(1998) 09 CAL CK 0004

Calcutta High Court

Case No: Writ Petition No. 2282 of 1997 16 September 1998

JAY SHREE TEA and INDUSTRIES LTD.		APPELLANT
	Vs	
DY. COMMISSIONER OF INCOME TAX		RESPONDENT

Date of Decision: Sept. 16, 1998

Acts Referred:

- Income Tax Act, 1961 - Section 148, 154

Citation: (1999) 106 TAXMAN 508

Hon'ble Judges: Y. R. Meena, J

Bench: Division Bench

Judgement

1. The Court, by this writ petition, the writ petitioner has challenged the Notice u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as `the Act''), by the respondent No. 1 and has prayed that the Notice be quashed and no steps be taken further for reassessment in pursuance to the impugned Notice dated 30-9-1997, issued u/s 148.

2. The writ petitioner is a pubic limited company and derives its income from the business of growing and manufacturing tea in India, manufacturing chemicals and fertilisers and manufacturing plywood, shipping and warehousing. For the assessment year 1990-9 1, the accounting period ending on 31-3-1990, the petitioner filed return along with Tax Audit Report and claimed deduction u/s 32AB(5) of the Act. The assessment was completed on 22-3-1993, u/s 143(3) of the Act and the assessing officer determined the income chargeable to tax under the Act from growing and manufacturing of tea in India, being 40 per cent at Rs. 6,47,84,258. In computing the said taxable income from growing and manufacturing of tea in India, the deduction of Rs. 1,59,92,021 was allowed, being 40 per cent of Rs. 3,99,80,053.

3. After completion of the assessment year, the assessing officer had issued Notice u/s 148 read with section 147, being Annexure''B'' to the petition, dated 30-9-1997, asking the petitioner that its income had escaped as deduction u/s 32AB(5) allowed more than the amount permissible u/s 32AB.

4. The petitioner has challenged this Notice on the ground that the Notice has been issued after four years from the end of the relevant assessment year. Therefore, before the issue of Notice, the Income Tax Officer should satisfy whether any income has escaped and that the assessee has f ailed to disclose fully and truly all material facts necessary for the assessment.

5. The counsel for the petitioner submits that all materials required for assessment of income were disclosed fully and truly by the assessee. Therefore, even if some income had escaped, but the materials being fully and truly disclosed, the Income Tax Officer had no jurisdiction to issue Notice u/s 148.

6. The case of the department is that the assessee has claimed the deduction u/s 32AB to the tune of Rs. 3,99,80,053. The assessing officer has wrongly allowed the claim. Therefore, income had escaped and there was justification for isssuing Notice u/s 148. If the assessee has any grievance, the nit can submits case before the assessing officer in re-assessment proceedings and even if it has any further grievance, the assessee can change that order before the Commissioner and thereafter before the Tribunal. Therefore, there is an alternative remedy and this Court should not interfere at the Notice-stage.

7. Before 1 proceed, 1 would like to give some relevant facts to see whether deduction is allowed more than admissible u/s 32AB. The counsel for the petitioner has furnished the following chart-

8. The counsel for the respondent also filed a chart indicating total income deduction allowed u/s 32AB as per the Act and excess deduction allowed which reads as under:-

JAY SHREE TEA & INDUSTRIES LTD.

10, CAMAC STREET, CALCUTTA - 700 017

Statement of Income from Tea growing and manufacturing business and deduction allowed u/s 32AB of the Income Tax Act, 1961 for the Assessment year 1990-91 as per the Assessment Order

	Composite income from Tea as per Asst. order	Deduction u/s 32AB considered in the asst. year from composite tea income	Composite Tea Income before deduction u/s 32AB	40 as per cent of the Tea income chargeable to Income Tax before deduction u/s 32AB	Deduction Allowable u/s 32AB@ 20 per cent	Net income Chargeable to Tax
Sholayar	2,88,28,498	72,15,644	3,60,44,142	1,44,17,657	28,86,258	1,15,31,399
Merchiston	7,78,023	1,96,447	9,74,470	3,89,788	78,579	3,11,209
Dewan	5,53,78,317	1,36,88,658	6,90,66,975	2,76,26,790	54,75,463	2,21,51,327
Towkok	3,31,87,080	82,02,552	4,13,89,632	1,65,55,853	32,81,021	1,32,74,832
Meleng	1,01,15,045	24,38,245	1,25,53,290	50,21,316	9,75,298	40,46,018
Nahorhabi	58,05,562	13,70,314	71,75,875	28,70,350	5,48,125	23,22,225
Kalline	1,51,81,119	37,94,237	1,89,75,356	75,90,142	15,17,695	60,72,448
Jellalpore	82,70,580	20,63,851	1,03,34,431	41,33,772	8,25,540	33,08,232
Tukvar	12,09,868	2,25,883	14,35,751	5,74,300	90,353	4,83,947
Risheehat	32,06,553	7,84,222	39,90,775	15,96,310	3,13,689	12,82,621
	16,19,60,645	3,99,80,053	20,19,40,698	8,07,76,287	1,59,92,021	6,47,84,258

8. The counsel for the respondent also filed a chart indicating total income deduction allowed u/s 32AB as per the Act and excess deduction allowed which reads as under :-

JAY SHREE TEA & INDUSTRIES LTD.

ASSESSMENT YEAR 1990-91

Statement of total income and deduction u/s 32AB as allowed in the Assessment Order

S. No.	Name of the estates	Total income before deduction u/s 32AB	Deduction allowed u/s 32AB in the assessment	Deduction u/s 32AB allowed as per Income Tax Act, 1961	Excess deduction allowed in the asstt.
1.	Sholayer T.E.	360,44,142	72,15,644	28,86,258	43,29,386
2.	Merchiston	9,74,470	1,96,447	78,529	1,17,868
3.	Dewan T.E.	690,66,975	136,88,658	54,75,463	82,13,195
4.	Towkok T. E.	413,89,632	82,02,552	32,81,021	49,21,531
5.	Neleong T. E.	125,53,290	24,38,245	9,75,298	14,62,947
6.	Nahorhabi, T. E.	71,75,876	13,70,314	5,48,126	8,22,188
7.	Kalling T.E.	189,75,356	37,94,237	15,17,695	22,76,542
8.	Jellapore T.E.	103,34,431	20,63,851	8,25,540	12,38,311
9.	Tukver T.E.	14,35,751	2,25,883	90,353	1,35,530

10.	Risheehat T.E.	39,90,775	7,84,222	3,13,689	4,70,533
		2019,40,698	399,80,053	159,92,022	239,88,031

There is no dispute that deduction allowable u/s 32AB is Rs. 1,59,92,002 on perusal of both the charts given by the counsels for the parties.

9. The counsel for the assessee, Dr. Pal, submits that though the deduction u/s 32A is initially allowed on the total income from tea-growing and manufacturing, yet ultimately deduction u/s 32AB allowed is Rs. 1,59,92,02 1, L e., 20 per cent of 40 per cent of the total income. So instead of apportioning the total income first what the assessing officer has done is that he had allowed straightway 20 per cent deduction on the total income. Then he apportioned it between 60 to 40 ratio. But there is no dispute that the net taxable income from tea growing comes to 32 per cent. So either the deduction be allowed on 40 per cent income or on total income if deduction is allowed on total income, it can be apportioned thereafter, the taxable income from tea-growing should be 32 per cent of total income from tea-growing and manufacturing income.

10. The counsel for the petitioner places reliance on various decisions, wherein the notices u/s 148 were issued and before issuing of notice u/s 148 the Income Tax Officer should satisfy himself about the escapement of income and that the assessee had failed to disclose fully and truly all material facts for assessment of the income.

Proviso to section 147 provided that where an assessment under subsection (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 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".

11. Before issue of notice whether assessing officer should satisfy that there was escapement of income in the assessment order and that is on account of omission or failure to disclose fully and truly all material facts by the assessee. in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, their Lordships observed as under:-

"...The scheme of the law clearly is that where the Income Tax Officer has reason to believe that an under-assessment has resulted from nondisclosure he shall have jurisdiction to start proceedings for reassessment within a period of 8 years; and

where he has reason to believe that an under- assessment has resulted from other causes he shall have jurisdiction to start proceedings for reassessment within 4 years. Both the conditions, (i) the Income Tax Officer having reason to believe that there has been under-assessment and (it) his having reason to believe that such under-assessment has resulted from non-disclosure of material facts, must co-exist before the Income Tax Officer has jurisdiction to start proceedings after the expiry of 4 years. . ." (p. 207)

12. In The Coca-Cola Export Corporation Vs. Income Tax Officer and Another, . Their Lordships observed as under:-

". . The assessments for the years 1971-72 to 1973-74 were already completed before the issuance of this letter. If any remittance of foreign exchange had been made in excess of the prescribed limit from January 1, 1969, that will be for the Reserve Bank or the Central Government to take action or to grant permission as may be provided under the Foreign Exchange Regulation Act, 1973. That, however, cannot be a ground for the Income Tax Officer to assume jurisdiction to start reassessment proceedings either u/s 147(a) or 147(b) of the Act on the ground that that will be" in consequence of information" in his possession in the shape of these two letters. Whatever amount be payable in respect of home office expenses or service charges by the Indian Branch to its principal Office abroad as allowed by the Income Tax authorities under the Income Tax Act, the remittance can only be permitted under the provisions of the Foreign Exchange Regulation Act by the Reserve Bank of India. Both Acts the Income Tax Act and the Foreign Exchange Regulation Act, operate in different fields." (p. 214)

13. Finally their Lordships held that there was inherent lack of jurisdiction in the Income Tax Officer to issue the notices u/s 148.

14. The Counsel for the respondent placed reliance on AIR 1986 SC 1850, Inspecting Assistant Commissioner of Income Tax Vs. V.I.P. Industries Ltd., and Sri Krishna Private Ltd. Etc. Vs. I.T.O., Calcutta and Others, . In Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay, their Lordships observed that mere production of evidence before the Income Tax Officer was not enough. That there may be omission or failure to make a true and full disclosure. If some material for the assessment lay embedded in the evidence which the revenue could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. In the case of Central Provinces Manganese Ore Co. Ltd. Vs. I.-T.O., Nagpur, their Lordships observed as under:-

"...If the true price has not been disclosed and there was under invoicing, the logical conclusion prima facie is that there has been failure on the part of the appellant to disclose fully and truly all material facts before the Income Tax Officer. We are, therefore, satisfied that both the conditions required to attract the provision of section 147(a) have been complied with in this case." (p. 667)

15. In Sri Krishna (P) Ltd. v. case (supra) in para 8 their Lordships reproduced the observations of the Constitution Bench which read as under:-

"In material particulars, the provisions in Section 34 were similar to those in section 147. Having regard to the fact that it is the only Constitution Bench decision on the point, it is necessary to examine it in some detail. The Constitution Bench explained the purport of Section 34 in the following words:-

''To confer jurisdiction under this section to issue notice in respect of assessment beyond the period of four years under-assessed. The second is that he must have reason to believe ... income u/s 22 or (it) Omission or failure on the part of an assessee to disclose for the year. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment''."

16. Considering the observations of their Lordships before issue of notice u/s 148, if he wants to issue notice after 4 years from the assessment years, the Income Tax Officer has to satisfy himself that there was an escapement of income to tax in the assessment order and secondly, that the assessee has failed to disclose fully and truly all material facts for assessment of his income. Admittedly, the notice u/s 148 has been issued after the expiry of 4 years from the end of the relevant assessment years.

17. Again, we come to the chart indicating the total income disclosed, assessed and deduction u/s 32AB allowed by the assessing officer.

18. If we see the assessment order and take the figure of Unit Sholayar, composite income from tea as per order is Rs. 2,88,28,498. That has been accepted and there is no dispute of income computed. The dispute is only on the deduction u/s 32AB of the Income Tax Officer as done. He straightway allowed Rs. 71,12,106 instead of Rs. 28,86,258 but finally he has allowed only Rs. 28,86,258. If we see from the assessment order, he assessed the composite income from tea which comes to Rs. 2,88,28,498.40 per cent of Rs. 2,88,28,498 comes to Rs. 1,44,17,657 but finally he taxed the income only to the extent of Rs. 1,15,31,399 and if we take 20 per cent of Rs. 1,44,17,657, that roughly comes to Rs. 28,86,258. So net taxable income comes to Rs. 1, 15,31,399 and that he has taxed. Therefore, the total taxable income from all these units comes to Rs. 6,47,84,258. There is no dispute on this assessed income.

19. It we look into the assessment order as well as the chart produced by both the counsels, there is hardly any case of escapement of income. Secondly, the department has failed to prove that the assessee has failed to disclose fully and truly all material facts required for assessment of its income.

20. Assuming but not accepting that there is some mistake in calculation either on the part of the assessee or on the part of the Income Tax Officer, that does not mean that the assessee has not disclosed fully and truly the material facts regarding

his income. If some calculation mistake has been committed for the purpose of deduction under a particular section, that can be rectified, u/s 154 of the Act, but on that ground no notice u/s 148 can be issued.

21. When the notice itself is bad in law, there is no reason to carry on with the futile exercise of completion of re-assessment proceedings. Therefore, on both the counts 1 find no case or justification to issue the notice u/s 148, particularly when the Income Tax Officer cannot assume jurisdiction to issue notice u/s 148 as per the provisions of the Act and the facts of this case.

22. In the result, the impugned notice issued is quashed.

23. There will be no order as to costs.

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