

(2011) 07 P&H CK 0228

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal No. 869 of 2010 (A.Y. 2000-01)

Om Sons International

APPELLANT

Vs

CIT

RESPONDENT

Date of Decision : 12-07-2011

Acts Referred:

Finance Act, 2008 — Section 292BB

Income Tax Act, 1961 — Section 143(1), 143(3), 147, 148, 260A

Citation : (2011) 07 P&H CK 0228

Hon'ble Judges : Adarsh Kumar Goel, Acting C.J.;Ajay Kumar Mittal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ajay Kumar Mittal, J.—This appeal u/s 260A of the IT Act, 1961 (for short "the Act") has been filed by the assessee against the order dt. 16th Oct., 2009, passed by the income tax Appellate Tribunal, Amritsar Bench, Amritsar (in short "the Tribunal") in ITA No. 332/Asr/2009, relating to the asst. yr. 2000-01.

2. The following substantial questions of law have been claimed for determination of this Court :

(i) Whether on the facts and in the circumstances of the case the action initiated by respondent No. 3 in issuing the notice u/s 148 of the IT Act, 1961 and the consequential passing of the orders u/s 143(3) is bad in law in view of the fact that the same have been issued/taken without proper service of notice u/s 148 which is a basic condition for starting of any proceedings under any enabling provisions of the IT Act, 1961 and also the Tribunal has erred in not adjudicating upon the said issue though specifically taken as per ground No. 3 ?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the very issuance of notice u/s 148 of the IT Act, 1961 by the authorities below, as valid without appreciating the fact and the trite law that law applicable on the date of filing of the IT return is to be seen than the

subsequent events or judgments ?

(iii) Whether on the facts arid in the circumstances of the case, the Tribunal was justified in confirming the very issuance of notice u/s 148 of the IT Act, 1961 by the authorities below, as valid without appreciating the fact and the trite law that there was no concealment or wrong claim of deduction by the appellant rather it was as per law applicable on the date of filing of the IT return ?

(iv) Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the very issuance of notice u/s 148 of the IT Act, 1961 by the authorities below, as valid without appreciating the fact and the trite law that there was no concealment or wrong claim of deduction by the appellant rather it was as per law applicable on the date of filing of the IT return and the reopening on the basis of retrospective amendment that too beyond four years from the end of the assessment year is bad in law ?

(v) Whether on the facts and in the circumstances of the case, the Tribunal was justified in concurring with the reason recorded by the AO ?

(vi) Whether on the facts arid in the circumstances of the case, the findings of Tribunal are perverse and against the evidence on record, thus, unsustainable in law ?

(vii) Whether Tribunal has misdirected itself in being influenced by irrelevant facts and applying erroneous criteria while deciding the issue for claiming deduction u/s 80HHC of the IT Act, 1961 ?

3. The facts, in brief, necessary for adjudication as narrated in the appeal, are that the assessee is a partnership firm. It is engaged in the business of manufacturing, assembling, processing and exporting goods to various parts of the world. The assessee filed return for the assessment year in question on 31st Oct., 2000 declaring total income of Rs. 11,05,920. The income" also included deduction of Rs. 1,18,10,594" claimed" under" section " 80HHC" of the" Act." The" return" was processed u/s 143(1) on 28th March, 2002. However, reassessment proceedings u/s 147/148 of the Act were initiated. The AO vide order dt. 26th Dec, 2007 computed the taxable income,-of the assessee at Rs. 1,29,16,510. The appeal carried by the assessee to the Commissioner of income tax (Appeal) [for short "the CIT(A)"], was dismissed vide order dt. 11th May, 2009.

4. The appellant-assessee filed appeal before the Tribunal challenging the action of the AO in reopening of the assessment under sub section 147/148 of the Act, which was rejected vide order dt. 16th Oct., 2009.

5. This is how the assessee has preferred the instant appeal.

6. We have heard learned counsel for the appellant and perused the record.

7. The first substantial question of law claimed by the assessee relates to the validity of proceedings u/s 148 and the consequential order passed u/s 143(3) in

the absence of proper service of such notice u/s 148 of the Act.

8. It would be expedient to refer to section 292BB of the Act. section 292BB had been inserted by Finance Act, 2008 w.e.f. 1st April, 2008 whereby presumption is made relating to service of notice on the assessee in respect of assessment and reassessment proceedings. The scope and applicability of the aforesaid provision on pending proceedings came up for consideration in CIT v. Panchvatt Motors (P) Ltd., IT Appeal No. 292 of 2008 decided on 3rd May, 2011 [reported at (2011) 343 CTR (P&H) 189 : (2011) 59 DTR (P&H) 289 -Ed.], wherein it was held as under :

section 292BB of the Act was inserted by Finance Act, 2008 w.e.f. 1st April, 2008. It reads thus :

292BB : Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of the Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was't

(a) not served upon him; or

(b) not served upon him in time; or

(c) served upon him in an improper manner :

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.

A presumption has been raised under the said provision relating to service" of" notice" upon" the" assessee" in" respect" of" assessment" or reassessment proceedings. According to this provision, where an assessee appears in any proceedings or cooperates in any enquiry relating to assessment or reassessment proceedings, it shall be presumed that the assessee has been validly served and it shall not be open to the assessee to object that the notice was not served upon him or was not served in time or was served upon him in an improper manner. However, an exception to the aforesaid presumption has been made in a case where such objection has been raised before completion of assessment or reassessment. The provision has been made effective from 1st April, 2008 and, therefore, shall apply to all pending proceedings. The CBDT issued Circular No. 1 of 2009 dt. 27th March, 2009 {(2009) 222 CTR (St) 69 : (2009) 310ITR (St) 42] giving explanatory notes on the provisions relating to direct taxes contained in Finance Act, 2008. Clause 42.7 (at p. 86 of the report) is relevant which relates to applicability of this provision and reads thus :

42.7 Applicability - This amendment has been made applicable w.e.f. 1st April, 2008. This means that the provision of new- section 292BB shall apply in all

proceedings which are pending on 1st April, 2008.

9. Accordingly, such objection having been raised for the first time before this Court do not give any valid justification for challenging the reassessment proceedings on that ground. Accordingly, question No. 1 is held not to be a substantial question of law calling for consideration of this Court.

10. Adverting to questions mentioned at 2, 3 and 4 above, claimed by the assessee, suffice it to notice that the reassessment proceedings were questioned by the assessee before the Tribunal wherein it was contended that the AO had no material to take recourse to reassessment proceedings and the same was based on imagination, suspicion and change of opinion. The contention of the assessee was repelled by the Tribunal by noticing as under :

We have carefully perused the relevant facts of the case, rival submissions and the order of the authorities below. We find that the return of income was processed u/s 143(1) (a) of the Act. Needless to emphasise that under summary scheme, the processing is made even by the ministerial staff acknowledgment is treated as intimation, which indicates refundable or payable amount. The AO is not competent to make any enquiry under such summary scheme as Government of India has reposed full faith in the assessee and introduced the said Scheme. Therefore, to contend that there is change of opinion, in such circumstances, is incomprehensible. In our considered view, change of opinion, presupposes existence of opinion. So, in the summary scheme, at the time of processing the return u/s 143(1) of the Act, there is no formation of opinion. Hence, the question of change of opinion, does not arise. Therefore, the contention that the case has been reopened on change of opinion is patently erroneous and contrary to the statutory provisions contained u/s 143(1) of the Act. The fact-situation of the present case is squarely governed by the ratio of the decision, in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., . The relevant part of the decision is reproduced hereunder :

The Supreme Court in Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., has reiterated some of the first principles relating to reassessment. In this case, the AOs jurisdiction was questioned on the ground that the AO already having issue an intimation u/s 143(1) of the Act, could not issue reassessment notice on matter disclosed along with return and such notice should be taken as one prompted by change of opinion not permitted by law. The Supreme Court found that prima facie adjustment u/s 143(l)(a) (now deleted), is no assessment. In fact, in this case, such intimation was issued on 26th Nov., 2001, after intimation u/s 143(l)(a) was replaced w.e.f. 1st June, 1999 by a different intimation u/s 143(1), which did not permit even such adjustment. There can be no change of opinion inferable, where no opinion could have been formed at the time of intimation.

The Supreme Court held, all that is required for issue of notice u/s 147 is "reason

to believe" that some income has escaped assessment in following words :

The word reason in the phrase reason to believe would mean cause or justification. If the AO has cause or justification to know or suppose that income had escaped assessment it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. The function of the AO is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers as observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd. Vs. I.T.O., Nagpur*, , for initiation of action u/s 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief, whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction [see *INCOME TAX OFFICER Vs. SELECTED DALURBAND COAL CO. (P) LTD.*, ; *Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others*, .

11. Learned counsel for the assessee was unable to demonstrate that the aforesaid conclusion of the Tribunal was perverse or against law in any manner. In the absence thereof, question Nos. 2 to 4 as claimed by the assessee do not arise from the order of the Tribunal for consideration of this Court.

12. Question Nos. 5, 6 and 7 being general in nature cannot be held to be substantial questions of law that may require this Court to give any opinion thereon.

13. In all fairness to learned counsel for the assessee, the following judgments whereupon reliance was placed by him are noticed here :

(i) *Commissioner of Income Tax Vs. Hindustan Electro Graphites Ltd.*, ;

(ii) *Commissioner of Income Tax Vs. Max India Ltd.*, ;

(iii) *Addl. Commissioner of Income Tax Vs. Prem Kumar Rastogi*, .

14. A perusal of the aforesaid judgments shows that the same were on individual fact situation involved therein and thus, have no applicability to the facts involved in the present appeal. Accordingly the said judgments do not advance the case of the assessee.

15. In view of the above, there is no merit in the appeal and the same is accordingly dismissed.