(2014) 08 CAL CK 0103

Calcutta High Court

Case No: W.P. No. 64 of 2014

Man Mohan Kedia		APPELLANT
	Vs	
Income Tax Officer		RESPONDENT

Date of Decision: Aug. 29, 2014

Acts Referred:

- Income Tax Act, 1961 - Section 139, 143(2), 143(3), 147, 148

Citation: (2015) 370 ITR 649

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

Bench: Single Bench

Advocate: A. Sen, Advocate for the Appellant; S. De, Advocate for the Respondent

Judgement

I.P. Mukerji, J.
The writ petitioner manufactures paints and related products. He also deals in computer accessories.

2. For the assessment year 2006-2007 he filed a return of income under the Income Tax Act, 1961. It was filed on 23rd October, 2006. Total income was declared as Rs. 3,29,860/-. Tax due thereon was shown as Rs. 49,937/-. It was also declared there that advance tax of Rs. 75,000/- had been paid. A refund of Rs. 25,563/- was claimed. The previous or the financial year was 2005-2006

3. According to the writ petitioner, he attached a note that Rs. 17,97,336/- was received by him in that financial year as subsidy under the West Bengal Industrial Promotion Scheme, 1994. This subsidy was released further to a notification No. 1460-FT dated 27th May, 1994 issued by the government of West Bengal. He treated the receipt as being of a capital nature. Apparently, the writ petitioner, according to the averments in the writ petition, also, mentioned in the note that the said receipt was non-taxable as held by the Income Tax Tribunal Kolkata in its order dated 18th May, 2001 in ITA No. 1080/Cal/98 in the similar case of Re: Rasoi Ltd. Vs. Deputy Commissioner of Income Tax, Special Range-123, Calcutta.

4. The return was filed u/s 139 of the Act. It was not put under scrutiny or formally assessed. To put it more legalistically, no notice u/s 143(2) of the Act was issued to the writ petitioner.

5. On 22nd March, 2013 the income tax department issued a notice to the writ petitioner u/s 148 of the Act proposing to reopen the assessment for the assessment year 2006-2007.

6. This notice u/s 148 is issued when the department contemplates action u/s 147 of the Act. It is issued in the case of an income which has, inter alia, "escaped assessment". The law is well-settled that in these proceedings, an assessment cannot be reopened beyond the ordinary period of limitation because a mistake therein is detected or realised or that something which ought to have come to the notice of the department went unnoticed. There is also no room for "change of opinion". (See Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, where Mr. Justice S.H. Kapadia for the Supreme Court opined as follows:-

On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. 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 assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

7. An assessment may be reopened when in spite of exercise of due diligence something escaped the attention of the assessing officer. The grounds on which an assessment can be reopened are very limited and strictly construed.

8. By his letter dated 10th April, 2013 the writ petitioner requested the assessing officer to treat the original return filed by him for the said assessment year as the return u/s 148. The writ petitioner also sought reasons. By a letter dated 16th May, 2013 issued by the department u/s 143(2) of the Act, he was asked to appear before the assessing officer on 28th May, 2013. By another letter of the same date the reasons for issuance the notice u/s 148 were disclosed. It was stated that the writ petitioner received Rs. 9,54,326/- from the government of West Bengal. This was reimbursement of value added tax and Central Sales Tax paid by the writ petitioner. The payment was made by the government under the above scheme of 1994. According to the department the receipt did not fulfil the requirement of a capital receipt. It was being treated as a revenue receipt on the basis of the judgment of

the Supreme Court in the Case of Sahney Steel.

9. In the letter dated 16th May, 2013 the writ petitioner was further informed that an amount of Rs. 14,17,382/- had escaped assessment. This amount was received as similar subsidy and shown in the assessment year 2010-2011.

10. By a letter dated 20th May, 2013 the writ petitioner duly filed an objection to the said assessment of income for the assessment year 2006-2007. In his objection at paragraph-2 the writ petitioner stated that in the assessment year 2003-2004, assessment was completed u/s 143(3). The amount of subsidy was excluded from the total income on the ground that it was a capital receipt. The said assessment for the assessment year 2003-2004 was scrutinised in Section 263 proceedings and upheld.

11. The objection of the writ petitioner was rejected by an order dated 10th June, 2013. The Income Tax Department followed the ratio of Sahney Steel, a judgment of the Hon''ble Supreme Court reported in 228 ITR 203

12. The entire proceedings under sections 147/148 of the said Act, beginning from issuance of the notice till passing of the order rejecting the objection of the writ petitioner are challenged in this writ application.

13. So much has been said on the judgment of the Hon''ble Supreme Court in M/s. Sahney Steel and Press Works Ltd., Hyderabad etc. etc. Vs. Commissioner of Income Tax, Andhra Pradesh-I, Hyderabad, The judgment of the Court was delivered by Justice Suhas C. Sen. It was based on a House of Lords opinion in Seaham Harbour Dock Co.''s case reported in (1931) 16 TC 333 (HL). The principle enunciated in that case was that assistance given by the government for completion of a project was of a capital nature. Another opinion of the House in Ostime''s case (1946) 14 ITR (Suppl) 45 (HL) rendered by Viscount Simon was relied upon in the said judgment of our highest Court, to lay down the principle that when subsidy was granted for the purpose of carrying on the business of the assessee, it was to be taken as revenue receipt. So what follows from these decisions is that the subsidy utilized for setting up or commencing, proceeding with or completion of a project can be treated as a capital receipt whereas the subsidy if utilized for carrying on the day to day business would be taken as a revenue receipt.

14. The case of M/s. Sahney Steel and Press Works Ltd., Hyderabad etc. etc. Vs. Commissioner of Income Tax, Andhra Pradesh-I, Hyderabad, was considered by a Division Bench of this Court in the case of Commissioner of Income Tax Vs. Rasoi Limited, . In this case this particular subsidy scheme was under consideration by this Court. It held that the "object of the subsidy was expansion of the business capacities, modernisation and improving marketing capabilities and those were for assistance on capital account.....the subsidy was a capital receipt".

15. In Sahney Steel the Supreme Court opined that it was a question of fact, in each case, as to whether subsidy was to be taken as a capital receipt or a revenue receipt. In Commissioner of Income Tax Vs. Rasoi Limited, Bhaskar Bhattacharya, J speaking for a Division Bench of this Court held with specific regard to this scheme that the subsidy was capital in nature.

16. Therefore, when there was a specific observation of a Division Bench of this Court that this particular subsidy was to be taken as a capital receipt and not a revenue receipt it was gross indiscipline on the part of the Income Tax Officer to refer to the Hon''ble Supreme Court decision in Sahney Steel which did not decide whether this subsidy was to be taken as capital receipt or revenue receipt but laid down a broad proposition as to how on factual enquiry subsidies were to be treated.

17. Following M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax, the Hon''ble Supreme Court in Commissioner of Income Tax Vs. Excel Industries Ltd., disallowed reconsideration of an issue in a subsequent year if the same "fundamental aspect" permeated different assessment years. The underlying principle is that at one point of time litigation must come to an end. It cannot be reopened. A point cannot be re-agitated again just because a person with "legal ingenuinity" thinks that the decision could have been different if certain law points not cited were placed or a certain weight were given to a particular piece of evidence. (See Hoystead V. Commissioner of Taxation reported in (1926) AC 155 (PC).) If one follows the ordinary rules of res-judicata reopening of an issue in a subsequent year or with regard to another assessee may not be barred. But atleast, in taxation cases the revenue is taken as one party for all assessment years and the assesses together taken as the other party. That which is decided between the revenue and one assessee in an assessment year, having permanent effects should not be decided otherwise or treated in any other way by the revenue with regard to any other assessee, so as to maintain consistency and fairness in government action.

18. In Amrit Feeds Ltd. Vs. Assistant Commissioner of Income Tax, I had remarked as follows:-

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 writ 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.

In my opinion, the facts on this case are quite similar to the one decided by our court in India Steamship Co. Ltd. Vs. Joint Commissioner of Income Tax and Others, 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 had 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.

19. That this subsidy was treated as a capital receipt in Section 263 proceedings for the assessment year 2003-2004 was within the knowledge of the department. Therefore, there was no ground for the Income Tax department to contend that income had escaped assessment and proceed to invoke the extraordinary provisions of Section 147 and 148 of the Act.

20. Considering all the decisions there is considerable merit in the submissions of Mr. Sen that the initiation and prosecution of the sections 147/148 proceedings were without jurisdiction. At any rate, they were in abuse of powers conferred on the Income Tax Authorities.

21. For those reasons this writ application has to succeed order in terms of prayer (a) of the writ petition by quashing the Sections 147/148 proceedings and the order dated 10th June, 2013.

22. No order as to costs.

23. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.