

(2011) 04 CAL CK 0001

Calcutta High Court

Case No: Writ Petition No. 1347 of 2006

Amrit Sales Promotion Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision: April 5, 2011

Acts Referred:

- Income Tax Act, 1961 - Section 143, 143(3), 144A, 147, 148

Citation: (2013) 353 ITR 68

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: V. Murarka, with Ms. S. Roychowdhury, for the Appellant; Dipak Shome , with Md. Nizamuddin, for the Respondent

Final Decision: Allowed

Judgement

Soumitra Pal, J.

In the writ petition, the petitioner, a company under the Companies Act, 1956, has challenged the reassessment notice dated March 31, 2006, issued by the Assistant Commissioner of income tax, Circle-5, Kolkata, respondent No. 2, u/s 148 of the income tax Act, 1961 ("the Act" for short), for the assessment year 2001-02 and all proceedings relating thereto. It appears from the facts, as stated in the petition, that during the relevant assessment year, the petitioner carried on the business, inter alia, of actual delivery based purchase and sale of shares and speculation business in shares. The petitioner suffered a loss of Rs. 11,49,39,400 in business of share dealing and a loss of Rs. 5,50,95,999 in speculation business. The petitioner earned short-term capital gain of Rs. 1,57,23,404 and long-term capital gain of Rs. 10,86,84,635 and dividend income of Rs. 9,26,000 during the previous year.

2. On October 22, 2001, the petitioner filed return under the Act for the said assessment year showing a total income of Rs. 94,68,640 comprising the said business loss, the said speculation loss, the said short-term capital gain and the said

long-term capital gain. In the assessment proceedings, the income tax Officer, Ward-4(3) (Kolkata), respondent No. 3, as the Assessing Officer, proposed to apply the provisions contained in the Explanation to section 73 of the Act to the said business loss in actual share dealing business. During the said proceedings, the petitioner by letter dated November 6, 2003, submitted that as non-speculative business was much less than the income from capital gain, the provisions contained in section 73 were not applicable. However, as respondent No. 3 insisted upon applying the provisions contained in the Explanation to section 73, the petitioner by a letter dated December 18, 2003, invoked the provisions in section 144A of the Act requesting the Additional Commissioner of income tax, Range-4, Kolkata, to call for the assessment records and to issue appropriate direction. Thereafter, the Additional Commissioner of income tax directed respondent No. 3 to send the draft assessment order, which was duly sent by respondent No. 3 proposing to include the said speculation loss for the purpose of deciding the applicability of section 73 to the said business loss. Assailing the said proposal, the petitioner on February 20, 2004, made a written submission before the Additional Commissioner of income tax and oral hearing was granted. Thereafter, by direction dated March 23, 2004, u/s 144A, the Additional Commissioner decided the issue regarding the applicability of the Explanation to section 73 and directed respondent No. 3 not to treat the share trading loss of Rs. 11,11,77,739 as deemed speculation loss within the meaning of the Explanation to section 73 of the Act and the Assessing Officer was directed to frame the assessment in the light of the direction contained in the said order. Pursuant to the order u/s 144A, respondent No. 3 by assessment order dated March 31, 2004, u/s 143(3)/ 144A completed the assessment by passing an assessment order. However, after completion of the assessment proceedings, the petitioner received the impugned notice dated March 31, 2006, u/s 148 of the Act for the said assessment year on the ground that the said respondent had reasons to believe that the income of the petitioner chargeable to tax under the Act for the said assessment year had escaped assessment within the meaning of section 147 and, therefore, the petitioner was required to file a return. In compliance with the notice u/s 148, the petitioner filed the return and requested respondent No. 2 to furnish the recorded reasons on which the impugned notice was issued.

3. In the recorded reasons, respondent No. 2 had observed that the interest income and incentive of investments were treated as business income along with share loss in share dealing business and, thus, the business loss of Rs. 11,49,39,400 and speculation loss of Rs. 5,50,95,999 were shown separately and not considered as business income. Moreover, capital gains and dividend income were shown separately and total income was computed at Rs. 9,48,640. Thereafter, the petitioner filed his objection to the recorded reasons on the ground that it was contrary to the Explanation to section 28 and section 43(5) and since assessment was made under the provisions of sections 143(3)/ 144A of the Act, wherein the question of applicability of the Explanation to section 73 of the Act as proposed in the recorded

reasons by respondent No. 2 was disapproved by the higher authority by exercising its discretion u/s 144A, the same issue could not be reopened or reexamined and could not be gone afresh or did not constitute a relevant material for formation of belief u/s 147. Moreover, such reopening was violative of the directions u/s 144A, which has a binding effect. After notice u/s 148 was served, the petitioner by a representation dated August 21, 2006, prayed for its cancellation. Thereafter, writ petition was moved on September 19, 2006, when direction was issued for filing of affidavits and an interim order was passed restraining the respondents from reopening the assessment. Further, the Assessing Officer was directed to pass a reasoned decision on the objection filed by the petitioner to the impugned notice. Consequently, the Assessing Officer by letter dated September 22, 2006, replied.

4. Mr. Murarka, learned advocate appearing on behalf of the petitioner, supporting the statements in the writ petition has contended that a view taken by the Assessing Officer which was negative by the higher authorities pursuant to the directions u/s 144A cannot be reopened by taking recourse to the procedure u/s 147 of the Act. Since the directions by the Additional Commissioner u/s 144A are binding on the Assessing Officer, he cannot pass an order contrary to the directions u/s 144A since it is apparent from the reply dated September 22, 2006, that the Assessing Officer was trying to reopen the issues which have been concluded pursuant to the assessment order u/s 143(3)/ 144A Moreover, the order u/s 144A had achieved its finality since the Commissioner did not revise the order passed u/s 144A by invoking the provisions contained in section 263.

5. Mr. Shome, learned senior advocate, appearing on behalf of the respondents, has submitted that since the directions u/s 144A was limited to assessment and its purpose was to make assessment, the Department was justified in issuing the notice u/s 148. Moreover, since the order dated September 22, 2006, by respondent No. 2 was an order in answer to the representation dated August 21, 2006, and since it raised fresh cause of action, no order may be passed.

6. The question is whether the Department by taking recourse to the proceedings u/s 147/ 148 can reopen an assessment which was done pursuant to the directions issued by the Additional Commissioner u/s 144A.

7. In order to answer the question it is necessary to refer to the relevant portion of section 144A, which is as under:

A Joint Commissioner may, on his own motion or on a reference being made to him by the Assessing Officer or on the application of an assessee, call for and examine the record of any proceeding in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reason, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment and such directions shall be binding on the Assessing Officer.

(emphasis Here printed in italics supplied)

8. As seen, section 144A envisages that not only the Joint Commissioner has been granted discretion to issue such directions to guide the Assessing Officer to enable him to complete the assessment but such directions are also "binding" on such officer.

9. Looking at the facts I find that it is an admitted position that the petitioner at the stage of assessment had objected to the application of the provisions contained in the Explanation to section 73 of the Act and had invoked the provisions of section 144A. Pursuant thereto, on March 19, 2004, the Additional Commissioner after considering the various provisions of the Act had passed an order u/s 144A holding, "I, therefore, direct the Assessing Officer not to treat the share trading loss of Rs. 11,11,77,739 as deemed speculation loss within the meaning of the Explanation to section 73 of the Act. The Assessing Officer shall now frame the assessment in the light of the directions contained in this order". Thereafter, on March 31, 2004, assessment order was passed u/s 143/ 144A of the Act. However, after the assessment was made, respondent No. 2 had issued the impugned notice u/s 148 of the Act. It is evident from the recorded reasons that respondent No. 2 is trying to reopen the assessment on the same ground on which earlier the Assessing Officer proceeded to assess before order u/s 144A was passed. Now, the moot question is, in such circumstances can the Assessing Officer issue the notice u/s 148 for reopening the assessment proceedings? So far the facts are concerned it is evident from the records that there has been no change. Rather facts are similar. Therefore, as the Assessing Officer is trying to reopen and reappraise the assessment on the same set of facts, in my view, it is a mere change of opinion. Secondly, had the Department considered the order passed u/s 144A prejudicial to the interests of the Revenue, it could have invoked the provisions contained in section 263, which it did not. Therefore, the order passed u/s 144A, which has a "binding" effect on the Assessing Officer, became final and cannot be reopened by issuing the impugned notice u/s 148. That direction u/s 144A has a "binding" effect is clear since statute postulates that "A Joint Commissioner..., may issue such directions as he thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment..." making his jurisdiction very wide. In this context, it is appropriate to refer to the judgment of the apex court in Commissioner of Income Tax, New Delhi Vs. Rao Thakur Narayan Singh, relied on by the petitioner, wherein the Assessing Officer was seeking to reopen the assessment on the same set of facts, wherein it was held (page 240):

The finding of the Tribunal is, therefore, binding on the income tax Officer and he cannot, in the circumstances of the case, reopen the assessment and initiate proceedings over again. If that was not the legal position, we would be placing an unrestricted power of review in the hands of an income tax Officer to go behind the findings given by a hierarchy of tribunals and even those of the High Court and the

Supreme Court with his changing moods.

10. Therefore, in view of the settled position of law and since in the instant case, the Department did not take steps to revise the order passed u/s 144A by invoking the provisions of section 263, the impugned notice u/s 148 of the income tax Act, 1961, dated March 31, 2006, issued by respondent No. 2, cannot be sustained and is, thus, set aside and quashed. Accordingly, all consequential proceedings are also set aside and quashed. The writ petition is allowed.

11. No order as to costs. Urgent photostat certified copy of this order, if applied for, be furnished to the appearing parties on priority basis.