Indian Metals and Ferro Alloys Ltd. Vs Assistant Commissioner of Income Tax

Court: Orissa High Court

Date of Decision: Feb. 11, 2011

Acts Referred: Constitution of India, 1950 â€" Article 14, 19, 19(1)(g)
Income Tax Act, 1961 â€" Section 143(3), 147, 148, 148, 149

Citation: (2013) 353 ITR 561 : (2012) 209 TAXMAN 46

Hon'ble Judges: V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench: Division Bench

Advocate: Ganesh, J. Sahoo, D. Panda, P. Mohapatra and A. Mohapatra, for the Appellant;

Final Decision: Dismissed

Judgement

V. Gopala Gowda, C.J.
The petitioner, an assessee under the Income Tax Act, has filed this writ petition questioning the impugned notice

dated 28.10.2010 issued u/s 148 of the Income Tax Act, 1961 for the assessment year 2006-07 seeking for issuance of a writ of certiorari urging

various facts and legal contentions and has sought for a declaratory relief to declare section 147 of the Income Tax Act, 1961 in so far as it permits

the Assessing Officer to reopen the assessment on a mere change of opinion as unconstitutional being violative of Articles 14 and 19 of the

Constitution and to issue a mandamus restraining the opposite party, his subordinates and agents from acting pursuant to section 147 of the Income

Tax Act, 1961. Relevant brief facts are stated for the purpose of appreciating the rival legal contentions of the parties to find out if the petitioner is

entitled for the relief as sought for in this writ petition.

2. The case of the petitioner is that the assessing officer issued the impugned notice on erroneous premises that the entire depreciation allowance

for the period from Assessment years 1990-91 to 1997-98 aggregating to Rs. 42578.02 lacs had lapsed before the assessment year 2006-07 by

virtue of the provisions of Section 32(2) of the Act and therefore the petitioner was not eligible for the purpose of set off and carry forward of the

said amount during the assessment year 2006-07 and that non-consideration of the explanatory note for the second amendment to Section 32(2)

of the Act by Finance Act, 2001 was a fatal mistake committed by the assessing officer. Hence, the issuance of the impugned notice is patently

erroneous and the same is without jurisdiction. The opposite party has failed to appreciate that the petitioner had preferred an appeal to the

Commissioner of Income Tax (Appeals-II), Bhubaneswar against the assessment order dated 30.12.2008 of the opposite party in which appeal

the issue with respect to unabsorbed depreciation allowance for the assessment year 2006-07 has been decided in petitioner"s favour by the

Commissioner of Income Tax (Appeals) by order dated 30.9.2010 after duly considering both the amendments to section 32(2) of the Act by

Finance Act, 1996 and the Finance Act, 2001. While issuing the impugned notice, the opposite party has completely ignored the fact that the

Commissioner of Income Tax (Appeals) has already considered and given a reasoned order adjudicating upon and determining the issue with

respect to the unabsorbed depreciation for assessment year 2006-07. The Tax Department has filed an appeal against the said order of the

Commissioner of Income Tax (Appeals) before the Income Tax Appellate Tribunal which is pending adjudication. Therefore, issuance of the

notice is contrary to the second proviso to section 147 of the Act which specifically prohibits reassessment proceedings in respect of the income

which is the subject matter of an appeal.

3. The opposite party is seeking to disallow the unabsorbed depreciation for the assessment years prior to and including 1997-98 aggregating Rs.

425.78 crores on the patently erroneous ground that the amendment to section 32(2) by the Finance Act, 2001 being prospective, only the

depreciation pertaining to assessment year 2002-03 and thereafter can be set off and carried forward without any restriction as regards the length

of time. In doing so, the opposite party has failed to appreciate the provisions of section 32(2) and Circular No. 762 dated 18.2.1998 issued by

the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes which categorically provide, inter alia, that the unabsorbed

depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the

depreciation allowance of the next year and be deemed to be part thereof. Accordingly, once the unabsorbed depreciation up to the assessment

year 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it was governed by the provisions of section 32(2) as

amended by Finance Act, 2001 and was available for carry forward and set off without any limit whatsoever. This position has also been reiterated

and held in favour of the petitioner by the Commissioner of Income Tax (Appeals) in the aforesaid order dated 30.9.2010 which issue is now

pending in appeal before the Income Tax Appellate Tribunal.

4. It is further contended that the notice was issued u/s 148 of the Act to the petitioner seeking to reopen the assessment of the petitioner for the

assessment year 2006-07 on the ground that the income of the petitioner had escaped assessment. In response to the said notice, the petitioner

addressed a letter dated 11.11.2010 requesting the opposite party to treat its return of the income filed on 28.6.2007 as its return furnished in

response to the said notice without prejudice to its submission that the said notice has been issued without jurisdiction and is, therefore, not valid.

In support of the said contention, learned Senior Counsel Mr. Ganesh for the petitioner has placed reliance on the decision of the Supreme Court

in GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, wherein the Supreme Court has made observation that the opposite party

shall provide the reasons for issuing the impugned notice before commencing the proceedings u/s 148 of the Act on furnishing the return of income

by the assessee. The said letter is also produced in this writ petition.

5. The action of the assessing officer is contrary to section 32(2) as amended by Finance Act, 2001 by which the limitation introduced in 1997 was

deleted and the law what it was prior to 1997 was restored. Non-consideration of the same by the assessing officer is rightly considered by the

Commissioner of Income Tax (Appeals) and granted the relief to the petitioner. Placing reliance on Article 19(1)(g) of the Constitution it is

contended by the learned counsel for the petitioner that it is well settled law that power of restriction on the right of the petitioner to carry with on

business guaranteed under the aforesaid fundamental right does not enable the department to reopen and unsettle closed and finalized assessments.

He also placed strong reliance upon the judgment of the Supreme Court in Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara

Vs. D"costa Brothers, .

6. Statement of counter is filed by opposite party No. 1 inter alia opposing the prayer of the petitioner traversing the petition averments. It is

necessary to refer briefly to paragraphs 7, 8 and 10. At para-7 it is stated that while giving effect to the order of the Commissioner of Income Tax

(Appeals), it was found that the then assessing officer had not appreciated the fact that the entire depreciation allowance beginning from the

assessment year 1990-91 to the assessment year 1997-98 aggregating to Rs. 42578.02 lakh had lapsed before the assessment year 2006-07 and,

therefore, the petitioner was not eligible for the purpose of set off and carry forward during the relevant assessment year 2006-07 by virtue of the

provision of Section 32(2) of the Income Tax Act., as the said provision was amended by Finance Act, 2001 with effect from 1.4.2002. The said

provision was explained by the Finance Minister in his speech while moving Finance Bill 1996 by which the amendment was made. With regard to

the reliance placed upon the amendment of Section 32(2) by the Finance Act, 2001 with effect from the assessment year 2002-03, it is stated that

though the restriction of eight assessment years was removed by the said amendment, the said amendment was prospective in nature. It is

specifically stated that 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 comes to his notice subsequently. Appeal against the order of the Commissioner of Income Tax in granting the relief

against disallowance of depreciation amount for the aforesaid financial years is filed before the Tribunal urging relevant grounds. The ground on

which impugned notice has been issued is not the subject matter either before the Commissioner of Income Tax (Appeals) or before the Tribunal.

Therefore, the second proviso of section 147 does not come to the rescue of the appellant as urged in this petition. Hence, he has requested for

dismissal of this petition. Learned counsel submitted that the writ petition against the show cause notice is not maintainable in law as he has

appeared before the assessing officer and taken time. Whatever grounds urged in this writ petition may very well be stated before the assessing

officer.

7. With reference to the above said rival legal contentions, the following points would arise for consideration: (a) whether this Court is required to

exercise its extra ordinary jurisdiction to interfere with the show cause notice, (b) whether action taken u/s 147 of the I.T. Act to reopen completed

assessment on the ground that while completing assessment u/s 143(3) the Assessing Officer has allowed excess amount of depreciation to which

the petitioner is not entitled to; (c) What order?

8. For this purpose, it is necessary to extract the reasons for the show cause notice issued u/s 147 for assessment of the escaped income

chargeable under the provisions of the Act. Paragraphs 3 and 4 are relevant which are extracted hereunder:

3 The AO disallowed the unabsorbed depreciation allowance pertaining the assessment year 90-91,91-92,92-93 aggregating to Rs.

182,74,22,000/- for the purpose of being carried forward for the reason that such allowance had already lapsed for being carried forward before

the relevant assessment year. He considered the remaining amount of Rs. 319,41,24,000/- (Rs. 502,15,46,000/--Rs. 182,74,22,000/-) as eligible

to be set off against current year''s income and also for being carried forward to the next year. Thus, after set off he has allowed Rs.

251,88,45,000/- to be carried forward to the next year.

4. The AO has not appreciated the fact that the entire depreciation allowance beginning from the A.Y. 90-91 to A.Y. 97-98 aggregating to Rs.

42578.02 lakh had lapsed before the A.Y. 2006-07 and therefore was not eligible for the purpose of set off and carry forward during the relevant

A.Y.2006-07 by virtue of provision of Section 32(2) of the I.T. Act. As per the said provisions as amended by the Finance Act (FA) 2001 w.e.f.

01.04.2002, depreciation allowance pertaining only to the previous year 2001-02 and the succeeding previous years which could not be adjusted

due to insufficiency of profits was eligible for set off and carry forward. The depreciation allowance pertaining to the earlier previous years which

remained unadjusted against profits as at the beginning of the previous year relevant for the A.Y. 97-98 could be carried forward only up to end of

the A.Y. 2005-06. This is so because Section 32(2) as it existed prior to A.Y. 97-98 was amended with effect from A.Y. 97-98. As per this

amended provisions depreciation allowance of earlier years which remained unabsorbed as on 01.04.1996 could be carried forward only up to

eight assessment years beginning from the A.Y.1997-98. This provision was also explained so by the Finance Minister in his speech while moving

the Finance (No. 2) Bill 1996 by which the amendment was made.

9. Paragraph 3 is relatable to disallowance of unserved depreciation amount of Rs. 182,74,22,000/- pertaining to assessment years 1990-91, 92-

93 and 92-93. Appeal was carried before the Commissioner of Income Tax (Appeals) challenging such disallowance which was allowed by the

latter for the reason stated in his order. Challenging the order of the Commissioner of Income Tax (Appeals), the Department preferred appeal

before the Tribunal which is now pending. Now the Department initiates the reassessment proceeding u/s 147 on the ground that depreciation

amounting to Rs. 24.304 lakhs has been wrongly allowed pertaining to the assessment year 1993-94 to 1997-98 to which the petitioner was not

entitled. This has been deemed to have escaped assessment within the meaning of Section 147 of the I.T. Act for which action u/s 147 was taken

and the impugned notice u/s 148 is issued. It may be noted that the amount of depreciation which was allowed by the Assessing Officer while

completing assessment u/s 143(3) was never before the 1st Appellate Authority and consequently before the ITAT. Therefore, the 2nd proviso to

Section 147 upon which reliance is placed is wholly untenable in law and devoid of merit. Since the show cause notice contains the reason and the

assessee is present before the Assessing Officer there is no need for interference by this Court with the same. For the reasons stated supra, the

petitioner is not entitled to any declaration as prayed for or issuance of mandamus. There is absolutely no merit in this writ petition. Accordingly,

the writ petition is dismissed with liberty to the petitioner-assessee to participate in the proceedings and take all such legal contention which shall be

examined by the assessing officer.

Writ petition dismissed.