with failure to disclose, fully and truly all material facts necessary for his assessment. In *Fenner (India) Ltd. Vs. Deputy Commissioner of Income Tax*, similar matter had come up for consideration before the Madras High Court and it has been held as under:

"The precondition for the exercise of the power u/s 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably "entertained by the AO that any income chargeable to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further precondition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return u/s 139 or in response to a notice issued u/s 142 or Section 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the AO does not acquire jurisdiction to initiate any proceeding u/s 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the AO must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. The relevant words in the proviso are,

".....unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee....."

Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must

be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment.

Whenever a notice is issued by the AO beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons referred to in the main paragraph of Section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the AO to record that anyone or all the circumstances referred to in the proviso existed before the issue of notice u/s 147."

Similarly, in *Aivind Mills Ltd. v. Dy. CTT* (2000) 242 ITR 173 it was held as under:

"It is a clear case where the AO has no reason to link escapement of income from assessment with non-disclosure of any material fact necessary for his assessment at the time of original assessment but is due to an erroneous decision on the question of law by the AO. Thus, the case is squarely covered by the proviso to Section 147 and not Section 149. Initiation of proceedings under the proviso being clearly barred by time, the AO could not have assumed jurisdiction by issuing notice u/s 148 in respect of the asst. yr. 1982-83."

In the case of *Mercury Travels Ltd.* (supra), the proceedings u/s 147 were initiated for asst. yrs. 1989-90, 1990-91 and 1991-92 vide issue of notices u/s 148 in September, 1996, which was after the expiry of four years. The reassessment proceedings had been initiated almost on identical grounds as in the present case. In the reasons recorded, it was mentioned that the deduction u/s 80HHD was allowable on total profit of the business by multiplying by ratio of total receipt of convertible foreign exchange to total receipt of whole business carried on by the assessee. However, to calculate total receipt of the business, the assessee had taken gross receipt of foreign exchange plus net receipt of domestic business in respect of commission/service charges. Thus, it was claimed that the assessee had claimed excess deduction u/s 80HHD. The High Court observed that where expressly deduction u/s 80HHD was claimed and it was examined and granted by the assessing authority, there could be no omission or failure on the part of the assessee to disclose any material fact necessary for the assessment. It has been further observed that in the reasons for reopening the assessment, it had not been alleged that there had been any omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment for those assessment years. It has been further observed that it was not even noted in the recorded reasons as to what other primary facts were required to be disclosed by the assessee. The notice u/s 148 and the proceedings relating thereto were, accordingly, quashed.

10. In view of the above, we are of the considered view that the notice u/s 148, dt. 22nd March, 2002 (Annex. P-2) cannot be sustained.

11. We may also briefly refer to the authorities cited by the Revenue. The judgment of the Supreme Court in the case of Ess Ess Kay Engineering Co. (P) Ltd. (supra) is clearly distinguishable. In this case, the Supreme Court had dismissed the appeal by a short order against the decision of this Court in Commissioner of Income Tax Vs. Ess Ess Kay Engineering Co. Pvt. Ltd., . The proceedings in this case had been initiated on the ground that the AO, on the basis of subsequent information, had found that the facts disclosed at the time of original assessment were false. Thus, it had been clearly found that the assessee had failed to disclose truly all facts for its assessment. There is no allegation in the present case that the facts disclosed by the assessee have been found to be false at any later stage.

12. In Hira Lal Sutwala's case (supra), the Allahabad High Court was dealing with the question whether rectification of a mistake can be resorted to u/s 35 of the IT Act, 1922, even if some income had escaped assessment and the AO could accomplish his object by proceeding u/s 34(1) of said Act instead. This authority is clearly not applicable to the facts of this case.

13. In the case of IPCA Laboratories Ltd. (supra), the Bombay High Court was dealing with a case where notice had been issued within four years of the end of the assessment year. Thus, it had no occasion to consider the import of the proviso to Section 147 of the Act.

14. In the case of Sundaram & Co. (P) Ltd. (supra), the Supreme Court was dealing with a case where proceedings u/s 34(1)(b) of the IT Act, 1922, had been initiated. In the aforesaid provision also, action could be taken within four years from the end of the concerned assessment year and unlike the proviso to Section 147 of the Act, there was no stipulation that the escapement of income had to be attributed to the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

15. In the case of Punjab Tractors Ltd. (supra), this Court was dealing with a case where notice u/s 148 had been issued within four years from the end of the assessment year and, thus, the scope of the proviso to Section 147 of the Act did not come up for consideration.

16. Thus, none of the authorities cited by the Revenue is applicable to the facts of the present case.

17. In view of the above, we are of the considered view that the impugned notice dt. 22nd March, 2002 (Annex. P-2) cannot be sustained and is, accordingly, quashed. The writ petition is allowed accordingly. However, in the circumstances of the case, there shall be no order as to costs.