
(2012) 5 AD 748 : (2012) 189 DLT 720

Delhi High Court

Case No: WPC 1255 of 1999

Jagson International
Ltd

APPELLANT

Vs

CIT

RESPONDENT

Date of Decision: May 2, 2012

Acts Referred:

- Income Tax Act, 1961 - Section 143(1)(a), 143(3), 147, 148, 80(1)(3)

Citation: (2012) 5 AD 748 : (2012) 189 DLT 720

Hon'ble Judges: Sanjiv Khanna, J; R.V. Easwar, J

Bench: Division Bench

Advocate: C.S. Aggarwal with Mr. Prakash Kumar and Ms. Pushpa Sharma, for the Appellant;
N.P. Sahni, Advocate., for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. Jagson International Limited prays for issuance of a writ of certiorari and quashing of the notice dated 20.2.1997 issued u/s 148 of the Income Tax Act, 1961 (Act, for short). The said notice pertains to the assessment year 1989-90. At the outset, we record that we are not required to resort to the procedure prescribed by the Supreme Court in [GKN Driveshafts \(India\) Ltd. Vs. Income Tax Officer and Others](#), because in the present case the Assessing Officer has passed the re-assessment order, impugning which the petitioner has succeeded before the tribunal and the addition made in the re-assessment order has been deleted on merits. The revenue has filed ITA No. 753/2011 against the said decision of the tribunal.

2. The question and issue raised in the present writ petition pertains to whether or not jurisdictional pre-conditions mentioned in Section 147 of the Act are satisfied in the present case.

3. The reasons to believe recorded by the Assessing Officer on 20.2.1997 read as under:

The assessee company was engaged in the business of offshore drilling. By framing a original assessment for assessment year 1989-90, the assessee has been allowed deduction u/s 80I amounting to Rs. 29,32,203/-. The assessee has claimed deduction u/s 80-I on the ground that it is an industrial undertaking engaged in the business of manufacturing or producing articles or things. However, while finalizing the assessment for subsequent years and on perusing the record for assessment year 1989-90, it is observed that the assessee is not producing any article of thing but is engaged by the ONGC for locating the deposits of oil and on locating the deposits, the information is passed to ONGC which then proceeds with extraction of oil. It is also seen from the records that the assessee has entered into Bare Boat agreement with foreign profit and gains derived from a ship as it has not fulfilled all the conditions laid out in Section 80-I(3). In view of the above facts, I have reason to believe that an income of Rs. 29,32,203/- chargeable to tax has escaped assessment within the meaning of Section 147 of IT Act, 1961 for which notice u/s 148 is required to be issued. Issue notice u/s 148 of IT Act, to the assessee.

(Emphasis supplied)

4. Learned Counsel agree that two conditions are required to be satisfied, if we are to uphold the re-assessment proceedings. Firstly, it is not a case of change of opinion and secondly, there was failure on the part of the petitioner-assessee to disclose full and true material facts at the time of original assessment u/s 143(3) of the Act. The second condition has to be examined with the Explanation.

5. In order to decide the said aspects, necessary facts may be noticed.

6. On 29.12.1989, the petitioner had filed a return declaring an income of Rs. 1,17,28,813/-. In this return, the petitioner had not claimed deduction u/s 80-I of the Act. This return was processed and an intimation u/s 143(1)(a) as issued on 28.2.1990. On 20.8.1990, the petitioner filed a revised return and for the first time claimed deduction u/s 80-I of the Act of Rs. 29,32,203/-. On 9.1.1991, the assessing officer framed the assessment order u/s 143(3) of the Act. He allowed the deduction claimed u/s 80-I of the Act of 29,32,203/-.

7. On or about 12.9.1994, the assessing officer recorded reasons for reopening of the assessment on the ground that deduction u/s 80-I of the Act was not allowable. Notice under Sections 147/148 of the Act was issued but by order dated 31.1.1997, these proceedings were dropped. We need not examine the aforesaid reasons because the reasons to believe were again recorded on 20.2.1997 and, thereafter, notice for re-assessment was issued. There is a difference between the reasons recorded on 12.9.1994 and the reasons recorded on 20.2.1997. We are concerned with the reasons recorded on 20.2.1997.

8. Having considered the factual matrix in the present case, we feel that the petitioner is entitled to succeed.

9. As noticed above, in this case, the petitioner-assessee had not originally claimed deduction and it had filed return of Income without claiming any deduction u/s 80-IA. The said return was processed u/s 143(1)(a) of the Act and intimation was issued. Subsequently, a revised return was filed and for the first time deduction u/s 80-I of the Act was claimed. It is this revised return which was made subject matter of the scrutiny and examination by the assessing officer who passed the assessment order dated 9.1.1991. The claim for deduction u/s 80-I was specifically allowed in this assessment order. The assessment order though not filed as an annexure to the petition, but is available on record. We deem it appropriate to reproduce the relevant portion of the assessment order dated 9.1.1991, which reads:

... The reason for revising the return is stated to be due to the claim of deduction u/s 80-I in respect of 25% of profit from New Industrial Undertaking of Oil Drilling and Exploration business. Statutory notices were issued and served upon. In response to these notices Shri V.K. Gupta, C.A. attended the proceedings from time-to-time and the case was discussed with him. The assessee company is engaged in the business of Off-shore drilling for exploration and production of oil. The requisite information/details have been furnished and placed on file. After discussion total income is computed as under:

Net Profit as per P & L A/c.		1,19,51,421/-
Add:		
Depreciation for separate consideration		64,962/-
Disallowance under Rule-6D		95,734/-
		1,21,12,117/-
Less:		
1/10th of preliminary Expenses.	56,294/-	
Depreciation as claimed.	3,27,010/-	3,83,304/-
		1,17,28,813/-
Less:		
Deduction u/s. 80-I being 25% of Rs. 1,17,28,813/-.		29,32,203/-
Taxable Income:		87,96,610/-

Assessed: Issue necessary forms after giving credit for pre-paid taxes."

10. It is, therefore, clear that the assessing officer at the time of original assessment had examined the question whether deduction u/s 80-I should be allowed or not. After examining the factual position, the assessing officer, on the basis of his understanding of law, had allowed the said deduction as claimed by the assessee.

11. We may also note the contention of the learned Counsel for the petitioner that for the succeeding two assessment years also, the assessing officer had initiated re-assessment proceeding on the same grounds but the tribunal affirmed the decision of the CIT (Appeals) quashing the re-assessment notices as well as the reassessment order on merits. Learned Counsel for the petitioner states that Revenue has accepted the decision and has not preferred any appeal against the order of the tribunal.

12. It is not the case of the revenue that any new material fact has come to the knowledge after passing of the original assessment order. It is not the case of the Revenue that new evidence or material has resulted in initiation of the re-assessment proceedings. Thus, we find merit in the contention of the petitioner that it is a case of change of opinion.

13. In the present case, the proviso to Section 147 of the Act and bar/prohibition is applicable as re-assessment proceedings have been initiated after four years from the end of the assessment year in which return of income was filed. The reasons do not support or alleged that the petitioner had failed to disclose full and true all relevant material facts. Even in the counter affidavit, Revenue has not been able to show and point out that new facts or material had come to the knowledge or that the assessee had failed to furnish full and true material facts, which had caused the assessing officer to form a wrong legal opinion. In fact, in the reasons to believe dated 20.2.1997 it is said that the assessee had entered into a Bare Boat agreement with foreign profits and gains and, therefore, it does not fulfil the condition laid down u/s 80(1)(3) of the Act. The agreement was on record. The reasons also mention the activities/work undertaken under the contract with ONGC. It is not alleged or averred that the factual details and the work undertaken by the petitioner was not stated or informed to the Assessing Officer at the time of original assessment. The reasons recorded highlight and indicate that there was failure on the part of the assessing officer to properly appreciate and legally apply the law, i.e., Section 80-I(3), to the said factual matrix which was apparent and on record. An erroneous order which is also prejudicial to the interest of the Revenue can be revised but cannot be made subject matter of reopening on this ground unless the pre-conditions stipulated in Section 147 are satisfied. Explanation also does not help/assist the Revenue because full and true facts i.e. the activities of the petitioner were known. Nothing was hidden or imbedded in the documents or had escaped notice/attention for want of due diligence by the Assessing Officer. The facts were known and had not escaped notice.

14. The view is, as per the ratio and law explained by the Supreme Court in [Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited](#), wherein it has been held:

5. 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 1.4.1989), 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 - 1.4.1989, 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.

6. 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 fulfilment of certain precondition 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. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1.4.1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer."

In these circumstances, we allow the present petition and quash the notice dated 20.2.1997 under Sections 147/148 of the Act for the assessment year 1989-90. The effect thereof is that the entire re-assessment proceedings are struck down and set aside. However, we make it clear that we have not examined the legal issue with regard to deduction u/s 80-I of the Act in the present decision and the said aspect is left open. No costs.