(2013) 09 MP CK 0346

In the Madhya Pradesh High Court

Case No : Writ Petri. No. 1036 of 2006

Vippy Industries Ltd. APPELLANT

Vs

CIT RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2013) 09 MP CK 0346

Hon'ble Judges : S.R. Waghmare, J;P.K. Jaiswal, J

Bench : Division Bench

Judgement

P.K. Jaiswal, J.—By this writ petition under Art. 226/227 of the Constitution of India, the petitioner is praying for quashment of notice of reassessment dt. 24-5-2004 (Annex. P20), reasons for reopening the assessment recorded by the respondent No. 2 on 24-5-2005 (Annex. P4) and order dt. 5-12-2005 (Annex. P6) rejecting the objections of the petitioner against issuance of notice for reassessment.

2. Brief facts of the case are that the petitioner is a company duly incorporated and registered under the provisions of the Indian Companies Act, 1956. The petitioner is a regular assessee under Income Tax Act, 1961 (in short, the Act) and is being assessed year after year in the status of a company.

3. On 30-10-2001, the petitioner filed its return for the assessment year 2001-02 accompanied by the tax audit report as required u/s 44AB of the Act showing a net loss of Rs. 22,76,37,023. The said return was processed u/s 143(1) of the Act, but no scrutiny of return was made at the time of processing of such return nor any notice u/s 143(2) of the Act has been issued within a period of 12 months as required under the said provision.

4. On 10-6-2005, the petitioner received a notice dt. 24-5-2005 (Annex. P2) u/s 148 of the Act for reopening the assessment for the assessment year 2001-02. By the said notice, the petitioner was asked to file a return within 30 days from the date of receipt of the said notice. In compliance of the said notice u/s 148 of

the Act, the petitioner filed the return on 16-9-2005. Thereafter, the petitioner vide letter dt. 17-11-2005 requested the respondent No. 2 to supply it a copy of the reasons recorded by him u/s 148 of the Act before issuance of the notice for reassessment as required by sub-section (2) of section 148 of the Act. In response to the said letter, the respondent No. 2 supplied the reasons recorded by him on 24-5-2005 (Annex.-P4)

5. On receipt of the reasons dt. 24-5-2005, the petitioner filed its written objections on 24-11-2005 to the issuance of the notice u/s 148 of the Act. In the said objections, the petitioner contended, inter alia, that the reasons recorded do not fall within the scope of section 147 of the Act, and, therefore, the notice u/s 148 is bad in law and without jurisdiction. It was further pointed out in the said objections that, complete information about all the facts necessary, was submitted by the petitioner in the return and was available also from the tax audit report accompanying the return and in the face of all the materials, the loss shown in the return, was accepted. There was no new material coming into the possession of the ITO entitling him to issue the notice u/s 147/148 of the Act merely on the basis of a change of opinion. The assessment cannot be reopened merely on a change of opinion.

6. The respondent No. 2, by order dt. 5-12-2005 (Annex. P6) rejected the objections filed by the petitioner, and holding that the proceedings u/s 147/148 of the Act were validly initiated, fixed the case for hearing on 28-12-2005. It is this action which is impugned in this writ petition.

7. By interim order dt. 27-4-2006, this court directed the respondents to go on with the reassessment proceedings pursuant to the impugned notice but shall not pass any final order.

8. It is submitted by the learned senior counsel for the petitioner that the reasons recorded by the respondent No. 2 for issuing the notice u/s 148 of the Act do not fall within the ambit of the provisions of section 147 of the Act, since all the materials including the percentage of yield for the year in question, as also for the previous years, were already available with the respondent No. 2. Once the return was accepted, on the basis of the material submitted by the petitioner, it cannot be said that, on the very same material, the respondent No. 2 can say that he has "reasons to believe" that, any income chargeable to tax, has escaped assessment for the year in question. It is also submitted that, this is merely a change of opinion and the assessment cannot be reopened merely on a change of opinion. The notice dt. 24-5-2005 as well as the order by which objection of the petitioner has been rejected, are bad in law.

9. It is further submitted by the learned senior counsel for the petitioner that the reasons disclosed show that the only ground on which the assessment is sought to be reopened is that, the percentage of yield is low as compared to the previous year, and likewise, the percentage of loss shown, is high as compared to the previous year. This, by itself, it is submitted, cannot be a reason to believe

that, the income chargeable to tax, has escaped assessment, particularly when the facts on which it is based were fully within the knowledge of the respondent No. 2, when the original return was filed and processed by the respondents.

10. It is also submitted by the learned senior counsel for the petitioner that the percentage of yield and percentage of loss are worked out on the basis of books and records regularly maintained and periodically checked by the cost auditors and there is no finding that these books/records are not proper or the percentage of yield/loss cannot be worked out there from. The reasons assigned for reopening the assessment, merely amount to a change of opinion, and an assessment could not be reopened on the basis of a mere change of opinion. He also placed reliance on the Full Bench decision of the Delhi High Court in the case of Commissioner of Income Tax Vs. Kalvinator of India Ltd.,

11. In the case of CIT v. Kalvinator of India Ltd. (supra), regular order of assessment was passed in terms of the sub-section (3) of section 143 of the Act. Subsequently, a notice u/s 148 of the Act was issued for reopening of the assessment in terms of section 147 of the Act. The assessment was reopened on the alleged ground of various disallowable claim. The Full Bench considering the fact that a regular order of assessment was passed in terms of the section 143(3) on application of mind, the assessing officer cannot initiate reassessment proceedings upon a mere change of opinion. A mere change of opinion cannot form the basis for reopening a completed assessment.

12. The view taken by the Full Bench of the Delhi High Court in the case of CIT v. Kalvinator of India Ltd. (supra), has been upheld by the Hon''ble Apex Court in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, of the, aforesaid judgment is relevant which reads as under:

"6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the 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 (w.e.f. 1-4-1989), 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 reopen the assessment. Therefore, post-1-4-1989, power to reopen 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 reopen assessments on the basis of mere change of opinion, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of change of opinion is removed, as contended on behalf of the Department, then, in the garb of reopening 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 1-4-1989, the assessing officer has power to reopen, 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 reintroduced the said expression and deleted the word opinion on the ground that it would vest arbitrary powers in the assessing officer. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31-10-1989 [(1990) 82 CTR (St) 1: (1990) 182 ITR (St) 1], 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."

13. It has been held by the Hon''ble Apex Court in the case of CIT v. Kelvinator of India Ltd. (supra) that the concept of "change of opinion" on the part of the assessing officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income Tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989. After the amendment, the assessing officer has to have reason to believe that income has escaped assessment, but this does not imply that the assessing officer can reopen an assessment on mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of power. Hence, after 1-4-1989, the assessing officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief.

14. On the other hand, Shri R.L. Jain, learned senior counsel for the respondent-Department has submitted that the return has been filed u/s 139(1) of the Act. It is submitted that the petitioner filed its original return of income on 31-10-2001 and no notice u/s 143(2) was issued till the last date for issuing of such notice i.e., 30-10-2001. He further submitted that if notice u/s 143(2) was not issued, it does not debar the assessing officer from issuing notice u/s 148 of the Act in respect of escapement otherwise subsequently. It is also submitted that

reopening of assessment u/s 148 of the Act is not based on change of opinion. He also submitted that the return filed by the petitioner on 31-10-2001 was merely processed u/s 143(1) of the Act and no scrutiny of the return was made at the time of processing of such return and, therefore, issuance of notice u/s 148 of the Act cannot be said to be on change of opinion. He further submitted that the reasons have been recorded vide Annex. P4 for reassessment and, thus, the contention of the petitioner that on the basis of change of opinion reassessment proceedings have been initiated, is not correct. He also placed reliance on the decision of the Apex Court in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., wherein the Hon''ble Apex Court has held that provision for initiating reassessment applies only on reason to believe that income chargeable to tax has escaped assessment. Paras 14 to 18 of the aforesaid judgment are relevant which read as under:

"14. Additionally, section 148 as presently stands is differently couched in the language from what was earlier the position. Prior to the substitution by the Direct Tax Laws (Amendment) Act, 1987, the provision reads as follows:

148. Issue of notice where income has escaped assessment--(1) Before making the assessment, reassessment or recomputation u/s 147, the assessing officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under subsection (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The assessing officer shall, before issuing any notice under this section, record his reasons for doing so.

15. Section 147 prior to its substitution by the Direct Tax Laws (Amendment) Act, 1987, stood as follows:

147. Income escaping assessment--If--

(a) the assessing officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year to the assessing officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in cl. (a) on the part of the assessee, the assessing officer has in consequence of information in his possession reason to believe that 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 or recomputed the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where income chargeable to tax has been under-assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian Income Tax Act, 1922(11 of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.--Production before the assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the assessing officer will not necessarily amount to disclosure within the meaning of this section.

16. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in phrase reason to believe would mean cause or justification. If the assessing officer 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 assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an in-built 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 assessing officer 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,

17. The scope and effect of section 147 as substituted w.e.f. 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clause (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction u/s 147(a) two conditions were required to be satisfied: firstly the assessing officer must have reason to believe that income, profits or gains

chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice u/s 148 R/w. section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provisions and not the proviso.

18. So long as the ingredients of section 147 are fulfilled, the assessing officer is free to initiate proceeding u/s 147 and failure to take steps u/s 143(3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation u/s 143(1) had been issued."

19. Learned senior counsel for the respondent also placed reliance on the decision of the Apex Court in the case of Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others,

20. We have heard the arguments of the learned counsel for the parties and perused the record of the case.

21. The challenge in this case is to the reopening of assessment of the petitioner-company for assessment year 2001-02. The reason disclosed by the Department shows (Annex. P4) that the percentage of yield was low as compared to the previous year and likewise, the percentage of loss shown is high as compared to the previous year. In the assessment year 2000-01, the percentage of yield was 99.994 per cent whereas, in the assessment year 2001-02, the percentage of yield was shown as 99.155 per cent. Apart from the above, the petitioner-company in the assessment year 1997-98 had shown the percentage of yield at 100 per cent. In the assessment year 2000-01, the profit was 7 per cent whereas in assessment year 2001-02, the company shows the loss of 3.52 per cent. The case of the Revenue was that the assessee knowingly shown the yield of 3.83 per cent and loss of 3.52 per cent which assessing officer has reason to believe that income has escaped assessment. The objection of the assessee company has been rejected by order dt. 24-11-2005 (Annex. P5). In the aforesaid order, it has been held by the learned authority that the assessee has not filed any document in respect of yield and gross profit is not correct.

22. As per clause (b) of Explanation 2 of section 147, if the notice u/s 143(2) was not issued, it does not bar the assessing officer from issuing notice u/s 147 of the Act in respect of escapement observed subsequently.

23. As per reasons recorded in Annex. P4, the yield for assessment year 2001-02 was compared with the yield of 2000-01 and yield of 1997-98.

24. The reasons recorded by the assessing authority can be said to have reason to believe that an income had escaped assessment and it confers jurisdiction to the assessing officer to reopen the assessment. We are of the view that there exist prima facie material on the basis of which the Department had reopened the case. The commencement of reassessment proceedings is valid.

25. In this case, we do not have to give a final decision whether there is suppression of the material fact by the assessee. We have to only see whether there was only prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that no case to strike down the reopening of the case in the facts of this case is made out. It will be open to the assessee to prove that the assumption of fact made in the notice was erroneous. The assessee may also prove that no new fact came to the knowledge of ITO after completion of the assessment proceeding. We are not expressing any opinion on merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The petitioner will be entitled to take all the points before the assessing authority. The writ petition is dismissed. There will be no order as to costs.

