

(2008) 08 DEL CK 0259

In the Delhi High Court

Case No : Writ Petition (C) 7722 of 2007

Wel Intertrade Private Limited (formerly Wel Intertrade Limited) and Another

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 11-08-2008

Acts Referred:

Income Tax Act, 1961 — Section 139, 142(1), 143(2), 143(3), 147

Citation : (2009) 308 ITR 22 : (2009) 178 TAXMAN 27

Hon'ble Judges : Rajiv Shakdher, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : C.S. Aggarwal and Prakash Kumar, for the Appellant; R.D. Jolly and Paras Chaudhary, for the Respondent

Judgement

Badar Durrez Ahmed, J.—Rule. With the consent of the counsel for the parties, the writ petition is taken up for disposal straightaway.

2. In this writ petition, the petitioner is impugning the notice dated 28.03.2007 u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") and the order dated 17.10.2007 disposing of the objections to the initiation of re-assessment proceedings. The petitioner is seeking the quashing of the said notice and the said order as also the entire re-assessment proceedings initiated pursuant to the said notice.

3. The petitioner had filed its return for the assessment year 2000-01 on 30.11.2000. Thereafter, the assessee's case was picked up for scrutiny and a notice u/s 143(2) of the said Act was issued on 27.11.2001. It is material to note that in the course of the assessment proceedings, the Assessing Officer issued three notices to the petitioner / assessee. One of the notices was dated 10.01.2002. Through that notice, the Assessing Officer required the petitioner to disclose and furnish detailed information regarding various aspects pertaining to the said assessment year. One of the details that was required from the petitioner was with regard to exchange fluctuation loss as would be evident from

S. No. 13 (k) of the said notice dated 10.01.2002. The petitioner replied to the said notice on 05.02.2002 and with regard to exchange fluctuation loss specifically stated as under:

j) Exchange Fluctuation Loss.

With respect to exchange fluctuation loss it is submitted that since the assessee company is in the business of imports, it become necessary to book exchange fluctuation loss / gain as arising at the close of year to show the actual profit or loss of business. Accordingly as on 31.03.2000 on account of 10.70 lacs was determined as additional liability by the assessee company to meet the acceptances for purchases which was outstanding as at the close of the year. A party wise detail to whom additional liability arose on account of purchases is enclosed marked as Annexure-M.

4. As noted above, the petitioner enclosed party-wise details in respect of whom the additional liability arose on account of purchases in Annexure-M to the said reply. Thereafter, the Assessing Officer framed the assessment on 28.03.2003 u/s 143(3). Though, in the assessment order there is no mention of the aspect of loss on account of exchange rate fluctuation, it is apparent that the Assessing Officer, through the said notice dated 10.01.2002, required the petitioner to furnish details in respect thereof, which the petitioner did by virtue of its reply dated 05.02.2002. The only sentence that appears in the assessment order is that the assessee company is engaged in the business of import and export trading and real estate. The assessment order also notes that the Assessing Officer had gone through the details filed and the balance sheet and the profit and loss account and thereafter he computed the total income. As noted above, while there is no specific mention about the loss on account of foreign exchange fluctuation, it can be easily discerned that the Assessing Officer did require the petitioner to furnish details in respect thereof and it is only after going through the details filed and the balance sheet and the profit and loss account that the total income was computed.

5. The Section 148 notice was issued on 28.03.2007 and since it pertained to the assessment year 2000-01, it was clearly beyond the four year period mentioned in Section 147 of the said Act. The reasons recorded by the Assessing Officer for initiating the proceedings u/s 147 and for issuing the notice u/s 148 are as under:

Return of income declaring loss of Rs. Nil was filed on 30.11.2000 vide receipt No. 0297 for assessment year 2000-01. In the Profit and Loss the assessee has claimed the expenditure such as Commission, claim and brokerage, Exchange Fluctuation. These matter have not been examined by the ITO at the time of assessment. The ITO made an effort by issuing a letter to the Custom Authorities. The full information about the import which resulted in foreign exchange fluctuation was not available from the Custom Authorities. The ITO made a office note "The complete information yet to be received from the Custom Authorities. In case of any discrepancy found after the receipt of

information from the Customs Authorities the relevant action as per law will be taken". Assessee company has claimed a deduction of Rs. 10,69,996/- on account foreign exchange fluctuation in Profit and Loss account. The Ministry of Law clarified that exchange loss arrived at on the basis of fluctuation is the rate of exchange not locked [(sic) backed] by actual remittance can not be allowed as deduction in computing the income and the above amount is not allowable expenditure as it was not locked [(sic) backed] by actual remittance.

The loss on account of Foreign Exchange Fluctuation was not established, the income has escaped assessment with in the meaning of Section 147.

I have therefore, reason to believe, that the 10,69,996/- has escaped assessment.

(Dalip Singh)

Income tax Officer, Ward-18(3),

New Delhi

6. The learned Counsel for the petitioner submitted that the invocation of Section 147 of the said Act itself is without jurisdiction and, therefore, the notice as well as the proceedings pursuant thereto ought to be quashed. The learned Counsel submitted that since the notice had been issued after four years from the end of the relevant assessment year, the proviso to Section 147 would come into play. One of the pre-conditions for invoking the jurisdiction u/s 147, in view of the proviso, was that there must be escapement of income for such assessment year and such escapement of income must be by reason of failure on the part of the assessee to, inter alia, disclose fully and truly all material facts necessary for his assessment, for that assessment year. The learned Counsel submitted that in the aforesaid reasons, which have been extracted above, there is no mention of any failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for the assessment year in question. In fact, the learned Counsel submitted that the Assessing Officer in the course of the regular assessment had required the petitioner to furnish details with regard to loss on account of foreign exchange fluctuation and the petitioner / assessee had furnished all the details that were requisitioned from it. There could be no case of non-disclosure of all the material facts.

7. Apart from this, the learned Counsel for the petitioner also drew our attention to the counter-affidavit of the respondents wherein the respondents have stated that from the reasons recorded, it is very clear that the office note is not the reason for reopening the assessment and that the actual reason for reopening the assessment is the clarification issued by the Ministry of Law with regard to non-allowability of exchange fluctuation loss not backed by actual remittance.

8. Mr Jolly, who appeared on behalf of the respondents, submitted that the provisions of Section 149(1)(b) ought to be taken note of inasmuch as the said provision permits the Assessing Officer to reopen assessments beyond four years

upto six years. He also submitted that since the Assessing Officer had not formed any opinion with regard to exchange fluctuation loss in the original assessment order, it was also not a case which could be said to entail a mere change of opinion. He, therefore, submitted that the initiation of proceedings u/s 147 were fully justified and the notice as well as the impugned order do not suffer from any jurisdictional error.

9. We have considered these submissions and we are inclined to agree with the submissions made by the learned Counsel for the petitioner. The proviso to Section 147 reads as under:

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.

A plain reading of the said proviso makes it more than clear that where the provisions of Section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return u/s 139 etc. or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, the question of making of a return is not in issue and the only question is with regard to the second portion of the proviso, which relates to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Insofar as this pre-condition is concerned, there is not a whisper of it in the reasons recorded by the Assessing Officer. In fact, as indicated above, the Assessing Officer could not have made this a ground because the Assessing Officer had required the petitioner to furnish details with regard to loss occasioned by foreign exchange fluctuation which the petitioner did by virtue of the reply dated 05.02.2002. Since the petitioner had fully and truly disclosed all the material facts necessary for the assessment, the pre-condition for invoking the proviso to Section 147 of the said Act had not been satisfied.

10. In this connection, it may be relevant to note one decision, although there are several others. The said decision is that of the Punjab and Haryana High Court in the case of Duli Chand Singhania Vs. Assistant Commissioner of Income Tax, . In the said decision, the High Court of Punjab and Haryana was faced with a similar situation. The court noted that there was not even a whisper of an allegation that the escapement in income had occurred by reason of failure on

the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The court observed that absence of this finding, which is the sine qua non for assuming jurisdiction u/s 147 of the Act in a case falling under the proviso thereto, makes the action taken by the Assessing Officer wholly without jurisdiction. We agree with these observations of the Punjab and Haryana High Court and are of the view that in the present case also, the Assessing Officer has acted wholly without jurisdiction. The invocation of Section 147, the issuance of the notice u/s 148 and the subsequent order on the objections are all without jurisdiction. The impugned notice as well as the proceedings pursuant thereto are quashed.

The writ petition stands allowed accordingly. No order as to costs.