

(2010) 06 CAL CK 0028

Calcutta High Court

Case No: Writ Petition No. 265 of 2006

Amrit Feeds Ltd.

APPELLANT

Vs

Assistant Commissioner of
Income Tax

RESPONDENT

Date of Decision: June 30, 2010

Acts Referred:

- Income Tax Act, 1961 - Section 80

Citation: (2011) 239 CTR 82 : (2012) 344 ITR 187 : (2011) 196 TAXMAN 244

Hon'ble Judges: I.P. Mukerji, J

Bench: Single Bench

Advocate: J.P. Khaitan, Anupa Banerjee and Vivek Khaitan, for the Appellant; R.K. Chowdhury, for the Respondent

Final Decision: Allowed

Judgement

I.P. Mukerji, J.

This writ challenges several notices, all dated 15-2-2005 u/s 148 of the income tax Act, 1961 (hereafter "the Act") covering assessment years 1998-99, 1999-2000, 2000-01 to 2001-02. It also challenges an order dated 29-12-2005 by the income tax Authority negating the objection made by the writ Petitioner/Assessee against the said reassessment proceeding initiated u/s 147 of the Act. By that decision the revenue proposed to proceed with the said reassessment proceedings.

Thereafter, this writ was filed which now comes up for final determination. There is an interim order dated 24-2-2006 restraining the revenue from proceeding with such assessment.

2. The whole question in this writ application revolves around the interpretation to be given to Section 80IB(5) of the Act read with Sub-section (2) defining an industrial undertaking. This section of the Act provides for specified deduction from the profits of an industrial undertaking situated in an industrially backward district as notified

by the Central Government, while computing its income. Industrial undertaking is to be taken according to the statute as one which is engaged in manufacture. In this case, there is no dispute that an establishment of the writ Petitioner/Assessee is situated in an industrially backward district. But the dispute is with regard to its being treated as engaged in "manufacture".

3. The writ Petitioner/Assessee is engaged in production of "cattle and poultry feed" in their said establishment. This cattle and poultry feed is produced from raw materials, purchased by them like Maize, Soya and other ingredients. According to the revenue, this production of "cattle and poultry feed" cannot be classified as manufacture to enable the writ Petitioner/Assessee to avail of the benefit of Section 80IB(5) of the Act. Hence, according to the revenue, the grounds for reopening assessment u/s 147 have been made out and notices were appropriately issued.

According to the writ Petitioner/Assessee, they had always been treated as manufacturer of cattle and poultry feed by the revenue in past assessments, which include scrutiny assessment. There is description of the writ Petitioner/Assessee by the Assessing Officer as a manufacturer of such feed. Therefore, on such satisfaction assessments were made for those years. Therefore, on the date when the said notice u/s 148 of the Act was issued, there was no scope for any change of opinion for reopening the assessment. It was urged before me that this question of manufacture of "cattle and poultry feed" by the writ Petitioner/Assessee was the opinion held by the Assessing Officers in making the earlier assessments which have become final and conclusive or opinion held in those assessment years where returns have been filed and no assessments had been made. Therefore, just because there was a change of opinion of one officer regarding the status of the writ Petitioner/Assessee as a manufacturer, the proceedings could not be reopened. As such they are invalid and should be so declared by this Court.

4. On the other hand Mr. R.K. Chowdhury, learned Advocate appearing for the revenue submitted that this question whether the Assessee was entitled to deduction u/s 80IB was never considered by the income tax authority. The question whether they are in fact manufacturers of cattle and poultry feed has not been decided in assessment. In the past, assessments were made, on scrutiny or otherwise accepting the statements or declaration made by the writ Petitioner/Assessee in the forms or in other records filed by them. The assessment proceedings proceeded on the basis of these declarations without deciding the truth of it.

5. Further, on merits he has submitted that on a consideration of the process disclosed by the writ Petitioner/Assessee for production of such cattle and poultry feed they are not manufacturers. He has cited a decision in support of it which I will discuss under the heading "Discussion and Findings".

6. Therefore, according to the submission of Mr. Chowdhury, the decision rendered after receiving the objection to Section 148 notice was properly made and that the revenue should be permitted to proceed with the assessment.

7. The detailed submissions of the counsel are reflected in the discussion made below :

Discussion and findings

Ordinarily, if the time to make assessment expires and there is no assessment at all or there has been an assessment, but that assessment is erroneous, the assessment cannot be reopened at all. It becomes final between the Assessee and the revenue. In appropriate circumstances such assessment can be reopened u/s 147. Such circumstance is if the Assessing Officer entertains a belief on proper grounds that any income has "escaped assessment". Now, it is well settled that each and every assessment which has not been made or wrongly made cannot be treated as an "escaped assessment" so as to enable the revenue to enlarge the period of limitation for limitation. One limitation upon the revenue is that it cannot reopen assessment on the basis of a change of opinion. It has been held by the Supreme Court in [Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited](#), that despite amendment of Section 147 with effect from 1-4-1989 mere change of opinion will not be enough to reopen the assessment. This decision has been cited by the learned Counsel for the Petitioner. Of course, this decision has to be read with Asstt. [Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.](#), cited by the learned Counsel for the revenue that if the necessary conditions of Section 147 are fulfilled, the Assessing Officer is free to initiate a proceeding under it to reopen assessments.

8. But the question in this writ application is whether the impugned notice u/s 148 and the proceeding u/s 147 were justified. The subject-matter of Section 148 notice in this case is assessments for the period 1998-2002. What is important is that in at least one of these assessments years, that is, 2000-01, there was scrutiny assessment. The order u/s 143(3) in such scrutiny assessment was passed on 28th March, 2003. In the data which is entered just above the assessment order in a set format, as per usual practice, against item No. 10 which relates to nature of business, it is stated "manufacturing of animal feeds and chicks". The following is recorded in the assessment order:

The Assessee was engaged in the business of manufacturing of poultry feeds during the year under consideration. It was found from record that the Assessee has 4 manufacturing units at Dum Dum and Howrah in West Bengal, Hazipur in Bihar and at Bhiwadi in Rajasthan. The Assessee's industrial undertaking at Hazipur is situated in notified backward District of Vaishali in Bihar. The unit commenced commercial production in assessment year 1998-99. In respect of profit derived by Hazipur unit, the Assessee claimed deduction u/s 80IB(5) at the rate of 100 per cent. The Assessee

has also claimed deduction u/s 80IB at 30 per cent of the profit derived by the Assessee's industrial undertaking at Bhiwadi. This unit started commercial operation in assessment year 1996-97.

9. Further, in a requisition for information u/s 142(1) of the Act, the income tax Officer by his letter dated 22-11-2002 called for various details regarding the business of the Petitioner/Assessee. The Petitioner duly replied to such requisition by their letter dated 11-2-2003 where the deduction claimed u/s 80IB was specifically mentioned. Thereafter, the Assessing Officer proceeded with such assessment. Further, there was another scrutiny assessment for the assessment year 2001-02 dated 27-2-2004 where the self same statement or recital about the manufacturing activity of the Petitioner was made.

10. A note of manufacturing process was also submitted during such exercise, which is contained in page 230 of the writ petition.

11. Now, these two assessment orders are also subject-matter of Section 147 notices. In these two assessment orders mentioned above deduction under the said section was granted.

12. Now, the question is can it be said that this issue regarding deduction u/s 80IB of the Act escaped assessment, permitting its reopening under the subject notices. This particular deduction and all issues connected therewith were properly before the Assessing Officer, in the assessment years which are sought to be reopened. For whatever reason best known to the Assessing Officer, assessments were made on the footing that the writ Petitioner/Assessee was a manufacturer of poultry and animal feed and entitled to deduction u/s 80IB.

13. The law regarding reopening of assessment is very strict. If an assessment could have been done but has not been done, or erroneously done it cannot be done after expiry of the prescribed time-limit. Exception can be made in very special circumstances. One of them as I have stated earlier being "escapement of income". Linked to this is the principle that a change of opinion would not constitute such escapement. In [India Steamship Co. Ltd. Vs. Joint Commissioner of Income Tax and Others](#), cited by the learned Counsel for the Petitioner, our court was concerned with deduction of expenditure for repairing ships. Such deduction was sought to be reopened and disallowed in Section 147 proceedings after having been allowed in the previous assessment years. The court allowed the writ application after discussing in detail several authorities on the subject. The court held that when all the necessary information was before the Assessing Officer in the earlier assessments, reopening u/s 147 amounted to change of opinion.

14. In my opinion, the facts on this case are quite similar to the one decided by our Court in India Steamship Co. Ltd.'s case (supra). If the Assessing Officers had not questioned the entitlement of the Assessee to deduction u/s 80IB in the assessment years in question, it was their mistake. All information regarding the alleged

manufacturing process of the Assessee was before them. After the time-limit for making assessment or reassessment has long expired, the revenue cannot turn round, take recourse to an extraordinary provision which is, Section 147 and attempt to reopen concluded assessments. If such exercise is permitted that would be quite contrary to the intention of the Act. In that case, there would be no finality to any assessment. Then, at any point of time after expiry of time, the Assessing Officer can reopen assessments. That would plainly be against the statutory policy.

15. Further, before parting with this matter a case cited by the learned Counsel for the revenue-- [Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries \(P\) Ltd. etc. etc.,](#) has to be noticed. That decision was concerned with the consideration of the business of a hatchery as manufacture. It said that in a hatchery there was no manufacture as birth of chicks could not be said to be manufacture. As I am not going into the merits of the matter, this decision is not relevant in the facts of the case.

16. Therefore, the impugned notice and proceedings in prayer (a) of the petition are quashed and set aside. This writ application is allowed but I would add that the decision in this writ application would in no way prevent consideration of the issue arising out of Section 80IB of the Act in present or future assessment of the writ Petitioner/Assessee in accordance with law. Merits of the alleged entitlement of the writ Petitioner to claim such deduction have not been decided by me at all.