
(1994) 02 CAL CK 0029
In the Calcutta High Court
Case No : Matter No. Nil of 1993

Orient Beverages Ltd.

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 21-02-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 143, 143(3), 147, 148, 153

Citation : (1994) 122 CTR 126 : (1994) 208 ITR 509 : (1995) 78 TAXMAN 125

Hon'ble Judges : Ajit K. Sengupta, J

Bench : Single Bench

Advocate : R.K. Murarka, for the Appellant; Rupen Mitra, for the Respondent

Judgement

Ajit K. Sengupta, J.—In this application under Article 226 of the Constitution, the petitioner has challenged the notice dated June 26, 1990, issued by the Assistant Commissioner of Income Tax u/s 148 of the Income Tax Act, 1961, for the assessment year 1983-84. In the affidavit-in-opposition the following reasons for reopening the assessment have been disclosed :

"The original assessment was made in this case on December 15, 1986, on a total loss of Rs. 2,14,025 only. In the assessment, there were wrong deductions allowed for provision of interest of Rs. 5,19,486 on unpaid municipal tax liability as debited prior to the same being quantified/levied by the Calcutta Corporation. Add. excise duty for Rs. 11,34,704 was also wrongly allowed as deduction, although such liability was ascertained subsequent to 1983-84 assessment year. Thirdly, expenses of Rs. 12,46,235 only relating to earlier years but merged with the claim for current expenses (as certified by the relevant audit report in Schedule "E", serial No. 11 thereof) was wrongly allowed in the assessment, although the assessee followed the mercantile system of accounting generally. For this mistake, there was underassessment of income to the extent of Rs. 29,00,425 only within the meaning of Section 147. I, therefore, propose to reopen the assessment for 1983-84 assessment year in this case u/s 148 of the

Income Tax Act and your kind approval is solicited in this regard.

(sd.) (S.K. Nandy), Assistant Commissioner of Income Tax, C.C-2(3), Calcutta."

2. It appears from the records produced before this court that the sanction of the Chief Commissioner of Income Tax was obtained before issuance of the said impugned notice.

3. At the hearing, Mr. Murarka, learned advocate for the petitioner, has contended that in this case, the reopening could not have been made in view of the provisions of Section 147 which came into force with effect from April 1, 1989. It is his contention that the notice is barred by limitation u/s 147 as it stood at the material time which is as follows ;

"147. Income escaping assessment--If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 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 Sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under Sub-section (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, 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 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 his assessment for that assessment year."

4. The proviso to Section 147 is material for our purpose. It will be evident from the said proviso that if an assessment is made u/s 143(3) of the Act for the relevant assessment year, no action can be taken for reopening of such assessment 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 disclose fully and truly all material facts necessary for the assessment year. There is no dispute that the assessment in this case was made u/s 143(3) of the Income Tax Act, 1961. The only question is, therefore, whether the petitioner at the time of original assessment disclosed fully and truly all material facts necessary for its assessment for the assessment year in question. The reasons which have been recorded have been already extracted. It will be evident from the said recorded reasons that it is not the case of the Assessing Officer that any income escaped assessment on account of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the

assessment year 1983-84. The tenor of the reasons recorded indicates that the Income Tax Officer who made the assessment made a mistake in allowing certain deductions which according to the Assessing Officer resulted in underassessment and would constitute grounds for reopening the assessment. But the question is whether such underassessment was due to the failure on the part of the assessee to disclose fully and truly all material facts or not. From the order of assessment and from the averments made in the affidavit-in-opposition it will be evident that all particulars had been shown and/or disclosed by the assessee in the course of the original assessment.

5. The notice impugned is dated June 26, 1990, and the assessment year involved is 1983-84 and, accordingly, the notice should have been issued on or before March 31, 1988, for reassessing the escaped income or to rectify underassessment which had occurred in the original assessment. But since the notice has been issued after the expiry of four years from the end of the relevant assessment year, the Assessing Officer has no jurisdiction to issue the impugned notice in the absence of any material showing omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. It may be mentioned that prior to the issuance of the notice u/s 148, a notice u/s 154 was issued for the assessment year 1983-84 proposing rectification of the items in respect whereof assessment was proposed to be reopened by virtue of the impugned notice. Ultimately, that proceeding was dropped, as there was no mistake apparent on the face of the records. Thereafter, the impugned notice u/s 148 was issued.

6. It has been contended by Mr. Rupendra Nath Mitra, learned advocate for the respondents, that in this case, the law as in force on April 1, 1983, will apply and not this new law which came in the statute book with effect from April 1, 1989. According to him, since the assessment year is 1983-84 one has to look at the law as it stood during the relevant assessment year. He has drawn my attention to a judgment in the case of Commissioner of Income Tax, Lucknow Vs. M/s. Onkar Saran and Sons, .

7. In that case the Supreme Court has held that the law prevailing on the date of the original returns would apply in connection with penalty. The reason is that Section 271(1)(c) is attracted in respect of the concealment in this return already filed. Accordingly, the date of filing of the return is the crucial date and not the date when the penalty proceedings are initiated or completed. This decision does not help the respondents. Even assuming that the law prevailing at the relevant time is applicable, still then the Income Tax Officer has no jurisdiction to issue notice u/s 148 in respect of the assessment year 1983-84 after the expiry of four years unless there was any omission or failure on the part of the assessee to disclose fully and truly all material facts in connection with the assessment which is not the case here.

8. Mr. Mitra also relied on the judgment in M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another, for the proposition that the court is

not concerned with the sufficiency of the Income Tax Officer's belief. That being not justiciable, the Supreme Court allowed the Assessing Officer to reopen the assessment for investigating the genuineness of a transaction which could have been done at the time of original assessment.

9. Here, it is not the case of the Revenue that the assessee did not disclose any material facts or claimed certain transactions as genuine which were subsequently found to be not genuine.

10. Mr. Mitra has also submitted that since the assessee has an alternative remedy he should have availed of such remedy and the court should not interfere in such a case. In support of his contention, he has relied on the note of the Supreme Court in *Federal Bank Ltd. Vs. Commissioner of Income Tax*, where it has been held as follows :

"31-8-1989 : Their Lordships M.N. Venkatachaliah, N.D. Ojha and J.S. Verma JJ. dismissed the SLP of the assessee, a construction contractor, against the judgment dated June 1, 1987, of a Division Bench of the Kerala High Court in W. A. No. 542 of 1984 (which was against the judgment of a single judge dated November 7, 1984, in Original Petition No, 9486 of 1984) whereby the High Court dismissed the assessee's writ petition and writ appeal seeking to quash reassessment notices issued on the basis of the Departmental valuer's valuation of the assessee's construction, on the ground that it was open to the assessee to raise all its objections in regular appeal proceedings : *M.P. Joseph v. ITO: S. L. P. (Civil) No. 9283 of 1989.*"

11. From the note it appears that the Kerala High Court dismissed the writ application and the writ appeal giving liberty to the assessee to raise all objections in regular appeal proceedings in respect of notice issued on the basis of the Departmental valuer's valuation. But whether the court has jurisdiction or not was not decided in that case as it appears from the said note of the Supreme Court. Whether in a case the writ court should exercise jurisdiction shall depend on its facts. Where initiation of proceedings is palpably devoid of jurisdiction either for bar of limitation of time or the conditions precedent being absent, it is not fair to allow the Revenue authority to proceed with such invalid exercise of jurisdiction specially when remedy in appeal is a long drawn-out process.

12. It is now well-settled that the Income Tax Officer cannot assume jurisdiction to reopen an assessment wrongly unless the conditions for reopening are satisfied. The assessee can move this court and challenge the jurisdiction of the Income Tax Officer in issuing notice u/s 148 which has been done in this particular case where the condition precedent has not been fulfilled. The question of pursuing the alternative remedy does not arise at all.

13. For the reasons aforesaid, this application is allowed. The impugned notice dated May 26, 1990, u/s 148 of the Income Tax Act issued by the Assistant Commissioner of Income Tax for the assessment year 1983-84 is set aside and quashed.

14. Mr. Rupen Mitra asked for stay of the operation of the order. Stay is granted for three weeks. Interim order already made will continue in the meantime.

15. All parties are to act on a signed copy of the minutes of the operative part of this judgment/order upon the usual undertaking.