

(1991) 03 AHC CK 0113

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 152 of 1989

Ram Swarup Cold Storage and Allied Industries

APPELLANT

Vs

Assistant Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 04-03-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 147, 148, 69, 69B

Citation : (1991) 192 ITR 537 : (1991) 59 TAXMAN 245

Hon'ble Judges : B.P. Jeevan Reddy, C.J.; R.A. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Jeevan Reddy, C.J.—This writ petition is directed against a notice issued u/s 148 of the Income Tax Act on July 22, 1988, with respect to the assessment year 1980-81. The petitioner is a partnership-firm constituted under a deed of partnership dated June 22, 1978. It was observing the calendar year as the "previous year". During the year 1979 (assessment year 1980-81), the petitioner commenced construction and installation of a cold storage plant. The construction went on till March, 1980. During the year 1979, the petitioner did not have any income but only investment in the setting up of the said plant. For that reason, the petitioner says, he did not file a return for the assessment year 1980-81.

2. The return for the assessment year 1981-82 was filed on September 14, 1981, in response to a notice u/s 139(2) of the Act. Thereafter, on October 16, 1981, the petitioner also filed a nit return for the assessment year 1980-81. Along with this return, the petitioner says, he filed a number of documents, showing particulars of the investment during the relevant previous year. On February 15, 1983, an order of assessment was made for this assessment year (assessment year 1980-81) u/s 143(3) of the Act. In the assessment order, the Assistant Commissioner of Income Tax observed that since the construction of

the cold storage plant was completed during the previous year relevant to the assessment year 1981-82, the said investment will be considered in that year, The "nil" income return was, accordingly, accepted.

3. The assessment for the assessment year 1981-82 was completed u/s 143(3) of the Act on March 17, 1986. In this assessment order, the Assistant Commissioner observed that, during the assessment proceedings for the assessment year 1981-82, the assessee had submitted a valuation report, prepared by an approved valuer, showing that the construction of the cold storage plant was commenced in January, 1979, and completed in March, 1980, and disclosing investment thereon at Rs. 9,13,900. The matter was referred to the Department Valuation Cell, which valued the said construction at Rs. 20,80,000 up to March 31, 1980. A copy of the report of the Departmental Valuation Cell was sent to the assessee and his objections, submitted on more than one occasion, were duly considered and the figure of investment was revised to Rs. 18,52,470 from Rs. 20,80,000. Even so, there is a vast difference. According to Section 69 of the Act, unexplained investments made during the preceding financial year have to be taken into account in the relevant assessment year. Accordingly, the said unexplained investment has to be included in the assessment for the assessment, year 1980-81. Necessary remedial action would, therefore, have to be taken for including the said income in that assessment year.

4. It is in pursuance of the above observations made in the assessment order relating to the assessment year 1981-82 that the impugned notice u/s 148 was issued for the assessment year 1980-81. The notice is dated July 22, 1988, which the petitioner says was served upon him on August 9, 1988. The petitioner says that, since the notice did not contain any reasons, nor did it indicate to which clause of Section 147 it was relatable, it wrote a letter on August 17, 1988, to the Assistant Commissioner, calling upon him to intimate the information in his possession on the basis of which he issued the impugned notice and also calling upon him to clarify whether the notice was in terms of Clause (a) or Clause (b) of Section 147. The petitioner says that he did not receive any reply to his letter. All the same, the petitioner filed a nil return, objecting to the impugned notice. The petitioner complains that, without passing any orders upon his letter, the Assistant Commissioner issued a notice u/s 143(2) on December 26, 1988. It is then that the petitioner approached this court by way of this writ petition.

5. The writ petition was entertained and the respondents were called upon to file counter-affidavits which they have done. The petitioner has also filed a rejoinder-affidavit and we have heard learned counsel for the parties.

6. In the counter-affidavit filed on behalf of the respondents, it has been stated that, before issuing the impugned notice, reasons were duly recorded and the approval of the Commissioner was also obtained therefore. The Commissioner accorded the permission through his letter dated June 16, 1988. In paragraph 10

of the counter-affidavit, the reasons recorded by the Assistant Commissioner are set out. The first paragraph of the "Reasons" reads :

"Return for the assessment year 1980-81 had been filed showing income at "Nil". At the time of the hearing of the case, it transpired that the appellant had constructed the cold storage building and also installed machinery in it. The appellant was required to show the investment in it. The appellant had given in writing that since the building is still under construction the investment in the building should be considered in the year in which the construction is completed."

7. Thereafter, particulars regarding reference to the Department Valuation Cell are referred to and then it is stated that, from the said circumstances, it is clear that the assessee has not made full disclosure of the investment made by him and that his books of account are not correctly maintained. It is observed that an amount of Rs. 9,38,570, the undisclosed investment, is liable to be treated as the assessee's income for the assessment year 1980-81 under Sections 69 and 69B. It is asserted that the impugned notices were issued on the first respondent being fully satisfied that income has escaped assessment on account of the assessee's failure to make a full and true disclosure of all the material facts.

8. Before proceeding further, it would be appropriate, at this juncture, to refer to the assessment order for the assessment year 1980-81, It is dated December 15, 1983. It reads :

"The assessee runs a cold storage. Income has been shown at Rs. Nil because it was the construction period. The construction of the cold storage buildings was completed during the assessment year 1981-82. As such the same will be considered in that year.

2. Balance-sheet filed tallies at Rs. 10,38,697. The initial investment made by Smt. Sanju Agarwal at Rs. 50,000 has come as under :

Rs. 25,000 withdrawn from Messrs. Swarup Traders.

Rs. 25,000 withdrawn from her account with Messrs. Vishnu Swarup Mahendra Swarup.

Shri Mahendra Swarup Agarwal invested Rs. 50,000 after withdrawing the same from Swarup Cold Storage, Aishabagh Waterworks Road, Lucknow ; copy of account has been filed. Shri Promod Swarup invested Rs. 50,000 after withdrawing the same from Messrs. Swarup Cold Storage Aishabagh Waterworks Road, Lucknow ; copy of his account has been furnished. Shri Virendra Swarup Agarwal invested Rs. 50,000 after withdrawing the same from Messrs. Swarup Gold Storage, Aishabagh Waterworks Road, Lucknow. There is a deposit of Rs. 25,000 from Messrs. Swarup Brothers which is regularly assessed to tax in this ward. There is a loan of Rs. 5 lacs from the Bank of Baroda for which a bank certificate has been furnished. The deposit of Rs. 7,900 in the name of Swarup Agro Machinery has also been explained satisfactorily because this is assessed to tax in D-ward, Bareilly. Various copies of accounts have been furnished and

placed on record. As there was no business activity, assessment is completed on Nil income in the status of a registered firm. Claim for registration has been allowed, vide my separate order of even date.

Issue notice of demand."

9. We must mention another fact before dealing with the merits of the case. The "reasons" set out in the counter-affidavit refer to a request made by the petitioner in writing that "since the building is still under construction, the investment in the building should be considered in the year in which the construction is completed." The "reasons" further say that, on that basis, the assessment for the assessment year 1980-81 was completed. Since the assessment order does not refer to any such letter or application of the assessee, we called upon learned standing counsel for the Revenue to produce before us any such "writing" from the assessee as is referred to in the "reasons". Time was given on two occasions to produce the said letter or application. On the last day of hearing, i.e., on February 14, 1991, learned standing counsel produce the record containing a letter dated October 14, 1981, written by the petitioner. We have perused the letter, but it does not contain any such request as is referred to in the "reasons". The letter gives the particulars, of expenditure and also certain other particulars regarding the source of certain funds.

10. It is thus clear that, in this case, the assessment was reopened on the basis of the report of the Department's Valuation Cell, which was obtained subsequent to the completion of the assessment for the assessment year 1980-81, As stated above, in the course of assessment proceedings for the subsequent year (assessment year 1981-82), there was such a reference and the report of the Departmental Valuation Cell was communicated to the assessee. The final assessment of the investment was made after considering his objections. The question is whether reopening of the assessment on the basis of such a report is impermissible. It is beyond doubt that the impugned notice is relatable to Clause (a) of Section 147, as it stood at the relevant time, and not to Clause (b).

11. Learned counsel for the petitioner-assessee argues that this is a case of a mere change of opinion. He submits that the Commissioner of Income Tax was of the opinion, at the time of completing the assessment for the assessment year 1980-81, that the cost of construction should be considered in the assessment year 1981-82, which opinion he has now changed. He now wants to include the cost of construction in the assessment year 1980-81 on the basis of such change of opinion, says counsel. But, there is one aspect which learned counsel is ignoring. According to Sections 69 and 69B, unexplained investments in any financial year have to be included in the relevant assessment year, In this case, the construction was commenced in January, 1979, and completed in March, 1980. The petitioner was observing the calendar year as his "previous year". For that reason, the previous year for the assessment year 1980-81 was the calendar year 1979 (January 1, 1979, to December 31, 1979), which means that the period January 1, 1980, to March 31, 1980, was not included in the previous

year relevant to the assessment year 1980-81. It would fall within the "previous year" relevant to the assessment year 1981-82. But, the difficulty is that the unexplained investment made during January 1, 1980 to March 31, 1980, cannot be included in the assessment year 1981-82 in view of the language employed in Sections 69 and 69B. It can be included in the assessment year 1980-81 only. It is this aspect which is presenting us with a good amount of difficulty. We may set out Sections 69 and 69B to emphasise our point :

"69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investment or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

"69B. Where in any financial year the assessee has made investments or is found to be the owner of any building, jewellery or other valuable article and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year."

12. In this state of affairs, we do not think it advisable or appropriate to interfere at this stage. All the questions of fact and law can be gone into in the reassessment proceedings if the petitioner chooses to raise the same. We may not, however, be understood as saying that initiation of reassessment proceedings has been validly done. We do not express any opinion on that question and relegate the petitioner to the assessing authority. If he has not already filed his objection/revised return in pursuance of the impugned show-cause notice, he may do so now within a period of one month from today. The assessing authority shall consider the same and dispose of the matter in accordance with law.

13. The writ petition is dismissed with the above observations. No costs.