

(2013) 04 KL CK 0092
In the High Court Of Kerala
Case No : Writ Petition No. 5061 of 2013

Innovative Foods Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-04-2013

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (2013) 259 CTR 569 : (2013) 356 ITR 389

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas, K. John Mathai, Kuryan Thomas and Anil D. Nair, for the Appellant; P.K. R. Menon and Jose Joseph, for the Respondent

Judgement

P.R. Ramachandra Menon, J.—Exhibit P12 order passed by the third respondent disposing the objections to reopen the assessment under s. 147 of the IT Act, 1961 is the subject-matter of challenge in this writ petition. The petitioner company is engaged in the manufacturing and marketing of frozen value added food products and is an assessee on the files of the 3rd respondent under the IT Act. In the year 2007-08, another company engaged in similar line of business viz., M/s. Amalgum Foods & Beverages Ltd., was merged with the petitioner company in tune with the approved scheme of the Board for Industrial & Financial Reconstruction (BIFR). In the same assessment year, the petitioner also selected another company, M/s. Residency Foods & Beverages Ltd., as a strategic investor and it is stated that the said company had acquired the management and control of the petitioner company with 67.93 per cent shareholding in the petitioner company. In respect of the asst. yr. 2007-08, the petitioner filed return of income on 30th Oct., 2007, showing a business loss of Rs. 4,28,00,960. In response to the notice issued under s. 143(2) of the IT Act, the petitioner submitted Ext. P1 written statement dt. 8th Dec, 2009 explaining the facts and figures. After considering the same, the assessment was finalised under s.

143(3) of the IT Act as borne by Ext. P2 assessment order dt. 31st Dec. 2009.

2. According to the petitioner, there were some mistakes in Ext. P2 order and in the said circumstance, an application was preferred before the third respondent under s. 154 of the IT Act to rectify the mistakes, which was considered and Ext. P3 order came to be passed on 9th April, 2010. But, since some vital aspects were not considered, the petitioner filed an appeal on the issue of non-consideration of unabsorbed business loss and after considering the said appeal, the appellate authority passed Ext. P4 order dt. 6th Aug., 2012, granting the relief to the extent as specified. In respect of the other aspects contained in Ext. P2 assessment order, the petitioner has already filed a statutory appeal, as borne by Ext. P5 dt. 25th Jan., 2010, which is pending consideration before the second respondent/appellate authority. While so, the petitioner was served with Ext. P6 notice dt. 6th March, 2012, seeking to reopen the assessment under s. 147 of the IT Act. The petitioner pointed out that, by virtue of the law declared by the apex Court in GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, , reason for reopening the assessment was liable to be given in writing for contesting the matter effectively. According to the petitioner, Ext. P7 request was made and after considering the same, Ext. P8 order/proceeding was issued by the third respondent revealing the reasons. On receipt of Ext. P8, Ext. P9 statement of objections was filed by the petitioner and sought to pass a speaking order, particularly on the question of jurisdiction. However, before passing any such order, the petitioner was required to furnish some documents as per Ext. P10, when the petitioner reminded the third respondent as to the necessity to pass a speaking order vide Ext. P11. After considering the matter, Ext. P12 speaking order came to be passed on 11th Feb., 2013, overruling the objections and deciding to proceed with the merits of the case. The petitioner filed Ext. P13 representation dt. 18th Feb., 2013 seeking for extension of time to submit the version on merits and has approached this Court by filing the present writ petition.

3. The case of the petitioner, as projected by Mr. Anil D. Nair, the learned counsel for the petitioner, is that Ext. P12 order passed by the third respondent is not an appealable order and hence the challenge in the writ petition. It is stated that the present course of proceedings sought to be pursued by the third respondent, is only by virtue of a "change of opinion", which shall not be a ground for reopening the assessment under s. 147 of the IT Act, as made clear by the apex Court in Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, . It is pointed out that all the vital aspects which are now sought to be relied on for proceeding under s. 147 of the Act were dealt with by the petitioner, as pointed out in Ext. P1 written statement. These aspects were considered by the assessing authority earlier and some aspects were found as not acceptable, some were accepted and some were left out. Having taken such a conscious decision, it is not a matter which is liable to be reworked by resorting to the course and proceedings under s. 147 and hence the challenge. The learned counsel also submits that the very purpose of passing a speaking order when reassessment is

proposed under s. 147, in the light of the ruling rendered by the apex Court in GKN Driveshafts (India) Ltd. vs. ITO (supra) is to enable the assessee to substantiate the position to the effect that there is no tenable "reason to believe" that income was escaped so as to reopen the assessment and if it goes wrong, to have it challenged by way of Art. 226 of the Constitution of India instead of undergoing the ordeal of reassessment and the necessity to pursue the statutory remedy therefrom.

4. The learned counsel also submits that there was full and true disclosure of income on the part of the assessee, as borne by Ext. P1 and as such, the impugned proceedings are liable to be intercepted in view of the law declared by the various High Courts including that of the High Court of Gujarat in Mihir Textiles Ltd. Bank of Baroda Building Vs. JT. Commissioner of Income Tax, : Mihir Textiles Ltd. Bank of Baroda Building Vs. JT. Commissioner of Income Tax, , Sanand Properties (P.) Ltd. Vs. Joint Commissioner of Income Tax, Range-6, , Garden Finance Ltd. Vs. Assistant Commissioner of Income Tax, .

5. Mr. Jose Joseph, the learned standing counsel for the respondents vehemently opposed the reliefs sought for, pointing out that there is absolutely no merit or bona fides in the writ petition. It is stated that there is no violation of any of the relevant provisions of law or the mandate given by the various binding judicial precedents. It was in conformity with the law declared by the apex Court in GKN's case (supra) that Ext. P8 reason for reopening the assessment was given, followed by a speaking order, as borne by Ext. P12. The learned counsel also submits that it is not a case of "change of opinion" as contended by the petitioner, for the reason that the aspects which form the basis for reopening the assessment were never considered by the assessing authority earlier, when Ext. P2 order was passed and no opinion was formed in respect of these issues. In the absence of any opinion, there is no question of any change of opinion. It is also pointed out that the citations sought to be relied on from the part of the petitioner do not come to the rescue of the petitioner in any manner, but on the other hand, the true mandate of the law has been explained by the apex Court in Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., and also a Division Bench of this Court in Commissioner of Income Tax Vs. Popular Vehicles and Services Ltd., and also as in Commissioner of Income Tax, Cochin Vs. National Tyres and Rubber Co. of India Ltd., .

6. The primary question to be considered is whether there is any infringement of the law declared by the apex Court in GKN's case (supra). Admittedly, after considering the assessment vide Ext. P2, Ext. P6 notice was issued to the petitioner under s. 148 of the IT Act, proposing reassessment under s. 147. On seeking for reasons vide Ext. P7, the same were supplied as per Ext. P8, which reads as follows:

As per the records it is verified that the prior period depreciation of Rs. 28,86,370 debited to the current P & L a/c has not been disallowed and thus resulted in under-assessment. The "prepayment premium on IDFC term loan"

amounting to Rs. 15,00,000 debited to the P & L a/c, being an expenditure directly in relation to the capital base of the company, is a capital expenditure but has not been disallowed in computing the total income. The depreciation on plant and machinery was allowed in excess by Rs. 8,75,240. Excess depreciation amounting to Rs. 25,41,250 was allowed on the intangible asset brand name" by wrongly adopting WDV as on the first day of the year of amalgamation of the company instead of adopting the WDV as on the last day of the year of amalgamation. Hence I have reason to believe that assessee's income has escaped assessment within the meaning of s. 147 of the IT Act 1961.

7. It was in response to the said proceedings that the petitioner filed Ext. P9 statement of objection finally leading to Ext. P12 order. On going through the pleadings and proceedings, this Court finds that the steps taken by the respondents are in conformity with the statutory requirements and in tune with the law declared by the apex Court in GKN's case (supra).

8. The next question to be considered is whether the reasons given by the third respondent vide Ext. P8 are germane so as to have the reassessment reopened under s. 147 of the Act or whether it merely amounts to "change of opinion" to be intercepted in view of the law declared by the apex Court in Kelvinator's case (supra).

9. The main reasons for reopening the assessment, as understood and extracted by the petitioner in Ext. P9 statement of objections are as given below:

? Prior period depreciation amounting to Rs. 28,86,370 had been debited to P & L a/c during the asst. yr. 2007-08. However, the same had not been disallowed in the tax computation.

? Prepayment premium on IDFC term loan amounting to Rs. 15,00,000 debited to P & L a/c, being expenditure directly in relation to the capital base of the company, is a capital expenditure but has not been disallowed in computing the total income.

? Excess depreciation amounting to Rs. 8,75,240 had been claimed by the company on plant and machinery. However, the same had not been disallowed in the tax computation.

? Excess depreciation amounting to Rs. 25,41,250 had been allowed on the intangible asset "brand name" by wrongly adopting the WDV as on the first day of the year of amalgamation of the company instead of adopting the WDV as on the last day of the year of amalgamation.

10. The cruxes of the objection raised by the petitioner vide Ext. P9 are as given below:

1. No new material on record--Reassessment in the absence of any fresh facts or information is invalid.

2. Absence of discussion in the original assessment order does not imply non-

application of mind by the AO.

3. Change of opinion does not constitute reason to believe".

4. AO is not authorised to review orders in the pretext of reassessment.

11. The scope of reassessment under s. 147 of the IT Act as it exists now has to be considered in the backdrop of what it was earlier before the amendment in 1989 and what does it stand for, after the amendment. Sec. 147 as it stood earlier reads as follows:

147. Income escaping assessment. If--

(a) the AO has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under s. 139 for any assessment year to the AO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in cl. (a) on the part of the assessee, the AO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of ss. 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in ss. 148 to 153 referred to as the relevant assessment year).

Explanation 1.--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 income chargeable to tax has been under-assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian IT Act, 1922 (11 of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.--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 this section.

After the amending Act, 1989, s. 147 reads as under:

147. Income escaping assessment--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 ss. 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 ss. 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-s. (3) of s. 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 under s. 139 or in response to a notice issued under sub-s. (1) of s. 142 or s. 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 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.

12. After the amendment, as above, only one condition is required to be satisfied, i.e. existence of "reason to believe" that income has escaped assessment, which in turn has to be recorded in writing. This aspect has been considered by the apex Court in *Kelvinator's* case (*supra*) itself. But what will constitute "reason to believe" so as to invoke the power and procedure under s. 147 of the Act, was also considered by the apex Court in *Kelvinator's* case

(supra) holding that a mere "change of opinion" was not enough, which was ordered to be taken as an inbuilt test to check the abuse of power by the AO.

13. In *Asstt. CIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd.* (supra), the apex Court observed that the expression "reason to believe" in s. 147 of the Act would mean "cause or justification to know" and if the AO has cause or justification to know or suppose that income has escaped assessment, he can be said to have reason to believe that income has escaped assessment. It is added that the expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion and what is required is "reason to believe" but not the established fact of escapement of income and at the stage of issuance of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief.

14. The scope of the provision as it stood before the amendment and the position after the amendment has been discussed further in para 17 of *Rajesh Jhaveri's* case (supra) in the following terms:

17. The scope and effect of s. 147 as substituted w.e.f. 1st April, 1989, as also ss. 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of s. 147, separate cl. (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under s. 147(a), two conditions were required to be satisfied firstly the AO must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under s. 148 r/w s. 147(a). But under the substituted s. 147, existence of only the first condition suffices. In other words if the AO for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to s. 147. The case at hand is covered by the main provision and not the proviso.

The issue came to be considered by a Division Bench of this Court as well in *CIT vs. Popular Vehicles & Services Ltd.* (supra) holding that the only requirement to be satisfied is whether existence of a reason to believe that chargeable income has escaped assessment. Same is the view expressed in another case as well, as in *CIT vs. National Tyres & Rubber Co. of India Ltd.* (supra), wherein it has been held that reassessment can be made under s. 147, if the AO himself has committed a mistake or omission in the assessment completed by him; and what the statute visualises, is reconsideration and revision of regular assessment by the AO himself, if he finds that for any reason there is escapement of income chargeable to tax in the original assessment. Referring to the law declared by the

apex Court on the point, the Bench observed that the amended provision of s. 147 is sufficiently elastic to cover all cases of non-assessment or under-assessment of income chargeable to tax and the only condition for reopening or initiating an assessment under s. 147 is reasonable belief of the AO on escapement of income chargeable to tax.

From the above, it is explicitly clear that the reasons given in Ext. P8 for effecting reassessment were not the matters considered by the assessing authority while passing Ext. P2 assessment order and no opinion was formed in this regard. This being the position, the version of the petitioner that no new materials have been brought to light to invoke the power and proceedings under s. 147 or that it is proposed by way of "change of opinion", does not contain any pith or substance. This Court finds that the idea and understanding of the petitioner in respect of the challenge against Ext. P12 is wrong and misconceived. There is absolutely no merit in the writ petition and it is dismissed accordingly.