
(2001) 04 CAL CK 0020
In the Calcutta High Court
Case No : C.R. No. 13487 (W) of 1984

Grindlays Bank P.L.C.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-04-2001

Acts Referred:

Adjudicating Proceeding and Appeal Rules, 1974 — Rule 3, 3(1)
Foreign Exchange Regulation Act, 1947 — Section 10, 10(1), 10(2), 12(2), 17
Foreign Exchange Regulation Act, 1973 — Section 16, 51, 52
General Clauses Act, 1897 — Section 6
Income Tax Act, 1961 — Section 148

Citation : (2001) 106 CompCas 1 : (2001) 76 ECC 335 : (2001) 130 ELT 419

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : D. Mukherjee, for the Appellant; M.K. Lodh and M.K. Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Amitava Lala, J.—Under this writ petition, the writ petitioner-company and another challenged the notice of reassessment dated March 28, 2000, issued by the concerned Joint Commissioner of Income Tax, respondent No. 1, herein, u/s 148 of the Income Tax Act, 1961, relating to the assessment year 1993-94. Such notice can be issued by the Income Tax authority provided the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year or there is a 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 this assessment, for that assessment year.

2. The scope and ambit of Section 148 is very exhaustive and the same is applicable either when income has escaped from assessment or failure on the part of the assessee. Such section under the Act is a procedural enactment for the purpose of doing the needful by the authority concerned.

3. However, unless and until either of the two conditions are fulfilled, the authority concerned cannot open the assessment already made for the relevant assessment year in view of a proviso u/s 147 of the Act where it is categorically mentioned that where an assessment under subsection (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.

4. Factually, this case has a chequered history which has been dealt with by numerous Income Tax authorities of the Income Tax Act and the same has been proceeded up to the level of the Commissioner as well as the Tribunal which are not at all relevant at the present moment. The relevancy is in respect of the question of reassessment u/s 148 of the Income Tax Act when the assessment was completed in the year 1993-94.

5. Initially, it was alleged by the petitioner that the notice was served without any reason whatsoever but during the course of proceeding, the reason on which the notice was issued by the concerned Joint Commissioner of Income Tax has been disclosed before this court and it appeared from such reasoning that :

"It is seen from the record that in the computation of income for the assessment year 1993-94 customs duty of Rs. 39,39,096 was paid in advance during the financial year 1992-93, on account of bonding of imported raw materials shown under the head "Loan and advances" in the account. The assessee has claimed deduction u/s 43B of the Income Tax Act. The Assessing Officer has allowed the deduction of Rs. 39,39,096 as claimed by the assessee both in the order u/s 143(1)(a) and the order u/s 143(3) dated March 29, 1996.

As the closing stock of imported raw material in bond as on March 31, 1993, did not include the claim of customs duty involved, the allowance of deduction of customs duty paid in advance during the financial year 1992-93, on account of bonding of imported raw materials without increasing the value of closing stock to the tune of Rs. 39,39,096 without increasing the profit to the extent is not in order.

Thus, in view of the above, I have reasons to believe that the income of the assessee in the relevant assessment year 1993-94 has escaped assessment for which action u/s 147 is required.

The approval of the Commissioner of Income Tax, West Bengal-IV, Calcutta, is solicited to reopen the assessment for the assessment year 1993-94 for the reasons as discussed above."

6. Therefore, the context is very clear as per the fulfilment of the proviso u/s 147 of the Income Tax Act. Upon going through the reasons from the record placed before the court, learned counsel for the petitioner contended that neither there is a failure on their part in this respect nor any part is escaped from the notice from the Income Tax authority. The relevant part in respect of the closing stock,

imported raw materials wherein the customs duty involved, the same has been disclosed by the petitioner-company and dealt with by the authority on numerous occasions.

7. In this context, this court was pleased to grant leave to file a supplementary affidavit to establish this case before the court. It appears from the supplementary affidavit that there is a statement showing any tax, duty or other sums debited to the profit and loss account but not paid during the previous year. Under the signature of the Vice-President of the company, the statement as has been filed before this court from which it appears that all descriptions regarding contribution to provident fund, contribution to superannuation fund, bonus relating to the financial year 1992-93, professional tax, family pension fund, and customs duty are given therein. So far the customs duty is concerned, a note has been given in such statement which is as follows :

"Note : Rs. 39,39,096 has been paid in advance during the year on account o.f bonding of imported raw materials as per public notice No. 239 dated December 23, 1991, of the Collector of Customs and shown under the head "Loans and advances" in the account."

8. The petitioner contended that the aforesaid amount of Rs. 39,39,096 is not charged in the profit and loss account.

9. According to the writ petitioner, the Assessing" Officer made enquiries regarding the closing stock valuation relating to excise duty and customs duty which also included the customs duty paid in advance amounting to Rs. 39,39,096 and after considering the same, he disallowed Rs. 99,10,108 and also made an addition of Rs. 11,00,000 on account of closing stock valuation although he allowed the claim of the petitioner-company regarding the customs duty paid in advance on account of bonding of imported raw materials amounting to Rs. 39,39,096 u/s 43B of the Act which was part of the claim. Against the said order of disallowance and also other disallowances and/or additions made by the Assessing Officer, the petitioner-company preferred an appeal and by an order dated November 29, 1996, the Commissioner of Income Tax (Appeals)-IV, Calcutta, virtually allowed the appeal excepting one item and the said order was given effect to by the Assessing Officer after making enquiry by his letter dated January 8, 1997, and the order dated January 21, 1997. It will, therefore, be quite clear that apart from the fact that no income has escaped assessment and there has been no omission and/or failure on the part of petitioner No. 1-company from disclosing fully and/or truly all materials and/or primary facts necessary for the assessment of the petitioner-company for the concerned assessment year, the broader issue, namely, the valuation of the closing stock was not only considered by the Assessing Officer but also by the Commissioner of Income Tax (Appeals) although out of the total claim on account of closing stock valuation, the Assessing Officer disallowed Rs. 99,10,108 and made an addition of Rs. 11,00,000 which does not include the sum of Rs. 39,39,096 being the amount of customs duty paid in advance which was allowed by the Assessing

Officer himself u/s 43B of the Act. As such, the issue on which respondent No. 1 is now purporting to reopen the assessment has also merged in the appellate order and on this ground also respondent No. 1 has no competent authority and/or jurisdiction to invoke the power u/s 147 read with sections 148, 149 and 151 of the Act apart from all other points taken in the writ petition as also those stated hereinbefore.

10. It may also be pertinent to mention that the Commissioner of Income Tax (Appeals) in allowing the said petition of the company followed the order of the Income Tax Appellate Tribunal in the earlier years and the Department has also filed an appeal against the order of the said Commissioner of Income Tax (Appeals) for the assessment year 1993-94 before the Income Tax Appellate Tribunal and the said appeal is also pending before the Income Tax Appellate Tribunal along with the cross-objection which the writ petition company has filed.

11. It appears from the annexures to the writ petition that the second ground of appeal as made by the Deputy Commissioner of Income Tax, Special Range-4, Calcutta, before the Appellate Tribunal is as follows :

"On the facts and circumstances of the case, learned Commissioner of Income Tax (Appeals) had erred on facts and law in allowing deduction u/s 43B in respect of excise and customs duty on the basis of difference between the opening and the closing stock and not as per the provision of Section 43B."

12. From the assessment order as annexed in the writ petition it appears that the portion of the customs duty paid during the financial year 1992-93 on account of bonding of imported raw materials and shown a "loans and advances" in the accounts claimed allowable u/s 43B of the Income Tax Act is for the self-same sum of Rs. 39,39,096.

13. From the auditor's certificate for the relevant year at page 196 of the writ petition, it appears that such sum of Rs. 39,39,096 was recorded as paid towards customs duty during the year ended March 31, 1993, in accordance with public notice No. 239 dated December 23, 1991, issued by the Collector of Customs, Calcutta, and shown under the head "Loans and advances" under schedule 10 in the accounts for the abovementioned year. Such public notice is also annexed in the writ petition.

14. Under such circumstances, factually there is hardly any scope for the authority concerned to serve a notice u/s 148 of the Income Tax Act.

15. Mr. Pranab Kumar Pal, learned senior counsel appearing on behalf of the petitioner cited various decisions in support of his contentions.

16. He cited in Union Carbide (India) Ltd. Vs. Income Tax Officer and Others, to establish before the court that when there are no materials to indicate that the assessee had not disclosed fully or truly all material facts necessary for his assessment and the notice had been issued in pursuance thereof, such reassessment proceedings had not been valid and liable to be quashed.

17. Secondly, he cited a judgment in *Income Tax Officer and Others Vs. Calcutta Chromotype Pvt. Ltd.*, to establish that a person cannot be said to have omitted to disclose something when of such thing, he had no knowledge. Lack of knowledge of any further detail was asserted before the Income Tax Officer at the original assessment and he had accepted that confession of ignorance and acted upon it. By saying that he should not have acted that way, the Income Tax Officer who issued the notice u/s 148 was really acting on a difference of opinion regarding the same facts. It had, therefore, to be held that there had not been any omission to disclose material facts to reopen the assessment and the appeal was dismissed.

18. A single Bench of this court also in *Orient Beverages Ltd. Vs. Income Tax Officer and Others*, , held affirmatively in favour of the petitioner in the point as aforesaid as well as exercise of the jurisdiction of the writ court having alternative remedy. Similarly, in *East India Hotels Ltd. Vs. Deputy Commissioner of Income Tax and Others*, , it was held by this court affirmatively in favour of the assessee. In the cited paragraph it was observed by the court that it has been urged on behalf of the authority that when excessive depreciation allowance was given by the Income Tax Officer, that will be treated as escapement of income within the meaning of Explanation 2 to Section 147 of the Act. But that does not resolve the dispute. The Explanation by itself will not turn every case of excessive depreciation allowance into a case of omission or failure to disclose fully and truly all material facts. If the reopening is to be done after the prescribed period of four years, failure to disclose fully and truly all material facts by the assessee has to be, established. Merely because an under assessment has taken place on account of excessive depreciation allowance on a wrong understanding of law will not make it a case of omission to disclose fully and truly of all material facts.

19. He has also cited another judgment in *Modi Spinning and Weaving Mills Co. Ltd. Vs. Income Tax Officer, Special Investigation Circle (B), Meerut*, , to establish that either there should be (a) omission or failure on the part of an assessee to make a return of income, or (b) omission or failure on the part of an assessee to disclose fully or truly all material facts necessary for the assessment of that order.

20. Learned counsel appearing on behalf of the respondent contended that an effective alternative remedy is available by way of appeal under the Income Tax Act. In any event, the Assessing Officer had made a disallowance of Rs. 99,10,108 in respect of excise duty relatable to the closing stock and had made an addition of Rs. 11,00,000 as undisclosed value of closing stock. Following the orders of earlier years, the Commissioner of Income Tax (Appeals) deleted the disallowances of Rs. 99,10,108 and he also deleted the addition of Rs. 11,00,000 made on the basis on the position obtaining in the earlier year on the ground that the facts in the two orders were different as such, there was no scope for an addition to the value of closing stock this year on the basis of non-existing facts. The appropriate authority preferred an appeal before the Tribunal against the

order of the Commissioner of Income Tax (Appeals) which is pending.

21. In the circumstances, if the closing stock of the imported bonded raw materials representing customs duty of Rs. 39,39,096 paid during the year, had been the subject-matter of consideration for the assessment year under an appeal, there would be no scope for reopening the assessment. As the Assessing Officer would not have applied his mind in the course of original assessment, there could not be any reopening on account of change of mind when the issue had been the subject-matter of appeal.

22. Accordingly, this court enquired from the petitioner whether the figure of the closing stock of Rs. 99,10,108 includes the sum of Rs. 39,39,096 as well to which counsel for the petitioner replied affirmatively that such sum was included in the figure as aforesaid. The respondents contended that in earlier occasion hearing was adjourned on account of filing of supplementary affidavit giving categorical statement. But from such supplementary affidavit it appears that the amount was not included in the valuation of closing stock declared and that the advance duty paid would not be taken into consideration in valuing the closing stock as the amount was not debited to the profit and loss account. In view of the above, the matter would stand concluded on the earlier occasion but for the reply to the query by the court. As the affidavit is contrary to the statement of learned counsel for the writ petitioner, the writ petition would stand dismissed.

23. The writ petitioner has sought to take advantage of the hearing fixed with reference to the query of the court, regarding the treatment of the advance customs duty of Rs. 39,39,096 paid and inclusion thereof in the closing stock of Rs. 99,10,108 and to present the case afresh.

24. For the aforesaid purpose, the observation of the Supreme Court has to be followed. From the decision of the Supreme Court reported in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, the majority view is that there are certain prima facie facts which are relevant for the purpose of consideration. Such primary facts are that it was the assessee's duty to disclose all of them including particular entries in the account books, particular portions of documents, and documents and other evidence which could have been discovered by the assessing authority, from the documents and other evidence disclosed. The duty, however, did not extend beyond the full disclosure of all primary facts. Once all the primary facts were before the assessing authority, it was for him to decide what inferences of facts could be reasonably drawn and what legal inferences had ultimately to be drawn. It was not for anybody else--far less the assessee to tell the assessing authority what inference whether of facts or law, should be drawn. Hence, it cannot be construed now from the facts or law that the petitioner did not disclose such facts or closing stock of imported raw materials bonded as on March 31, 1993.

25. Under such circumstances, the notice u/s 148 of the Income Tax Act is violative of law. Therefore, the notice of reassessment as issued by March 28,

2000, in respect of the assessment year 1993-94 being annexure I to the writ petition stands quashed. However, no order is passed as to costs.

26. Xerox certified copies of this judgment will be supplied to the parties by the Department within seven days from the date of putting requisition for drawing up and completion of the judgment as well as the certified copies.

27. All parties are to act on a signed copy minute of this operative part of the judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.