
(2010) 02 GAU CK 0009

In the Gauhati High Court

Case No : Special Civil Application No. 5825 of 2000 (Assessment year 1995-96)

Mihir Textiles Ltd.

APPELLANT

Vs

Joint Commissioner of Income Tax

RESPONDENT

Date of Decision : 09-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 139, 142(1), 147, 148, 149

Citation : (2010) 02 GAU CK 0009

Hon'ble Judges : Rajesh H. Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; Manish R. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Rajesh H. Shukla, J.—The present petition has been filed by the Petitioner under Article 226 of the Constitution of India seeking a prayer or direction quashing the impugned notice u/s 148 of the Income Tax Act (hereinafter referred to as "the Act") (at Annex. D) and also seeking direction against the Respondents not to proceed further in pursuance of the said notice.

2. The facts of the case briefly summarized are that the Petitioner is a public limited company at Ahmedabad and the Respondent is assessing officer, who is entitled under the Act to assess the income of the Petitioner for the relevant assessment year 1995-96. The Petitioner company submitted the return of income for the assessment year 1995-96 as per the statement of total income, copy of which is at Annex. A. The Petitioner filed return of income declaring total loss of Rs. 4,54,42,033 and also computed the business loss of Rs. 11,29,45,200 and depreciation of Rs. 89,23,688 to be carried forward to the future years. A note was also annexed forming a part of the return which is stated in detail in the memo of petition. It is averred that the assessing officer has passed an assessment order u/s 143(3) of the Act dated 23-3-1998 (at Annex. B). Thereafter the assessing officer did not accept the submission in the note that

the Petitioner is not liable to tax in respect of the sale of its undertaking and the claim for deduction was considered by the assessing officer and he computed the gross total income of Rs. 5,24,06,934 by deducting Rs. 7,43,82,025 of business loss from Rs. 12,67,88,959 from the total capital gain of Rs. 12,61,19,259 as well as income from other sources to the tune of Rs. 6,69,700. It is averred that the said gross total income of the Petitioner to the tune of Rs. 5,24,06,934 was a capital gain for which he gave the deduction of unabsorbed depreciation from previous year of Rs. 2,06,01,400 and the past unabsorbed depreciation of Rs. 88,41,290. The assessing officer passed the assessment order and computed such unabsorbed loss to the tune of Rs. 2,06,01,400 and gave a set off against the capital gain of Rs. 5,24,06,934.

It is against such order, the Petitioner preferred appeal and the Commissioner (Appeals) passed the order.

3. After a period of four years on 5-5-2000, the Respondent gave a notice u/s 148 of the Act (Annex. D) stating that he had a reason to believe that the Petitioner's income had escaped assessment and therefore he proposed to reassess the said income and required the Petitioner to file the return. The Petitioner replied to the said letter asking for the copy of the reasons recorded for reopening the assessment. It is averred that the Petitioner was replied that it is the policy of the IT department not to furnish such reasons to the Assessee in general and therefore the present petition has been filed contending inter alia that the impugned notice u/s 148 of the Act (Annex. D) is beyond the limitation because the provisions of proviso to Section 147 of the Act clearly provide that the period of limitation is four years. It is also contended that the Petitioner had computed business loss and unabsorbed depreciation and the assessing officer in his own computed unabsorbed depreciation to the tune of Rs. 2,06,01,400 and set off the same against the capital gain. It is therefore contended that, in other words, even if any income has been under assessed it is not because of the failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment. It is therefore contended that it cannot be said that any material fact necessary for the assessment has not been fully and truly disclosed. Further, it is contended that in fact the allowance for unabsorbed depreciation against the capital gain is permissible and therefore the unabsorbed depreciation u/s 32(2) of the past year became the current depreciation for the assessment year 1995-96 u/s 71(2) and could be set off against the capital gain, for which reliance has been placed on the judgment of this Court in case of Commissioner of Income Tax Vs. Deepak Textile Industries Ltd., and also of the Honble apex court in case of Commissioner of Income Tax, Meerut and Others Vs. Virmani Industries Pvt. Ltd. and Others,

4. The affidavit in reply has been filed by the Respondent contending inter alia that it is not necessary for the department to furnish the Assessee, the reasons recorded for reopening the assessment along with its notice u/s 148 of the Act. It is also contended that the notice u/s 148 of the Act has been issued after

obtaining necessary approval from the CIT, and as per the provisions to Section 149(ii) and (iii), the notice could be issued within the time-limit of 10 years, and therefore, it is very much within the time. It is also stated that the Petitioner could have availed of the alternative remedy in respect of challenging the impugned notice by way of present petition under Article 226 of the Constitution of India. It is contended that the Petitioner has right of a remedy by way of appeal before the Commissioner (Appeals) after the assessment is made. It is also stated that the points raised by the Petitioner before this Court in this petition could also be raised before the Commissioner (Appeals), as Commissioner (Appeals) is vested with all powers to strike off the reopening of the assessment, and therefore, as the Petitioner has right to go in appeal, the present petition may not be entertained and, as he has not exhausted the normal channels of remedies available under the statute and therefore the court may not entertain the present petition.

5. It is also contended that the Petitioner-Assessee company has filed its return of income on 29-11-1995 declaring loss of Rs. 4,54,42,033. In the said statement of income, the Assessee company has shown total carry forward business loss of Rs. 11,25,45,200 and unabsorbed depreciation loss to the tune of Rs. 89,23,688, which includes current business loss of Rs. 4,53,59,635, a detail of which is narrated in the reply affidavit contending that the Assessee company had projected unabsorbed business loss and depreciation as on the date of filing of the return. It is therefore contended that:

It is pertinent to note that the figures of loss or unabsorbed depreciation adopted for assessment years 1988-89, 1989-90 and 1990-91 are based on the orders finalised after the filing of return of income for assessment year 1995-96 and the same were reduced from the total income without verifying the applicability of provisions of Section 71(1) wherein the carry forward and set off of business loss is dealt with. Thus the escapement of income is due to omission on the part of the Assessee.

6. It is further contended that in case of escaped income the assessing officer is having jurisdiction as per the provisions of Section 147-149 of the Act. Further, it is stated that with prior approval of the superior, notice u/s 148 of the Act can be issued within the period of 7 to 10 years from the end of the assessment year, and therefore, the limitation period of four years is not an absolute bar, and therefore, the Petitioner cannot make a grievance that it is not within the time-limit. Aain a reference is made to Section 32 of the Act contending that Sub-section (2) of Section 32 speaks about current depreciation and remaining part which are not given full effect and can be added to the amount of allowance for depreciation for the following years subject to the provisions of Sub-section (2) of Section 72 and Sub-section (3) of Section 73. Therefore, it is contended that:

Submission of audited P&L a/c, balance sheet or notes to the accounts is not sufficient for determination of correct taxable income but the bifurcative details with all classification and nature of expenditure and receipts is absolutely

necessary, which are lacking due to paucity of time available and co-operation of the Assessee in general.

7. Further affidavit-in-reply is also filed by the Respondent, again contending that the Petitioner-Assessee company sold its spinning mills to M/s Ashima Syntex Ltd. as ongoing concern. However, the sale proceeds of the same were not offered for taxation by the Assessee in the statement of total income. The Assessee appended the note being the note forming part of the return which is quoted in detail and which is reproduced:

The Assessee has transferred its undertaking being a spinning mill to M/s Ashima Syntex Ltd., as a going concern and on as is where is and as it what is basis. It is submitted that the undertaking is sold as a going concern as a whole and therefore the sale consideration is not liable to tax and hence not included in the above computation.

Without prejudice to the above, it is submitted that even if the undertaking as a whole is considered as a capital asset, no tax liability arises as the indexed cost of acquisition is more than the sale consideration.

Therefore it is contended that the Assessee has omitted the offer of sale consideration for taxation as per the scheme of the Income Tax Act, 1961 under the head of "Capital gain" and therefore it is open to the Respondent to reopen the case. It is also stated that when any asset is transferred, capital gain is attributed to it and in the notice it has been stated that even if the undertaking as a whole is considered as capital asset, no tax liability arises, as the indexed cost of acquisition is more than the sale consideration. It is therefore contended that it cannot be said that there is no omission on part of the Petitioner" company and it is ill-founded. The Petitioner company has furnished wrong facts along with the statement of total income by stating that the sale of ongoing concern is not taxable as capital gain, and further contending that, if the undertaking is treated as a whole and is considered as capital asset, no tax liability arises as the indexed cost of acquisition is more than the sale consideration, which is misleading and not borne out of the records.

8. Learned Counsel Mr. J.P. Shah referred to the averments made in the petition with annexures, the reply affidavit and also the provisions of Section 147, and submitted that the notice issued u/s 148 (Annex. D) is beyond the period of limitation. He further emphasized that proviso to Section 147 of the Act clearly provides that no action shall be taken under this section after expiry of period of four years from the end of the relevant assessment years. He further submitted that unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on part of the Assessee to make return u/s 139 or in response to notice issued under Sub-section (1) of Section 142 or Section 148 of the Act or "to disclose fully and truly all material facts necessary for his assessment, for that assessment year", therefore, learned Counsel Mr. J.P. Shah submitted that can it be said that the Petitioner-Assessee company is guilty

of not disclosing fully and truly all the material and relevant record. He further emphasized referring to the affidavit-in-reply and submitted that as stated in the affidavit-in-reply filed by the Respondent it is stated that:

Submission of audited P&L a/c, balance sheet or notes to the accounts is not sufficient for determination of correct taxable income but the bifurcative details with all classification and nature of expenditure and receipts is absolutely necessary, which are lacking due to paucity of time available and co-operation of the Assessee in general.

9. Learned Counsel Mr. Shah pointedly emphasized this aspect and submitted that admittedly the audited accounts were submitted with the notes which clearly reflect and disclose about transfer of an undertaking with unabsorbed depreciation of the claim made. Therefore, it cannot be said that there was withholding of any material fact or could not have noticed. However, due to paucity of time or for whatever reason, it could not be handled to cause harassment to the Petitioner and therefore the present petition has been filed. Learned Counsel Mr. J.P. Shah strenuously submitted that when the law provides about the manner or subject to the fulfilment of the criteria, the powers could be exercised, and when such ground does not exist, the purported exercise of power for issuance of notice is bad and illegal and without jurisdiction, and therefore, the present petition may be allowed.

10. Learned Counsel Mr. J.P. Shah has emphasized referring to the reply affidavit as referred to hereinabove that, can it be said to be withholding or non-disclosure of any material fact. He emphasized and submitted that as it can be seen from the note, which has been quoted, it is clear that the Petitioner Assessee has clearly stated about the fact that the Assessee has transferred its undertaking being spinning mills to M/s Ashima Syntex Ltd. as an ongoing concern on "as is where is basis". He further submitted that when this note was appended, there is no question of any kind of surreptitious way of putting it or hiding anything as sought to be canvassed. The assessing officer had all the opportunity and had every occasion to verify this note along with the accounts and it could have noticed on this aspect. He also referred to Section 32 as well as Sub-section (2) and Sub-section (3) of Section 72, which speaks about the current depreciation and the fact about the allowance for depreciation for the following years.

11. Learned Counsel Mr. M.R. Bhatt appearing for the Respondent again referred to and relied upon the affidavit-in-reply and further affidavit-in-reply and submitted that since it was a case of transfer of an undertaking, the income had escaped and therefore, with the approval of the higher authorities, the notice has been issued as required under the law. For that purpose, he referred again to the provisions of Section 147 of the Act and submitted that there is no total bar that after period of four years, notice cannot be issued. He further emphasized and submitted that in certain contingencies, subject to the approval of higher authorities, notice could be issued and that is done in the present case also. He

emphasized that as provided in proviso to Section 147 of the Act, when there is failure to disclose fully and truly all material facts necessary for the assessment, again he submitted that though the Petitioner Assessee may have filed the return with the audited account and the notes, the real crux of the matter is the disclosure made and he referred to the part of the note, which is quoted in the petition with regard to the disclosure and submitted that it was a case with regard to transfer of an undertaking being the spinning mills to M/s Ashima Syntex Ltd., and therefore, since it was a transfer of an undertaking, it would invite liability of tax as capital gain. He submitted that the Petitioner Assessee has omitted the offer of sale consideration of taxation as per the scheme of the Act under the head "Capital gain". He submitted that before the Commissioner (Appeals), it was also referred to as "the liability for the short-term capital gain". Learned Counsel Mr. Bhatt submitted that the claim made by the Petitioner Assessee that, even if the undertaking as a whole is considered as a capital asset, no tax liability arises as the indexed cost of acquisition is more than the sale consideration, is misleading as there is no material made available for the same. He therefore submitted that the Honble apex court has held that when a business undertaking is transferred, it is a capital asset, for which, he placed reliance on the judgment referred to in the reply affidavit. Therefore it was submitted that the Assessee will have all the opportunity to satisfy the authorities and therefore, the court may not entertain the present petition at this stage. He emphasized and submitted that the Petitioner Assessee company will have all the opportunity to give the explanation which could be considered, and the department cannot be denied the right for reopening, when there is escapement of the income.

12. Learned senior standing counsel Mr. Manish R. Bhatt also referred to and relied upon the judgment of the Honble apex court in the case of Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay, and emphasized the observations made therein:

It is well-settled that the obligation of the Assessee is to disclose only primary facts and not inferential facts. If some material for the assessment lay embedded in the evidence which the revenue could have uncovered but did not, then it is the duty of the Assessee to bring it to the notice of the assessing authority

Referring to these observations, he submitted that the submissions made by full and true disclosure have to be considered in context of these observations that even if some other details are given, but it is for the Assessee to draw the attention and bring it to the notice of the assessing authority with regard to transfer of undertaking, which he has not done, and therefore, the present petition may not be entertained.

13. In view of the rival submissions, it is required to be considered whether the present petition can be entertained or not.

14. Before the rival submissions are appreciated and considered, few admitted

facts are required to be mentioned that the impugned notice u/s 148 of the Act has been issued after the period of four years. It is also an admitted fact that the Petitioner company has submitted the return of Income Tax along with necessary records like audited accounts as well as notes which are also quoted in the petition as well as in the reply affidavit. Therefore perusal of provisions of Section 147 of the Act would make it clear from the language in which it is couched, that after the period of four years, normally when the assessment u/s 143(3) of the Act has been made, it would not be allowed to be reopened. However, the word "unless" is used for the purpose of referring to some contingency where it could be reopened subject to fulfilment of the necessary requirement as stated therein. In other words, normally, when the assessment u/s 143(3) of the Act has been made, it would not be allowed to be reopened unless the criteria provided for allowing such reopening is fulfilled. Thus, from the perusal of the section, it is very clear that as a general rule, normally the assessment is not permitted to be reopened after the period of four years and at the same time, the department is not totally deprived of its right and the absolute ban has not been imposed, but such a right to reopen is further qualified subject to the fulfilment of the conditions referred to therein. Therefore, an exception is carved out to enable the department to have this recourse of reopening after four years subject to fulfilment of the required conditions or the criteria laid down. One of the conditions or the criteria is failure to disclose fully and truly all material facts which has been emphasized by both the sides. Again, whether there was any such failure to disclose fully and truly all material facts will depend upon facts of each case and there cannot be any set norms or the parameters to decide and it will have to be decided with reference to the facts and material in each case depending upon the sound discretion to be exercised by the authority concerned. At the same time, while exercising such discretion, if it is resorted subjectively, without any basis or foundation or the material, it will be subject to the scrutiny and liable to be set aside. In other words, before such power of reopening beyond the period of four years could be resorted to, it is obligatory for the authority or the assessing officer to justify by providing a basis or foundation for exercise of such power which has been qualified by the statute itself. The legislature, being conscious of this aspect, has therefore, while balancing the right of the Assessee on the one hand and the department on the other hand, specifically used the word unless, which again provides that unless these conditions are specified (sic-satisfied), the powers of reopening cannot be resorted. Therefore, making it imperative that before such powers could be resorted to, the criteria or the conditions have to be fulfilled namely the foundation on the basis of some material facts have to be established prima facie with regard to the fact that there was a failure to disclose fully and truly all the material facts. It is only in such circumstances, the exercise of power would be justified. The word "unless" as provided in the Strouds Judicial Dictionary is defined as under:

Unless the contrary is shown" (R.S.C., order 10, r. 1(3)(a)). These words shall be

given their full meaning and not restricted to mean only unless the contrary is shown by the Defendant (*Abu Dhabi Helicopters v. International Aeradio* (1986) 1 All ER 395; *Hodgson and Anr. v. Hart District Council* (1986) 1 All ER 400).

In other words, normally, the power of reopening would not be exercised after 4 years as a rule unless the contrary is shown based on the material or the basis as fulfilment of the conditions provided in Section 143(3). Unless such criteria or conditions are fulfilled, the powers cannot be resorted to.

15. It is admittedly stated that audited books of accounts like P&L a/c, balance sheet along with the notes were submitted and what was necessary was the bifurcative details with all classification and nature of expenditure and receipts, which could have been called for by the assessing officer, and therefore, without calling for such record, when there is a specific disclosure in the form of note regarding transfer of an undertaking, specifically stated (sic) that the Petitioner cannot be said to be guilty of not making full and true disclosure as sought to be canvassed. Reliance placed by Mr. Bhatt on the observations of the Honble apex court in the case of *Indo-Aden Salt Mfg. & Trading Co. (P) Ltd. v. CIT* (supra), is also misconceived as the facts were totally different. In that case what was sought to be claimed was the depreciation on the masonry work, salt work and the depreciation for the salt work is higher than the masonry work which was sought to be added to the same for getting the benefit of higher depreciation and in that context, the observations have been made that if some material for the assessment lay embedded in the evidence which the revenue could have uncovered but did not, then it is the duty of the Assessee to bring it to the notice of the assessing authority. In the facts of the case that is not so as there was no evidence required with regard to the disclosure made for transfer of an undertaking and if any clarification was required thereof with regard to any bifurcation or classification, the assessing officer could have called for the said clarification once the Assessee had made the declaration. Therefore, in the facts of this case, it cannot be said that after such disclosure the assessing authority may not have noticed the necessary material and relevant facts. Further, it cannot be said that there was no disclosure of primary facts which has caused the escapement of the income.

16. The another facet of the argument with regard to the alternative remedy being available, is also required to be appreciated. Though the contention has been raised that the Petitioner has a remedy by way of an appeal before the Commissioner (Appeals) where all points could be considered, is also misconceived in light of the fact that if the purported exercise of jurisdiction of the authority is bad in law, then the availability of the alternative remedy is no bar to invoke the jurisdiction of this Court. If this is accepted, it would amount to accepting the exercise of power u/s 147 of the Act and issuance of notice u/s 148 of the Act as valid justification of contention between the parties. In other words if the Petitioner is relegated to the alternative remedy, it would validate the exercise of authority or jurisdiction in issuance of notice u/s 148 of the Act (at

Annex. D) and what it talks about, is further procedure, or the opportunity could be afforded to the Petitioner Assessee, but the notice would remain valid which is challenged in the present petition in light of the provisions of the statute. Therefore, this submission is also misconceived.

17. In the circumstances, we are of the opinion that the present petition deserves to be allowed and accordingly stands allowed.

18. The notice at Annex. D issued in exercise of powers u/s 148 of the Act is hereby quashed and set aside. Rule is made absolute accordingly. No order as to costs.