

(2000) 08 AHC CK 0105

In the Allahabad High Court

Case No : Civil Misc. Writ Petitions No's. 181 to 183 of 1999

Foramer

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 17-08-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 139, 142, 142(1), 143(3), 147

Citation : (2001) 166 CTR 129 : (2001) 247 ITR 436

Hon'ble Judges : Onkareshwar Bhatt, J;M. Katju, J

Bench : Division Bench

Advocate : Yashwant Varma and V.B. Upadhyay, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

M. Katju, J.—This writ petition has been filed for a writ of certiorari for quashing the impugned notice dated November 20, 1998 (annexure 4 to the writ petition), issued u/s 148 of the Income Tax Act, 1961. Counter and rejoinder affidavits have been exchanged. We have heard Sri V. B. Upadh-yay, learned senior advocate, and Sri Yashwant Verma, learned counsel, for the petitioner, as well as learned departmental counsel for the respondents.

2. This writ petition being Writ Petition No. 181 of 1999, relates to the assessment year 1988-89, whereas connected Writ Petition No. 182 of 1999, relates to the assessment year 1989-90 and Writ Petition No. 183 of 1999, relates to the assessment year 1990-91. Since the petitions are similar in nature they are being disposed of by a common judgment.

3. The petitioner is a foreign company incorporated in France. It is engaged in the business of oil exploration and providing expertise and assistance in the said field throughout the world.

4. During the relevant assessment year, the petitioner-company was operating

under three contracts with the Oil and Natural Gas Commission. These contracts were for drilling operation by employing its own "IDA" rig and also for manning and management services for supervision of drilling activities carried on by the ONGC on its rigs, Sagar Vijay and Sagar Bhu- shan. The petitioner-company supplied its own technical personnel and expertise in manning such contracts.

5. In the assessment year 1988-89, the IDA rig was sold to Mahindra and Mahindra Ltd. and the operations for the IDA were for part of the year, whereas operations on the other rigs owned by the ONGC continued up to the assessment year 1991-92.

6. The petitioner being a foreign company incorporated in France its taxability in respect of income accrued or deemed to accrue in India is governed by the double taxation avoidance agreement. A copy of the said treaty is annexure 1 to the writ petition. The petitioner being a non-resident was taxable in India only in respect of income accrued or deemed to accrue in India. Accordingly, the petitioner filed the returns of its income in the relevant assessment years disclosing its income by way of proceeds from manning and management contracts as fee for technical services as per the provisions of article XVI of the treaty. This was supported by an order u/s 195(2) issued by the Income Tax Department on August 25, 1987, directing the ONGC to apply a tax rate of 30 per cent, on the income from the said contracts. A true copy of the order dated August 25, 1987, is annexed as annexure 2 to the petition. The income relating to the IDA rig not falling under the definition of technical services were returned as ordinary business income. However, the Assessing Officer while making the assessment u/s 143(3) of the Act took the view that the proceeds from manning and management contracts with the ONGC were taxable as business income in terms of Section 44BB of the Act. This was the changed view of the Department in the light of the decision of the Tribunal in the case of Scan Drilling as also the opinion of the Attorney- General of India. It is also asserted that the view taken by the Tribunal and the Attorney-General was accepted by the CBDT vide Board's instructions dated November 22, 1990. A true copy of the assessment order dated February 26, 1991, for the assessment year 1988-89 is enclosed as annexure 3 to the petition. The assessments for the assessment years 1989-90 and 1990-91 were made on February 27, 1991.

7. It is alleged in paragraph "" of the petition that the Department had in the meantime issued instructions to the ONGC to stop all payments to the petitioner till a no objection certificate is issued. This was allegedly done to pressurise the petitioner to settle the dispute regarding the assessment year 1988-89. Accordingly to buy peace and avoid protracted litigation, the petitioner had no option but to accept the aforesaid assessment orders.

8. After the aforesaid assessment had become final and after a lapse of more than seven years thereafter the Department has issued the impugned notices u/s 148 on November 20, 1998, vide annexure 4 to the writ petition. The petitioner thereupon requested the respondents for disclosing the reasons for initiating

reassessment proceedings. A true copy of the said request is annexure 5 to the petition. In another letter dated January 14, 1999, the petitioner wrote to the Department stating that it had made full disclosure in the original return and there was no undisclosed income. The Department was again asked to disclose the reasons for initiating proceeding's for reassessment. In response to the said letter, the petitioner received a reply dated February 12, 1999, vide annexure 7 to the petition stating that in view of the Tribunal's decision rendered in the case of Boudier Christian relating to the petitioner-company's technician deputed to India, the income of the company was treated as to be a fee for technical services and not business income. A true copy of the letter dated February 12, 1999, is annexure 7 to the petition. A true copy of the decision of the Tribunal in Boudier Christian's case is annexure 8 to the petition.

9. The contention of the petitioner is that Boudier Christian's case was a decision pertaining to the taxability of income of an expatriate employee of the petitioner. The issue of eligibility of income to tax of the company was neither an issue directly or indirectly involved in that case.

10. Learned counsel for the petitioner has contended that in view of the amended Section 147 for issuing notice u/s 148, the Department must establish that either the income assessable to tax escaped assessment due to failure of the assessee to furnish a return u/s 139 or respond to a notice u/s 142 or 148 or that the assessee failed to disclose fully and truly all material facts necessary for assessment. Learned counsel contended that the petitioner filed the returns disclosing all material facts fully and truly in accordance with the provisions of the Act and the petitioner never received any notice u/s 142 or 148 which was not complied with prior to the impugned notices. He submitted that the impugned notices were issued in an arbitrary manner and did not fulfil the conditions mentioned in Section 147, as there is complete absence of the existence of any of the pre-conditions required for exercise of power u/s 147. He submitted that this was not a case where the original assessment was made in a summary manner, rather it was made u/s 143(3) after recording the view of the Department which was in accordance with the instructions of the CBDT and the opinion of the Attorney-General.

11. Learned counsel, Shri V. B. Upadhyay submitted that in view of the proviso to Section 147, the Income Tax authorities cannot reopen an assessment made after the expiry of four years from the relevant assessment year unless they record a finding that the petitioner has failed to disclose all material facts. He, however, submitted that the petitioner had itself returned the income as fee for technical services but it was the Department which sought to tax it as business income. Hence, there was no occasion for reopening the assessment. He further submitted that the impugned notice was issued on a mere change of opinion of the Department. As regards the decision of the Tribunal in Boudier Christian's case, learned counsel for the petitioner submitted that the Tribunal in that case was considering the question of taxability of income of the employee of the

petitioner-company in view of the provisions of the treaty, but the question of taxability of the corporate income of the petitioner was not an issue in that proceeding. Learned counsel submitted that the impugned notices are wholly without jurisdiction and deserve to be quashed.

12. The Department has filed a counter-affidavit. In paragraph 3 of the same, it is alleged that the petitioner has an alternative remedy before the income tax authorities. In paragraph 5, it is alleged that the taxability of the petitioner-company was governed by the provisions of the treaty between India and France and also the relevant provisions of the Income Tax Act. In paragraph 6 of the same, it is stated that on May 25, 1987, the Department had passed a provisional order. In paragraph 11, it is stated that the assessments have been reopened in the light of the findings of the Tribunal in cases of the petitioner's employees. In paragraph 13, it is stated that the Tribunal in the case of Boudier Christian held that the income of the petitioner was assessable as fee for technical services. In paragraph 14 of the same, it is alleged that Section 147 of the Income Tax Act was amended from April 1, 1989, and, hence, the existence of pre-conditions mentioned earlier are no longer necessary. In paragraph 15 of the "same; it is alleged that the notices u/s 148 were issued to give effect to the findings of the Tribunal. In paragraph 17, it is stated that the impugned notices were issued not because of change of opinion but because of the decision of the Tribunal in the case of Boudier Christian. In paragraph 21, it is stated that the decision of the Tribunal in the case of the employees of the petitioner-company had a direct bearing on the question of taxability of the income of the petitioner-company.

13. A rejoinder affidavit has been filed. In paragraph 3 of the same, it is stated that since the very jurisdiction of the respondents to initiate action u/s 147/148 has been challenged the petitioner cannot be relegated to his alternative remedy before the Income Tax authorities, In paragraph 6 of the same, it is stated that the tax liability may have been provisional but the order u/s 195(2) dated August 25, 1998, was final, since u/s 195 there is no provision for making a provisional order. In paragraph 9, it is stated that the case of the petitioner is clearly covered under the first proviso to Section 147, since it is not the Department's case that the petitioner failed to disclose the relevant facts or concealed material facts. It is further stated that the Department has been shifting its stand as is clear from the fact that while they referred to the findings of the Tribunal in the case of Boudier Christian as having become final, they have for the assessment years 1988-89, 1989-90 and 1990-91 in spite of the judgment collected taxes and interest amounting to Rs. 3,18,09,938 on the remuneration of the expatriates. In paragraph 11, it is alleged that the issue of taxability of the corporate income was neither an issue for adjudication before the Tribunal nor remotely connected to the controversy pending there. The observations of the Tribunal are hence clearly obiter dicta. It is further alleged that in view of the proviso to Section 147 the impugned notices are clearly barred by limitation.

14. Having heard learned counsel for the parties, we are of the view that these petitions deserve to be allowed.

15. It may be mentioned that a new Section substituted Section 147 of the Income Tax Act by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989. The relevant part of the new Section 147 is as follows : "147. 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 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."

16. This new Section has made a radical departure from the original Section 147 inasmuch as clauses (a) and (b) of the original Section 147 have been deleted and a new proviso added to Section 147.

17. In *Rakesh Aggarwal Vs. Assistant Commissioner of Income Tax*, the Delhi High Court held that in view of the proviso to Section 147 notice for reassessment u/s 147/148 should only be issued in accordance with the new Section 147, and where the original assessment had been made u/s 143(3) then in view of the proviso to Section 147, the notice u/s 148 would be illegal if issued more than four years after the end of the relevant assessment year. The same view was taken by the Gujarat High Court in *Shree Tharad Jain Yuvak Mandal and Another Vs. Income Tax Officer*,

18. In our opinion, we have to see the law prevailing on the date of issue of the notice u/s 148, i.e., November 20, 1998. Admittedly, by that date, the new Section 147 has come into force and, hence, in our opinion, it is the new Section 147 which will apply to the facts of the present case. In the present case, there was admittedly no failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment. Hence, the proviso to the new Section 147 squarely applies, and the impugned notices were barred by limitation mentioned in the proviso.

19. Learned departmental counsel relied on Section 153(3)(ii) of the income tax Act and submitted that there was no bar of limitation in view of the said

provision. We do not agree. Section 153 relates to passing of an order of assessment and it does not relate to issuing of notice u/s 147/ 148. Moreover, this is not a case where reassessment is sought to be made in consequence of or to give effect to any finding or direction contained in the order of the Tribunal in Boudier Christian's case. As already stated above, Boudier Christian's case related to the employees of the company, whereas the impugned notice has been issued to the company. Hence, it cannot be said that the proposed reassessment in consequence of the impugned notice would be in consequence of or to give effect to any findings of the Tribunal in Boudier Christian's case.

20. A direction or finding as contemplated by Section 153(3)(ii) must be a finding necessary for the disposal of a particular case, that is to say, in respect of the particular assessee and in relevance to a particular assessment year. To be a necessary finding it must be directly involved in the disposal of the case. To be a direction as contemplated by Section 153(3)(ii) it must be an express direction necessary for the disposal of the case before the authority or court vide *Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi , ; Gupta Traders Vs. Commissioner of Income Tax, ; Commissioner of Income Tax, Shillong Vs. Tarajan Tea Co. (P) Ltd., and Commissioner of Income Tax Vs. Goel Brothers, , etc.* The case of an expatriate employee was to be decided on the basis of the provisions of article XIV of the treaty, whereas corporate income was to be decided on the basis of either article III or article XVI of the treaty or Section 44BB of the Act. Hence, the observations of the Tribunal in Boudier Christian's case was not a direction necessary for the disposal of the appeal relating to the petitioner. The exigibility of income of the petitioner from manning and management contracts was never an issue directly or indirectly involved in the case of Boudier Christian.

21. Moreover, the Tribunal in the appeal relating to the assessment of the petitioner's own case, vide (1999) 70 ITD 468 has considered the decision of the Tribunal in Boudier Christian's case. It is settled law that an appeal is a continuation of the original proceedings and hence when the Tribunal in the appeal relating to the petitioner has considered the decision of the Tribunal in Boudier Christian's case, the impugned notice u/s 147/148 would obviously be on the basis of a mere change of opinion by the Income Tax authorities, which would not be valid as held by the Supreme Court in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, ; Gemini Leather Stores Vs. The Income Tax Officer, "B" Ward, Agra and Others, and Jindal Photo Films Ltd. Vs. The Deputy Commissioner of Income Tax, , etc.*

22. In the decision of the Tribunal in the assessee's own case, (1999) 70 ITD 468 it has been held that the income from the contract between the parties was business income and not fee for technical services.

23. Although we are of the opinion that the law existing on the date of the impugned notice u/s 147/148 has to be seen, yet even in the alternative even if we assume that the law prior to the insertion of the new Section 147 will apply

even then it will make no difference since even under the original Section 147 notice for reassessment could not be given on the mere change of opinion as held in numerous cases of the Supreme Court, some of which have been mentioned above. Since the Tribunal in the appeal relating to the assessee-company had considered the Tribunal's earlier decision in Boudier Christian's case, it will obviously amount to mere change of opinion, and hence the notice u/s 147/148 would be illegal.

24. As regards alternative remedy, we are of the opinion since the notice u/s 148 is without jurisdiction the petitioner should not be relegated to his alternative remedy vide Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, ; Smt. Jamila Ansari Vs. Income Tax Department and Another, ; Govind Chhapabhai Patel Vs. Deputy Commissioner of Income Tax, and Jindal Photo Films Ltd. Vs. The Deputy Commissioner of Income Tax, and other decisions.

25. This writ petition and connected writ petitions are hence allowed and the impugned notices are quashed.