2017 (4) TMI 727 - MADRAS HIGH COURT

M/s. Martech Peripherals Pvt. Ltd. Versus Deputy Commissioner of Income-tax, Assistant Commissioner of Income-tax

Writ Petition No. 10710 of 2014

Dated: - 04 April 2017

Reopening of assessment - reasons to believe - Held that:- Careful reading of Section 147 of the Act would show that it empowers an Assessing Officer to reopen the assessment, if, he has reason to believe, that any income chargeable to tax has escaped assessment for the relevant year, ''and also bring to tax'', any other income, which may attract assessment, though, it is brought to his notice, subsequently, albeit, in the course of the reassessment proceedings.

Explanation 3, to my mind, supports this approach, which emerges upon a plain reading of the said provision, along with the main part of Section 147 of the Act. The emphasis in this behalf is on the expression ''and also bring to tax'' appearing in the main part of Section 147 in relation to the right of the Revenue to assess taxable income discovered during reassessment proceedings. In my view, Explanation 3, clearly, expounds that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment and such other issue, that comes to his notice subsequently, albeit, in the course of proceedings held under Section 147 of the Act. In other words, if, notice for reopening of the assessment was issued on one aspect, and in the course of reassessment proceedings another aspect was discovered, the reassessment order would be valid, only if, the aspect, which led to the reopening of assessment, continues to form part of the reassessed income.

In this case, that the impugned order is assailed on the ground that the concerned authority lacked jurisdiction in the matter. The fact that this charge is established is evident, upon a bare perusal of the record of the case. The foregoing discussion qua the merits of the case would show that the impugned order was passed by concerned authority, even though, the necessary jurisdictional facts were absent and without dealing with the objections filed by the assessee qua the notice issued to it for reopening the assessment.

Accordingly, the objection advanced by the Revenue, in this behalf, would have to be rejected. Resultantly, in view of the discussion above, the impugned order is set aside. - Decided in favour of assessee

Judgment / Order

Rajiv Shakdher, J.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondents : Mr.T. Pramod Kumar Chopda

ORDER

1. This Writ Petition is directed against the order dated 31.03.2014, passed by respondent No.1, under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (in short 'the Act').

1.1. By virtue of the impugned order, the petitioner/assessee's income was reassessed and the taxable income was pegged at □ 2,68,64,646/-.

2. Notably, the reassessment was carried out for the Assessment Year (AY) 2008-09. The petitioner/assessee assails the impugned order, principally, on two (2) grounds: first it is contrary to the judgment of the Supreme Court in GKN Driveshafts (India) Limited V. ITO - 259 ITR 19 (SC). The objections filed qua the notice reopening the assessment, issued under Section 148 of the Act, were not disposed of, prior to the passing of the impugned order. Second, that the impugned order proceeded to tax sums received in the form of share application amount, which was transferred to "forfeiture of share account", under the head income from "profits and gains of business/profession", whereas, notice under Section 148 of the Act was issued on a different ground, which, ultimately, did not form part of the impugned order.

3. It may be pertinent to note that notice under Section 148 of the Act was issued to the petitioner on the ground that there was an escapement of income, for the reason that the petitioner/assessee had failed to offer to tax under the head "capital gains" - the reduction in the investments made in mutual funds for the previous year, 2007-08. In other words, what was alleged against the petitioner/assessee was that, the investments made in mutual funds, as obtaining on 31.03.2007, stood reduced at the end of the year, i.e., 31.03.2008, and that, such reduction should have been offered to tax under the head capital gains.

Prefatory facts:

4. In order to adjudicate upon the instant Writ Petition, the following brief facts are required to be noticed:

4.1. The petitioner, in the usual course, had filed its return of income for the relevant AY 2008-09, on 08.09.2008. In the return, the petitioner/assessee had reflected its total income at □ 1,68,64,645/-. This return was processed under Section 143(1) of the Act. Thereafter, on 07.05.2012, the petitioner/assessee was served with a notice under Section 148 of the Act by respondent No.2. The notice, inter alia, alluded to the fact that respondent No.2 had reason to believe that the petitioner/assessee's income for AY 2008-09, had escaped assessment, within the meaning of Section 147 of the Act. The petitioner/assessee was, thus, put to notice that there was a proposal to reassess its income for the said assessment year and therefore, it was required to furnish within a period of thirty (30) days from the date of service of the notice, a return of its income for the relevant assessment year, in the prescribed form to respondent No.2.

4.2. In response thereto, the petitioner/assessee vide communication dated 04.06.2012, wrote to respondent No.2, that it should treat the return already filed as the return, which, it was required to file, in response to the notice issued under Section 148 of the Act. Furthermore, a request was made to respondent No.2 to furnish reasons for reopening the assessment under Section 148 of the Act.

4.3. It appears, that thereafter, on 24.07.2012, respondent No.2 called upon the petitioner/assessee to attend his office, on 07.08.2012, at 11.00 a.m. via its authorised representative, as further information in the matter was required.

4.4. Respondent No.2, in response to the request made for furnishing reasons, via a communication dated 25.07.2012, furnished the reasons. For the sake convenience and, since, the same are pertinent for the adjudication of the instant Writ Petition, the relevant extract is set out hereunder:

" .....1. A required by you, the reasons for re-opening the assessment u/s.148 as recorded are reproduced as under for favour of your information.

"From the balance sheet of the assessee company it is found that there is a reduction in investments in mutual funds from 2,52,00,000/- (Y.E.31.3.2007) to 2,26,21,274/- (Y.E.31.3.2008). However, in the computation of income, the assessee company has not shown/offered any gain or loss on account of the sale of investments in mutual funds. Hence, there is a reason to believe that the income has escaped."

2. In view of the above, you are hereby required to furnish the details of investments in mutual funds as on 1.4.2007, purchases made during the year off loaded or sold during the year and held as on 31.3.2008, dividends therefrom, income therefrom and income on sale of these investments and as to how the gain or loss on account of sale of these investments in mutual fund has been reflected in your P&L Account vis a vis income computed under IT Act.

3. Please produce the Books of account and copies of Bank Statement.

4. Produce copies of account statements of Mutual Funds."

4.5. It appears that thereafter, vide communication dated 14.08.2012, respondent No.2 informed the petitioner/assessee, that a hearing in the matter was fixed on 23.08.2012.

5. The record shows that vide communication dated 30.08.2012, the petitioner/assessee lodged its objections to the reopening of assessment.

5.1. Briefly, the petitioner submitted that respondent No.2 could reopen the assessment, only if, there was tangible material available, on the basis of which, he could have reason to believe that income chargeable to tax had escaped assessment. Furthermore, the petitioner/assessee submitted in the very same communication that in the instant case, reduction in the investment in the mutual funds had taken place on account of the redemption at par and, therefore, reopening of assessment could not be undertaken by way of fishing or roving enquiry, as if, it was a scrutiny assessment.

5.2. The petitioner/assessee was at pains to highlight the fact that the condition for reopening of assessment, even where it is within a period of four (4) years from the end of the relevant assessment year and pertains to a return, which was processed under Section 143(1) of the Act, the Assessing Officer's belief that the income chargeable to tax had escaped assessment, must have a live link with the formation of such belief.

6. Notwithstanding the aforesaid stance, the petitioner/assessee supplied the information called for by respondent No.2, which included: the books of accounts, and the copies of bank statements and the mutual funds statement.

6.1. The record shows that the objections filed by the petitioner/assessee were not disposed of. On the other hand, respondent No.1, without waiting for the objections to be disposed of, passed the impugned order.

7. As indicated at the outset, the petitioner/assessee's taxable income was pegged at 2,68,64,646/-, on which, it was called upon to pay a tax, equivalent to 24,58,189/-. The impugned order, [while referring to the fact that the notice under Section 148 of the Act was issued with regard to the petitioner/assessee's purported failure to offer to tax, under the head "capital gains", the reduction in the value of mutual funds, which occurred in relevant previous year, (i.e., 2007-08)], brought to tax the sum of 1.00 crore, received

by the petitioner/assessee, as share application money, from an entity, known as: Ravishankar Industries P Limited - a sum, which was transferred to the "forfeiture of share account".

7.1. According to respondent No.2, the forfeiture of the share application money was taxable under Section 28(iv) of the Act, irrespective of whether the receipt was capital or revenue in nature. While coming to this conclusion, respondent No.2 gave a short shrift to the submission made on behalf of the petitioner/assessee that litigation was pending in this Court between itself and Ravishankar Industries P Limited with regard to forfeiture of the share application money.

8. Aggrieved by the impugned order, as indicated above, the petitioner/assessee has filed the instant Writ Petition.

Submissions :

9. In the background of the aforesaid facts, submissions were advanced by Mr.Suhrith Parthasarathy on behalf of the petitioner/assessee, while the respondents/Revenue were represented by Mr.T.Pramod Kumar Chopda.

10. Counsel for the petitioner/assessee, as indicated above, submitted that the impugned order was without jurisdiction, in as much as, it was passed without dealing with the objections filed qua the notice issued under Section 148 of the Act.

10.1. Learned counsel further submitted that the impugned order was also bad in law, since, the ground, on which, notice was initially issued for reopening of the assessment under Section 148 of the Act was not carried through and, thus, did not form part of the impugned order and, instead, respondent No.1 brought to tax, a receipt, which did not form part of the notice issued under Section 148 of the Act, for reopening the assessment.

10.2. It was the submission of the learned counsel for the petitioner/assessee that this was contrary to the judgments of various High Courts, which included, the Bombay High Court, the Gujarat High Court and the Delhi High Court.

10.3. In this behalf, reliance was placed on the following judgments:

i) CIT V. Jet Airways - [2011] 331 ITR 236 (Bom)

ii) CIT V. Mohmed Juned Dadani - Manu/GJ/0061/2013

iii) Oriental Bank of Commerce V. Additional Commissioner of Income Tax - Manu/DE/1935/2014.

11. I may also say that in so far as the first submission was concerned, which is that, objections were not disposed of, as was required under law, reliance was placed on the judgment of the Supreme Court in : GKN Drive Shafts (India) Limited V. ITO - 259 ITR 19 (SC).

12. On the other hand, Mr.Chopda, who appears for the Revenue, emphasised that the impugned order was valid in the eyes of law. Learned counsel further submitted that the objections filed by the petitioner/assessee had been duly considered, while passing the impugned order. Furthermore, learned counsel submitted that the impugned order was appealable under Section 246A of the Act, and, therefore, the instant Writ Petition ought not to be entertained, as an alternative remedy was available to the petitioner/assessee.

12.1. Mr.Chopda further submitted that the impugned order is viable, both on law and on facts, as not only were the objections dealt with in the impugned order, but also on account of the fact that the statutory

scheme reflected in Explanation (3) to Section 147 of the Act permitted reassessment order to be based solely on an issue which did not find in the notice issued under Section 148 of the Act.

13. I must also indicate, at this stage, that in the counter affidavit, the respondents/Revenue relied upon the following judgment: Allana Cold Storage Ltd. V. Income Tax Officer, [2006] 287 ITR 1 (Bom.)

13.1. In this judgment, the assessment orders were set aside by the Bombay High Court on the ground that objections filed qua notice issued under Section 148 of the Act were not disposed of.

13.2. It is not clear as to why this judgment was cited by the respondents/Revenue in their counter affidavit, except, perhaps, for the reason that based on the ratio of the said judgment, this Court could be persuaded to set aside the assessment order, with a direction being issued that the objections be dealt with, in the first instance, and therefore, if, such a direction is issued, the respondents/Revenue would have a second shot at passing a reassessment order.

13.3. In my view, this aspect will have to be examined in the context of the other submission raised on behalf of the petitioner/assessee, which has been noticed hereinabove by me.

Reasons:

14. Having heard the learned counsel for the parties and perused the records, according to me, in so far as the first submission of the petitioner is concerned, it has been conceded by the counsel for the respondents/Revenue that objections filed by the petitioner/assessee to the notice issued by respondent No.2, for reopening of the assessment, have not been disposed of.

14.1. The mandate of law requiring the Revenue to dispose of the objections is clearly set out in the Supreme Court's judgment rendered in : GKN Drive Shafts (India) Limited V. ITO - 259 ITR 19 (SC).

14.2. For the sake of convenience, the relevant extract is set out hereinafter:

> *" We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under s. 148 of the IT Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.*

14.3. Thus, having regard to the observations made by the Supreme Court, it is clear that the impugned assessment order cannot be sustained, as the objections have not been disposed of.

15. Therefore, had the counsel for the petitioner/assessee not advanced the second submission, which I would deal with hereafter, I may have been inclined to set aside the assessment order on that limited ground alone. Since, the second submission has been made, which is substantive in nature, I would like to deal with the same.

16. In so far as the contention of the petitioner/assessee is concerned, that the impugned order does not seek to reassess its income qua the issue, which formed the basis for reopening the assessment - the respondents/Revenue sought to rely upon Explanation (3) introduced in Finance (No.2) Act, 2009, albeit, with retrospective effect, i.e., 01.04.1989. Besides the explanation, reliance was also placed on the

judgment of the Punjab and Haryana High Court in the matter of : Majinder Singh Kang V. Commissioner of Income-tax, [2012] 25 taxmann.com 124 (Punjab & Haryana):[2012] 344 ITR 358.

17. In order to deal with this submission, it may be relevant to refer to the relevant provisions of Section 147 of the Act.

" Income escaping assessment.

147. 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 under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1. .....

Explanation 2. .....

Explanation 3. For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148. .

(emphasis is mine)

18. A perusal of the aforesaid extract of Section 147 of the Act would show that, if, the Revenue makes an attempt to reopen the assessment, within a period of four (4) years from the date, when, the relevant assessment year ends, then, all that the Assessing Officer has to show is that, he has reason to believe that any income chargeable to tax has escaped assessment for the concerned assessment year and while doing so, he is also empowered to assess any other income, which has escaped assessment and, which comes to his notice, subsequently, albeit, during the course of the assessment proceedings.

18.1. It is, only if, the original assessment is made under Section 143(3) or under Section 147 and, an attempt to reopen the assessment is made after the expiry of the four (4) years from the end of the relevant assessment year, the first proviso to Section 147 of the Act kicks in, which mandates, that no reassessment proceedings can be initiated, unless the escapement of income is occasioned by either the reason of failure on the part of the assessee to file a return under Section 139 or, in response to notice issued under Section 142(1) or Section 148 or, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for carrying out the assessment for the relevant assessment year.

18.2. Since, in the instant case, the original assessment was made under Section 143(1) of the Act and the notice under Section 148 of the Act for reopening of assessment was issued well within the period of four (4) years, the respondents/Revenue was not required to satisfy the conditions contained in the first proviso.

18.3. Having said so, the Assessing Officer even in such circumstance has to have a reason to believe that income chargeable to tax has escaped assessment, which, necessarily, is required to be based on the information that the Assessing Officer would have received after the completion of the assessment, and not, based on a mere change of view, as that, would be conferring an arbitrary power of review on the Assessing Officer, which is not contemplated under the Act.

18.4. To be noted, the power vested in the Assessing Officer under Section 147 read with Section 148 of the Act is a power of reassesment and not a power of review.

18.5. It is for this reason, that an amendment was made via the Amending Act of 1989, whereby, the expression "has reason to believe", was reintroduced in Section 147 of the Act, after it had been substituted by the expression "for reasons to be recorded by him in writing, is of the opinion ....". This amendment was brought about, as, according to the Revenue, it wanted to allay the apprehensions of the assessees that reopening of assessment could be made on a mere change of opinion. (See: Commissioner of Income-Tax V. Kelvinator of India Ltd. - 99(2002) DLT 221)

18.6. Thus, in other words, reassessment can only take place, if there is tangible material available in the hands of the Assessing Officer in the form of information, which was not available to him at an earlier point in time.

19. In the instant case, the reasons supplied by respondent No.2 vide communication dated 25.07.2012 showed that the notice under Section 148 of the Act to reopen the assessment was issued on account of reduction in the investments made in mutual funds (from □ 2,52,00,000/-, for the year ending 31.03.2007 to □ 2,26,21,274/-, for the year ending 31.03.2008), which had not been shown/offered to tax in the form of gain or loss, on account of the sale of investments made in mutual funds. This information, perhaps, was available on record, as the assessee, in his objections dated 30.08.2012, adverted to the fact that the reduction in investment was brought about consequent to redemption being made at par. Respondent No.2 having, perhaps realised the futility of going down this path and, having, during the course of reassessment proceedings, discovered this aspect of the matter, chose to tax the forfeited share application money, on the ground that, it was a receipt, which was taxable in the hands of the petitioner/assessee under the provisions of Section 28(iv) of the Act.

20. The petitioner/assessee, however, challenges this action of the respondents/Revenue, on the ground that it was not permissible for the respondents/Revenue to tax the forfeited share application money, by taking recourse to provisions of Section 147 read with Section 148 of the Act, unless it assesses to tax that income with reference to which the Assessing Officer had formed reason to believe (within the meaning of Section 147), that it had escaped assessment.

21. To my mind, a careful reading of Section 147 of the Act would show that it empowers an Assessing Officer to reopen the assessment, if, he has reason to believe, that any income chargeable to tax has escaped assessment for the relevant year, ''and also bring to tax", any other income, which may attract assessment, though, it is brought to his notice, subsequently, albeit, in the course of the reassessment proceedings.

21.1.To put it plainly, the purported income discovered subsequently during the course of reassessment proceedings, can be brought to tax, only, if the escaped income, which caused, in the first instance, the issuance of notice under Section 148 of the Act, is assessed to tax.

22. Explanation 3, to my mind, supports this approach, which emerges upon a plain reading of the said provision, along with the main part of Section 147 of the Act. The emphasis in this behalf is on the expression ''and also bring to tax'' appearing in the main part of Section 147 in relation to the right of the Revenue to assess taxable income discovered during reassessment proceedings. In my view, Explanation 3, clearly, expounds that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment and such other issue, that comes to his notice subsequently, albeit, in the course of proceedings held under Section 147 of the Act. In other words, if, notice for reopening of the assessment was issued on one aspect, and in the course of reassessment proceedings another aspect was discovered, the reassessment order would be valid, only if, the aspect, which led to the reopening of assessment, continues to form part of the reassessed income.

23. This view, as has been correctly submitted by the learned counsel for the petitioner/assessee, has found resonance with at least three (3) High Courts, i.e., the Bombay High Court, the Gujarat High Court and the Delhi High Court in the following cases:

i) CIT V. Jet Airways, [2011] 331 ITR 236 (Bom)

ii) CIT V. Mohmed Juned Dadani, Manu/GJ/0061/2013

iii) Oriental Bank of Commerce V. Additional Commissioner of Income Tax, Manu/DE/1935/2014.

23.1. The only High Court, which has taken a contrary view, as it were, is the Punjab and Haryana High Court in the matter of : Majinder Singh Kang V. Commissioner of Income-tax, [2012] 25 taxmann.com 124 (Punjab & Haryana).

23.2. In my opinion, with respect, the Court, in rendering the judgment in Majinder Singh Kang's case, ignored the fact that the provisions of Explanation 3 had to be read in conjunction with the main provision, and that, the said explanation cannot override the main provision.

23.3. This aspect of the matter has also been brought to fore by the Bombay High Court in : CIT V. Jet Airways - [2011] 331 ITR 236 (Bom).

23.4. The relevant observations made in this behalf are extracted hereafter :

"....However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he

has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee....."

(emphasis is mine)

24. This takes me to the last submission made on behalf of the respondents/Revenue, which is that, there is an alternative remedy available to the petitioner and, therefore, the instant writ petition should not be entertained.

25. To my mind, it is now far too well settled that in relegating a party to an alternative remedy, the Court employs self-restraint. This, however, does not exclude the power of the Court to entertain a Writ Petition, especially, when, the challenge is raised, inter alia, on the ground of absence of jurisdiction and/or breach of principles of natural justice.

26. In this case, that the impugned order is assailed on the ground that the concerned authority lacked jurisdiction in the matter. The fact that this charge is established is evident, upon a bare perusal of the record of the case. The foregoing discussion qua the merits of the case would show that the impugned order was passed by concerned authority, even though, the necessary jurisdictional facts were absent and without dealing with the objections filed by the assessee qua the notice issued to it for reopening the assessment.

26.1. Accordingly, the objection advanced by the Revenue, in this behalf, would have to be rejected.

27. Resultantly, in view of the discussion above, the impugned order is set aside.

28. The Writ Petition is disposed of in the aforementioned terms, leaving the parties to bear their own costs.