
(2021) 10 OHC CK 0065

In the Orissa High Court

Case No : Writ Petition (Civil) No. 14603 of 2014

M/s. Sri Jagannath Promoters & Builders, Giri Road
Berhampur, Ganjam

APPELLANT

Vs

Deputy Commissioner Of Income Tax, Berhampur Circle,
Berhampur, Ganjam And Others

RESPONDENT

Date of Decision : 26-10-2021

Acts Referred:

Income Tax Act, 1961 — Section 142(1), 143(2), 143(3), 147, 148

Citation : (2021) 10 OHC CK 0065

Hon'ble Judges : Dr. S. Muralidhar, CJ; B.P. Routray, J

Bench : Division Bench

Advocate : Pranaya Kumar Harichandan, T.K. Satapathy

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, CJ.

1. The challenge in this writ petition is to a notice dated 16th September 2013 issued by the Deputy Commissioner of Income Tax, Berhampur Circle, Berhampur (Opposite Party No.1) under Section 148 of the Income Tax Act, 1961 (Act) seeking to reopen the assessment of the Petitioner for the assessment year (AY) 2009-10.

2. While issuing notice in the present petition on 14th August 2014, it was directed by this Court, as an interim measure, the reassessment proceeding under Section 147 of the Act should remain stayed till disposal of the writ petition. That order has continued since.

3. The background facts are that the Petitioner is a partnership firm. It filed its return for the AY in question on 16th November 2009 disclosing a total income of Rs.15,30,110/-. The return was picked up for scrutiny. In response to the notices under Sections 142(1) and 143 (2) of the Act, the Petitioner appeared before the Assistant Commissioner, Income Tax (ACIT) [hereafter the Assessing Officer

(AO)], Berhampur Circle, Berhampur and produced its books of account including cashbook ledger, audit report, balance sheet and profit and loss (P & L) account. The AO, after examining the documents, issued on 19th October 2011 a detailed questionnaire to the Assessee which again the Assessee responded to. On 5th December 2011, the AO passed the assessment order under Section 143 (3) of the Act determining the total taxable income as Rs.18,43,708/-. Accordingly, the tax payable was determined as Rs.1,39,054/-. In the assessment order, the AO disallowed Rs.3,13,600/- on account of sundry creditors.

4. The appeal filed by the Assessee against the aforementioned assessment order was allowed by the Commissioner of Income Tax (Appeals) (CITA) by order dated 17th July, 2013. The aforementioned addition was deleted. The said order attained finality.

5. On 16th September 2013, the impugned notice was issued by Opposite Party No.1 under Section 148 of the Act stating inter alia as under:

"Whereas I have reasons to believe that your income chargeable to tax for the assessment year 2009-10 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

2. I, therefore, propose to for the said assessment year and I hereby require you to deliver to me within 30 days from the service of this notice, a return in the prescribed form of your income for the said assessment year."

6. The Petitioner then sought the reasons for reopening of the assessment. By letter dated 3rd July 2014, Opposite Party No.1 supplied the following reasons for reopening of the assessment:

"On perusal of Profit & Loss account, it is seen that the assessee has claimed deduction of Rs.48,183/- on account of loss on sale of assets. As per the provisions of Income Tax Act, 1961, any loss incurred on sale of assets can be set off against the short term as well as the long-term capital gains. Since, the loss occurred on sale of assets is not a revenue expenditure, the same is not deductible from the business income.

In the balance sheet, the assessee has claimed Rs.7,16,930/- as assets under the heads "Taxes and Duties" which includes income tax arrears, Sales tax demand and income tax demand of Rs.1,70,000/-, Rs.50,000/- and Rs.90,000/- respectively. The assessee has claimed these amounts as assets which is not allowable as assets as these demands are liabilities in nature and required to be shown in liabilities side of the balance sheet."

7. Thereafter, the present petition was filed in response to which no counter affidavit has been filed till date by the Department. However, Mr. T.K. Satapathy, learned Senior Standing Counsel for the Department has filed a detailed written note of submissions. Likewise, Mr. P.K. Harichandan, learned counsel for the Petitioner too has filed a written note of submissions.

8. The law in relation to the reopening of the assessment has been explained in detail in a number of decisions of the Supreme Court of India. Section 147 of the Act itself has undergone changes over the years. The legal position emerging on an analysis of the decisions and the legislative changes has been summarized succinctly by the Supreme Court of India in *Commissioner of Income Tax, Delhi v. Kelvinator of India Limited* (2010) 2 SCC 723 as under:

"6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe",

Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.--A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its

omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

(emphasis supplied)

9. The short question, therefore, to be determined in the present case is whether the reopening of the assessment was based on mere "change of opinion" as contended by the Assessee or was there new material which could not have been examined earlier and which justified the reopening of the assessment.

10. Mr. Satapathy, learned Senior Standing Counsel for the Department has relied on the following observation of the Gujarat High Court in *Gruh Finance Ltd. v. Joint Commissioner of Income Tax* (2000) 243 ITR 482 Guj:

"If conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making assessment and again different or divergent view is sought, it would tantamount to "change of opinion", whereas, in the case of existing material, no conscious attempt has been made, it would tantamount to mistake in not considering the relevant point or proposition and it would not be a "change of opinion"."

11. Reliance is also placed on the decision of the Delhi High Court in *Consolidated Photo and Finvest Ltd. v. Asst. Commissioner of Income Tax* (2006) 281 ITR 394 (Delhi) wherein it has been held as under:

"19. In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the assessing officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the assessing officer proposes to examine in the course of re-assessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the assessing officer and had been held in favor of the assessed is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is Page 436 silent, all possible angles and aspects of a controversy had been examined and determined by the

assessing officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening computed assessments would be applicable only to situations where the assessing officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the assessing officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the assessing officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

12. However, as against the aforementioned judgments of the two High Courts, pronounced in 2000 and 2006, it is the later judgment of Supreme Court in *Kelvinator of India Limited* pronounced in 2010 that holds the field. That judgment requires that there has to be some new material to justify the reopening of the assessment. It cannot be based on a mere change of opinion on the basis of the same materials.

13. In the present case, the reasons for reopening the assessment do not point to any new material that was available with the Department. What appears to have happened is that the same material viz., the accounts produced by the Assessee were re-examined and a fresh opinion was arrived at by the Opposite Party No.1 regarding the claim of the deduction of Rs.48,183/- on account of the loss of sale of assets. This had already been disclosed in the detailed accounts filed by the Assessee. In fact, a questionnaire had been issued by the AO in the course of the original assessment proceedings to the Assessee which was responded to by the Assessee. In other words, there was conscious application of mind by the AO to the said materials. Therefore, the inevitable conclusion as far as the present case is concerned is that the 'reason to believe' of Opposite Party No.1 that income for the AY in question had escaped assessment is based on a mere 'change of opinion'.

14. In this context, the following observations of the Delhi High Court in *Jindal Photo Films Ltd. v. the Deputy Commissioner of Income Tax* (1998) 234 ITR 170 (Del) are relevant:

"Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again different High Courts of the

country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the Assesses, the same could not be brought to tax by reopening the assessment merely on account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction."

"Though he has used the phrase 'reason to believe' in his order, admittedly, between the date of orders of assessment sought to be reopened and the date of forming of opinion by the ITO nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same assessing officer to the same set of facts."

15. Likewise, the Bombay High Court in *ICICI Securities Ltd. v. Asstt. Commissioner of Income Tax 3 (2)*, Mumbai in Writ Petition No.1919 of 2006 disposed of on 22nd August 2006 has held as under:

"In the facts of the present case, there is nothing new which has come to the notice of the revenue. The accounts had been furnished by the Petitioner when called upon. Thereafter the assessment was completed under section 143 (3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to section 147 of the Income Tax Act"

16. It may also be mentioned that the Civil Appeal No.5960 of 2012 filed by the Department against the aforementioned judgment of the Bombay High Court was dismissed by the Supreme Court on 22nd August 2012 in *Asstt. Commissioner of Income Tax, Mumbai and Ors v. ICICI Securities Primary Dealership Ltd.* wherein it was observed as under:

"The Assessee had disclosed full details in the Return of Income in the matter of its dealing in stocks and shares. According to the Assessee, the loss incurred was a business loss, whereas, according to the Revenue, the loss incurred was a speculative loss. Rejection of the objections of the Assessee to the re-opening of the assessment by the Assessing Officer vide his Order 23rd June, 2006, is clearly a change of opinion. In the circumstances, we are of the view that the order re-opening the assessment was not maintainable."

17. The threshold set by the Supreme Court of India in *Kelvinator of India Limited* to justify the reopening of the assessment has not been met in the present case. Consequently, the Court is unable to sustain the reopening of the assessment. Accordingly, for the aforementioned reasons, the impugned notice and all proceedings of the Department pursuant thereto stand hereby quashed.

18. The writ petition is allowed in the above terms, but in the circumstances, with no order as to costs.

19. An urgent certified copy of this judgment be granted as per rules.