(2012) 07 BOM CK 0248

Bombay High Court

Case No: Income Tax Appeal No. 1237 of 2011

Commissioner of Income Tax	APPELLANT
Vs	
ICICI Bank Ltd.	RESPONDENT

Date of Decision: July 9, 2012

Acts Referred:

- Evidence Act, 1872 - Section 114
- Income Tax Act, 1922 - Section 34(1)(b)
- Income Tax Act, 1961 - Section 143, 143(3), 147, 147(b), 148

Citation: (2012) 349 ITR 482

Hon'ble Judges: S.J. Vazifdar, J; M.S. Sanklecha, J

Bench: Division Bench

Advocate: Vimal Gupta, for the Appellant; Aarti Vissanji, instructed by S.J. Mehta, for the Respondent

Judgement

M.S. Sanklecha, J.

This appeal by the Revenue u/s 260A of the income tax Act, 1961. (hereinafter referred to as "the said Act"), is directed against the order dated August 27,2010, of the income tax Appellate Tribunal (hereinafter referred to as "the Tribunal") relating to the assessment year 1996-97. Being aggrieved by the order dated August 27, 2010, the appellant has raised the following substantial question of law for consideration by this court:

Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the notice for reopening of assessment issued under" section 148 of the income tax Act was bad in law as. the notice was based on mere change of opinion even though the assessment was reopened within a period of four years and the record shows that the assessee company had claimed excess deduction u/s 36(1)(viii) of the income tax Act on income which included non-fund based income and income from short-term finance ?

2. The appeal is admitted on the above question At the instance and request of the advocates for the appellant and the respondent the appeal is taken up for final disposal

3. The facts leading to this appeal are as under :

(a) The respondent is a public financial institution. The respondent carries on the business of providing finance in the form of long or medium term loans, equity participation, sponsoring and underwriting new issue of shares and securities, providing hire purchase, lending, etc. Its income from business of providing long-term finance, i.e., loans in excess of five years is referred to as fund based income while income arising from its business other than providing of long-term loans is referred to as non-fund based income.

(b) In its return of income for the assessment year 1996-97 the respondent had given the complete working of the fund based income (long-term finance) and also disclosed that 79.99 per cent, of its total income was attributable to it. Consequently/the expenses incurred were also shown to be divided between the fund based activity and the non-fund based activity at the rate of 79.99 per cent, and 20.01 per cent. By an order dated March 19, 1999, u/s 143(3) of the said Act, the Assessing Officer assessed the respondent to a total income of Rs. 193 crores and while so assessing allowed deduction u/s 36(1) (viii) of the said Act to the extent of Rs. 85 crores in respect of the special reserve created/credited, capped to the extent of 40 per cent, of the fund based income (long-term finance).

(c) Thereafter, the assessment for the assessment year 1996-97 Was reopened by notice dated October 21, 1999, u/s 148 of the said Act. This reopening was on the issue of claiming deduction u/s 80M of the said Act and with regard to interest attributable to investments u/s 36(1)(iii) of the said Act, Consequent to the above, by an order dated February 22, 2000, u/s 143(3) read with section 147 of the said Act the respondent was assessed to an income of Rs. 223 crores.

(d) Thereafter, one more notice u/s 148 of the said Act was issued on March 20, 2001, seeking to reopen the assessment for the assessment year 1996-97. The reasons recorded for reopening the assessment for the assessment year 1996-97 were as under :

In the course of assessment proceedings for the assessment year 1998-99, the issue has been examined on the basis of details obtained from the assessee. After going through the details, it is seen that the assessee has been claiming deduction u/s 36(1)(viii) on its income which included non-fund based income and income from short-term finance. As such information was not furnished for the assessment year 1996-97, the same could not be examined and proper deduction u/s 36(1)(viii) was not computed. Consequently, the assessee was allowed excess deduction u/s 36(1) (viii) to which I(sic) was not entitled to. In view of the above, I have reason to believe that the income chargeable to tax has escaped assessment within the meaning of

section 147. The assessment is required to be reopened by issuing notice u/s 148.

(e) Consequent to the above, the Assessing Officer on March 26, 2002, reassessed the respondent and computed the assessee''s total income at Rs. 264 crores. However, while so determining the assessee''s total income, deduction available u/s 36(1)(viii) was reduced from Rs. 85 crores to Rs. 40.22 crores. This was on the basis of the estimate that the expenses incurred in respect of non-fund activity was only 10 per cent, and not 20.1 per cent, as originally claimed by the respondent during the course of assessment proceeding for, the assessment year 1996-97.

(f) Being aggrieved by the order dated March 22, 2002, the respondent filed an appeal to the Commissioner of income tax (Appeals), inter alia, challenging the reopening of assessment for the assessment year 1996-97 by a notice dated March 20, 2001, u/s 148 of the said Act. On March 18, 2004, the Commissioner of income tax (Appeals) disposed of the respondent''s appeal by holding that the reopening of the assessment for 1996-97 by notice dated March 20, 2001, u/s 148 of the said Act was correct in law.

(g) Being aggrieved by the order dated March 18, 2004, of the Commissioner of income tax (Appeals) the. respondent preferred an appeal to the Tribunal. By its order dated August 2.7, 2010, the Tribunal allowed the appeal of the respondent holding that the reopening proceedings initiated by notice dated March 20, 2001, was only on account of mere change of opinion and would amount to review, which is not permitted. Further, the Tribunal held that the issue on which the appellant-Revenue had sought to reopen the assessment for the assessment year 1996-97 was that the income earned on non-fund business had been included in income earned on fund based activity, i.e., long-term finance while claiming deduction u/s 36(1)(viii) of the said Act while the reassessment order holds that expenditure claimed at 20.1 per cent, was higher then 10 per cent. which alone was allowable from the non-fund based income.

(h) Being aggrieved by the order dated August 27, 2010, of the Tribunal the appellant has filed the present appeal. The respondent has also filed its affidavit-in-reply dated June 15, 2012, opposing the appeal.

4. In support of the appeal Mr. Vimal Gupta, advocate, submits that :

(i) As the reopening of assessment in the present case is for a period less than the period of four years from the end of the relevant assessment year, the power to reopen the assessment under the main part of section 147 of the said Act is very wide and, therefore, the notice dated March 20, 2001, issued by the Department cannot be faulted.

(ii) During the course of the original assessment proceeding leading to the order dated March 19,1999 as well as the first reopening proceeding leading to the order dated February 22, 2000, the Assessing Officer had not considered the issue of the

expenditure claimed in respect of non-fund income at 20.01 per cent, and, consequently, the present proceeding cannot be considered to be on account of a mere change of opinion.

(iii) The fact that excess expenditure was claimed for deduction from the income attributable to the non-fund activity came to the Department''s knowledge only during the course of assessment proceeding for the assessment year 1998-99. Therefore, there was tangible material available only during the assessment year 1998-99 which led to the reasonable belief that income had escaped assessment for the assessment year 1996-97.

(iv) The Tribunal erred in holding that reasons for reopening the assessment u/s 148 of the said Act were different from the reasons for passing the reassessment order dated March 26, 2001; and

(v) The Tribunal did not deal with the decisions of the Supreme Court in (1976) 102 ITR 287 (SC) and A.L.A. Firm Vs. Commissioner of Income Tax, Madras, .

5. Per contra Ms. Aarti Vissanji, advocate appearing for the respondent, while supporting the order of the tribunal dated August 27, 2010, submits that :

(i) Even where the reopening is within a period of four years from the end of the relevant assessment year, the Assessing Officer does not have the power to review an assessment. This power can only be exercised when there is reason to believe that income had escaped, assessment on the basis of some tangible material.

(ii) Merely because the original order dated March 19, 1999, as well as the order dated March 22, 2000, passed, consequent to the reopening proceeding, do not discuss the issues raised in the present reopening proceedings, it does not follow that the same were not considered. The orders contain no discussion on the same as the Assessing Officer was satisfied with the claim. Mrs. Vissanji relied upon the affidavit-in-reply to establish that the material on the basis of which deduction is being claimed for expenditure at 20.1 per cent, was given to the Assessing Officer during the assessment proceedings. Therefore, on the same set of facts seeking to reopen the proceedings amounts to mere change of opinion and is not permissible.

(iii) There was no tangible material available during the assessment year 1998-99 which could lead to the reasonable belief that income had escaped assessment for the assessment year 1996-97 as the entire exercise of the quantum of deduction to be allowed as expenditure was on the basis of estimate; and

(iv) The material received during the assessment year 1998-99 as per the grounds for reopening communicated was that income attributable to the non-fund based activity was included in fund based income to claim higher deduction u/s 36(1)(viii) of the said Act. However, no particulars to support the aforesaid conclusion was made known to the respondent. In any case the reassessment has been done on a completely new ground, namely, that the expenses attributable to income earned

from the non-fund activities was only 10 per. cent, and not 20.1 per cent, as claimed by the respondent. Consequently, this is a completely new ground after giving up the earlier ground and, therefore, not sustainable in view of the decision of this court in the matter of The Commissioner of Income Tax-5 Vs. Jet Airways (I) Limited, .

6. In this case, the assessment is reopened, within a period of four years from the end of the relevant assessment year. In such cases it is settled law that the power of the Assessing Officer to reopen the assessment is not subject to the limitation provided'' in the proviso to section 147 of the said Act, namely, failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. ''''Consequently, even where an assessee has disclosed all facts'' fully and tally for the purpose of assessment, the Assessing Officer would still have jurisdiction to reopen the assessment, if he has reason to believe that income chargeable to tax has escaped assessment. However, this reason to believe that any income chargeable to tax has escaped assessment even Within a period of four years from the end of the relevant assessment year has to arise not on account of a mere change of opinion but on the basis of some tangible material. This is particularly so as the income tax Officer has not been conferred with a power to review his assessment As observed by the Supreme Court in the matter of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, (page 564) :

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 assessment 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 preconditions 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.

7. Therefore, the sine qua non to issue a notice for reopening of assessments even within a period of less than four years from the end of the assessment year, is reason to believe that income has escaped assessment and this reason to believe should be on the basis of tangible material, otherwise the exercise of power to reopen would be a review of the assessment order. As held by this court in the matter of Siemens Information Systems Limited Vs. Assistant Commissioner of Income Tax, Range 7(2), Mumbai and others, such tangible material could be even on the basis of fresh material obtained during subsequent assessment proceedings. However, the test is that the reason to believe that income has escaped assessment should emanate from tangible material.

8. As disclosed in the reasons recorded while issuing notice u/s 148 of the Act, in the present case, the impugned notice was based on the ground that the income earned from the non-fund based activities of the respondent had been included in

the fund based income so as to claim excess deduction u/s 36(1)(viii) of the said Act. The reasons only provide a conclusion and give no material particulars of information obtained during the course of assessment proceedings for the assessment year 1998-99 Therefore, the reasons recorded do not indicate any tangible material which has led to a reasonable belief that income has escaped assessment. As held by this court in the matter of Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income Tax and Others (No. 1), , the reasons for reopening as recorded must be clear and not suffer from any vagueness so to keep the assessee guessing for the reasons. It is the reasons which provide the link between the evidence and the conclusion. In this case, the reasons as recorded do suffer from the vice of vagueness. The material on the basis of which the assessment is sought to be reopened is clear in the order dated March 26, 2002, of the Assessing Officer while reassessing the respondent for the assessment year 1996-97 consequent to reopening. In the above order dated March 26, 2002 it is revealed that the case of the Department is that expenses attributable to the non-fund based activity should be 10 per cent, and not 20.1 per cent as claimed by the respondent. Consequently, the expenses attributable to the fund based activity would be 90 per cent, and not 79.99 per cent, resulting in less profit from the fund based activity (long-term finance). The respondent had allocated its expenditure between the fund based and the non-fund based activity on the basis of the ratio of the income earned between the fund and the non-fund based activity. Therefore, there was some basis for distributing the expenses. Neither the reasons nor the order of the Assessing Officer dated March 26, 2002, indicate the basis on which 10 per cent of expenditure is alone attributable to the non-fund activity. Therefore, this again establishes absence of any tangible material obtained during proceeding for the assessment year 1998-99 to form a reasonable belief that income has escaped assessment. In the circumstances, the exercise of powers u/s 148 of the said Act is unwarranted.

9. To overcome the above hurdle, Mr. Gupta submitted that tangible material could also be obtained from the record of the assessment proceedings which are sought to be reopened. This is particularly so as the Assessing Officer in this case had not applied his mind to the record when originally assessing the respondent. Therefore, according to him, this is not a case of a mere change of opinion but an opinion on the basis of material. In support of the above, he states the fact that a material was available and made known to the Assessing Officer during the assessment proceedings and he does not deal with/discuss the same in the adjudication order by itself would give rise to the conclusion that he has not formed any opinion on the issue. Consequently, in the present case, notice u/s 148 of the said Act has been properly issued.

10. The mere fact that an assessment order does not deal with a particular claim cannot lead to the conclusion that while allowing the claim the Assessing Officer had not applied his mind. In Idea Cellular Ltd. Vs. The Deputy Commissioner of Income

Tax, Range 3(2), The Commissioner of Income Tax and The Union of India (UOI), this court held as follows (page 414) :

It was also sought to be contended that since the Assessing Officer had not expressed any opinion regarding this matter in his original assessment order, it could not be said'' that there was any change of opinion in this case. In our view, once all the material was before the Assessing Officer and he chose not to deal with the several contentions raised by the petitioner in his final assessment order, it cannot be said that he had not applied his mind when all the material was placed by the petitioner before him.

11. The Delhi High Court in Commissioner of Income Tax Vs. Eicher Ltd., took the same view as above. Similarly, the Full Bench of the Delhi High Court in Commissioner of Income Tax Vs. Kalvinator of India Ltd., held as under (page 19) :

We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding u/s 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or subsection (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act the judicial and official acts have been regularly perforated. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.

Besides the above, the reasons for reopening the assessment in this case is the material obtained during the subsequent assessment proceedings for the assessment year 1998-99 and not the material already on record. Therefore, the Revenue cannot now urge a new ground to support the reopening of an assessment for the assessment year 1996-97.

12. Mr. Gupta also placed reliance upon the decision of the apex court in the matter of (1976) 102 ITR 287 (SC) and states that the Tribunal has not dealt with the above case law. In the above case, while dealing with section 34(1)(b) of the Indian income tax Act, 1922, the court laid down the following parameters for the purposes for reopening of assessments (page 296) :

On a combined review of the decisions of this court the following tests and principles would apply to determine the applicability of section 34(1)(b) to the following categories of cases :

(1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions.

(2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, in advertence or a mistake committed by the income tax officer. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority.

(3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment.

(4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

If these conditions are satisfied then the income tax Officer would have complete jurisdiction to reopen the original assessment. It is obvious that where the income tax Officer gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, section 34(1)(b) would have no application.

13. The aforesaid decision has been considered by the apex court in the matter of A.L.A. Firm Vs. Commissioner of Income Tax, Madras, while dealing with reopening of an assessment u/s 147(b) of the said Act as in existence prior to 1989. The issue was whether the Assessing Officer was entitled to reopen an assessment on the ground that while making the original assessment the law laid down by the jurisdictional High Court was not noticed. In the facts of the above case, the Assessing Officer became aware of the binding decision subsequent to passing of original order of assessment ''and he initiated proceeding u/s 147(b) of the said Act. The material on which the Assessing Officer acted in the above Case was the decision of the Madras High Court which was not pointed out during the original proceedings: It was this decision which constituted the opinion/material on the basis of Which reassessment was sought to be reopened. In the aforesaid facts the court questioned the conclusion of proposition No. 2 of (1976) 102 ITR 287 (SC) . However, so far as proposition No. 4 is concerned the court observed that it would apply and proceeded to hold that (page 298 of 189 ITR) :

Even making allowance for this limitation placed on the observations in (1976) 102 ITR 287 (SC) the position as summarised by the High Court in. the following words represents, in our view, the correct position in law (at page 629 of 102 ITR).

The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the income tax Officer subsequent to the original assessment. If the income tax Officer had considered and formed an opinion on the said material in the original assessment itself then he would be powerless to start the proceedings for the reassessment. Where, however, the Income.-tax Officer had not considered the material and subsequently come by the material from the record itself, then such as case would fall within the scope of section 147(b) of the Act''.

14. However, in our view, the decisions in Kalyanji Mavji as well as A.L.A. Firm of the apex court are not of any assistance to the appellant in the facts of this case as this case is based on merely change in opinion on the material which was already on record and considered. The apex court in the matter of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, held that the reopening of an assessment cannot be on a mere change of opinion as the same would amount to review and there is no power of review given to an income tax Officer.

15. Further, the Assessing Officer while reassessing the respondent by an order dated March 26, 2002, has in fact taken a ground different from the grounds in the reasons recorded for reopening the assessment u/s 148 of the said Act. The reasons furnished for reopening the assessment alleged that the non-fund income had been shown in the fund based income so as to avail of a higher deduction. However, the basis of the order dated March 26, 2002, was that 20.1 per cent, out of the gross expenses attributed to the non-fund income was excessive and ought to be restricted to only 10 per cent. Thus, the basis of the order is completely different from the reasons recorded for reopening the assessment. This is clearly not permissible as held by this court in The Commissioner of Income Tax-5 Vs. Jet Airways (I) Limited, . The Division Bench of this court in Jet Airways held as under (page 247) :

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 u/s 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 u/s 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

In view of the above reasons, we are of the view that the Tribunal was correct in taking the view that the reopening of assessment by notice dated March 20, 2001, u/s 148 of the said Act is not sustainable in law. We answer the question raised for

our consideration in the affirmative, i.e., in favour of the respondent and against the appellant-Revenue. The appeal is disposed of. No order as to costs.