

Assistant Commissioner of Vs. Super Instruments Ltd.

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Nov-05-1997

Reported in : (1998)65ITD79(Delhi)

Appellant : Assistant Commissioner of

Respondent : Super Instruments Ltd.

Judgement :

1. This appeal by the Revenue is directed against the order of the Commissioner of Income-tax (Appeals) - II, New Delhi and relates to the assessment year 1985-86.

2. The solitary ground raised in this appeal projects the following grievance :- "On the facts and in the circumstances of the case, the CIT (Appeals) has erred in quashing the assessment made after invoking provisions of section 147 of the Income-tax Act. The CIT (Appeals) has failed to appreciate that the assessee had claimed technical collaboration expenses as revenue expenditure without linking them with the date of production which resulted in underassessment and as such the case was clearly covered by the provisions of Explanation 1(a) to section 147 of the Income-tax Act." 3. Briefly the facts. Original assessment was completed on an income of Rs. 5,162 on 31-12-1985. Subsequently the assessment was reopened by resorting to the provisions of section 147 of the Income-tax Act, 1961.

The assessee made a claim in respect of a sum of Rs. 7,02,292 as 'technical collaboration fee'. The amount was debited in the profit and loss account. It was

allowed by the Assessing Officer. The audit party while scrutinising the records, found that the assessee-company started a new instrumentation division for which machinery and technical know-how was imported. A copy of the technical collaboration agreement dated 25-2-1982 was available on record. It was stipulated in this agreement that the assessee will pay royalty equivalent to 3% of the net sale price of all instruments manufactured and sold by the division. This provision was contained in clause 5 of the agreement. In clause 6 of the said agreement there was a stipulation for consideration. It was laid down that the assessee shall pay 1,00,000 U.S. Dollars (equivalent to Rs. 7,02,292) for transfer of technical property after deduction of Indian taxes.

4. The sales of the assessee during the year amounted to Rs. 3,20,633 only as against Rs. 4,78,794 in the earlier year. From this it was inferred that no item was manufactured by the new Instrumentation Division during the year. Thus, the payment of Rs. 7,02,292 was made for the transfer of technical property only. As such it was a capital expenditure.

5. Further a part of the payment amounting to Rs. 3,41,200 was made on 5-8-1983 and shown as prepaid expenses in the earlier year's balance sheet and the balance of Rs. 3,61,092 was paid on 16-1-1984 within the previous year relevant to this assessment year. The assessee claimed both the amounts as expenditure totalling to Rs. 7,02,292 in the year under consideration. In view of this audit party opined that the amount was wrongly claimed. It suggested proper enquiry apropos the date of commencement of business and utilisation of machinery by the assessee.

6. Pursuant to the objection raised by the audit party the Assessing Officer issued notice under section 148 on 12-3-1990. The Assessing Officer required the assessee to explain the claim in respect of allowance of technical collaboration fee, and also to prove that the depreciation was allowable in respect of machine required for Instrumentation Division. After perusing the agreement dated 25-2-1982 with Bandt. Industries (USA), the Assessing Officer concluded that the payment of Rs. 7,02,292 was not an expenditure of revenue nature. It was a payment for transfer of technical property. He, therefore, disallowed the claim of

the assessee in the reassessment proceedings.

Being aggrieved the assessee preferred appeal on this point before the CIT (Appeals). The CIT (Appeals) stated in the order, that the entire details were filed and assessment was completed under section 143(3) after due scrutiny by the Assessing Officer. There was no omission or failure on the part of the assessee-company to make the return.

Assessee disclosed fully and truly all the material facts necessary for the assessment. In the opinion of the CIT (Appeals), the Assessing Officer 'changed his opinion' on the basis of the objection raised by the audit party. He, therefore, relying on the judgment of the Apex Court rendered in the case of Indian & Eastern Newspaper Society v. CIT [1979] 119 ITR 996/2 Taxman 197 quashed the order of the Assessing Officer. Being aggrieved by the order of the CIT (Appeals), the department is in the appeal before us.

7. Shri S. K. Srivastava, learned Senior Departmental Representative appeared before us. Our attention was invited on clause 6 of the agreement dated 25-2-1982. It is laid down in this agreement that the assessee will in consideration of transfer of technical property as defined in Article 1(b) pay to the Bandt. Industries (USA) lump sum of 1,00,000 U.S. Dollars subject to the deduction of Indian taxes. This payment shall be made in three instalments as follows :- (c) 1/3rd within 30 days after the commencement of commercial production.

7.1 Mr. Srivastava vehemently argued that the audit party only reveted the attention of the Assessing Officer on certain factual aspects.

Those factual aspects were available on records. The Assessing Officer did not make recourse to those aspects. He, therefore, made a mistake in deciding the issue. The information was, therefore, in possession of the Assessing Officer on the basis of which it was concluded that the income had escaped assessment. According to the learned Departmental Representative, it is well within the power of the audit party to draw the attention of the Assessing Officer in relation to the actual error.

The audit party did not make any interpretation of the law. The issue which was skipped from the notice of the Assessing Officer was highlighted in the audit objection. In view of this, the ratio laid down in the case of *Indian & Eastern Newspaper Society (supra)* is not applicable. It was argued that as per the amended law, which is applicable in the facts of the instant case, if the Assessing Officer has "reason to believe" that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148/153 assess or reassess such income and also any other chargeable to tax which has escaped assessment and which comes to the notice of the Assessing Officer in the course of the proceeding under this section.

7.2 On the point whether the income escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, attention was invited on Explanation 1 of proviso to section 147. It is laid down in the said Explanation that the production before the Assessing Officer of account books or other evidence from which material evidence with the diligence can be discovered by the Assessing Officer, will not necessarily amount to disclosure. It was stated that the facts and material necessary for assessment differ from case to case. On the primary facts in his possession the Assessing Officer has to draw inference as regards certain other facts. What is full disclosure of all the relevant material facts depends upon the facts and circumstances of each case.

In the present case the assessee did not disclose complete material facts. Reliance was placed on the decision of the Apex Court rendered in the case of *Indo-Aden Salt Mfg. & Trading Co. (P.) Ltd. v. CIT* [1986] 159 ITR 624. In this case it was held that it is the obligation of the assessee to disclose the primary facts.

8. Shri R. Ganesan, learned Counsel for the assessee appeared before us. It was submitted that conditions precedent for issuance of notice under section 148 of the Act did not exist in the facts and circumstances of the case. According to the learned Counsel, the Assessing Officer reopened the assessment on the basis of audit objection. The issue apropos the same now stands settled by the decision of the Apex Court rendered in the case of *Indian & Eastern Newspaper Society*

(supra). It was submitted that an opinion of an internal audit party of the Income-tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) and the same cannot lead to proper and valid initiation of reassessment proceedings under that section.

8.1 The learned Counsel further invited our attention on the following two judgments of the Delhi High Court :- (1) Shriram Refrigeration Industries Ltd. v. CIT [1981] 127 ITR 746/6 Taxman 50.

In this case there was collaboration agreement. The licence was granted to manufacture and sell the product. There was no transfer of technical knowledge to the assessee. The Hon'ble High Court has held that lumpsum payment in addition to royalty based on sale price of manufactured articles is a revenue expenditure.

In this case amount was paid to the collaborator for conversion of measurement of drawings etc., to metric system. Assessee agreed to buy technical know-how and licence for ten years. Foreign collaborators continued to hold copyright in know-how. Lumpsum payment made to the collaborator was held to be a revenue expenditure.

8.2 Relying on the aforesaid decisions learned Counsel tried to demonstrate that the law on this subject is trite. Similar type of expenditure was held to be of the nature of revenue expenditure in the past by various courts. It was argued that on the basis of audit objection the Assessing Officer cannot make roving enquiry on a point which was concluded by the decision of the jurisdictional High Court.

8.3 The learned Counsel further relied on the decision of the Supreme Court rendered in the case of CIT v. Ciba of India Ltd. [1968] 69 ITR 692. It was stated that this case provides a clear guidance in the case of this type. In dealing with foreign collaboration agreement it is, sine qua non, to analyse the terms of agreement and ascertain the facts relating to the working or implementation of the agreement in order to find out, what rights or benefits in property have been acquired under the agreement. If the payment of a single sum is stipulated for variety of services, assistance and information supplied by the foreign participant, it is incumbent on the Assessing Officer to find out the extent to which the payment

made represents consideration for the mere user of technical knowledge and information for running the business during the period of agreement. He is also required to see that whether it amounts to benefit of enduring nature to the business. The learned Counsel invited our attention on the agreement. It was stated that clause 6 of the agreement should not be read in isolation. Agreement should be read as a whole.

9. We have heard the rival submissions in the light of the material placed before us, and precedents relied upon. In the case of Indian & Eastern Newspaper Society (*supra*), it was held that an opinion of the internal audit party of the Income-tax department on a point of law cannot be regarded as "information" within the meaning of section 147(b) and the same cannot lead to proper and valid initiation of the reassessment proceedings under that section. In the case, the Assessing Officer initiated proceedings under section 147(b) and reassessed such receipts on that basis. On a direct reference to the Supreme Court, a Three Judge Bench found that it was a case of mere change of opinion on the part of the Income-tax Officer. It was observed :- "While sections 9 and 10 can be described as law, the opinion of the audit party in regard to their application is not law. It is not a declaration by a body authorised to declare the law. That part alone of the note of an audit party which mentions the law which escaped the notice of the ITO constitutes "information" within the meaning of section 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO. In every case, the ITO must determine for himself what is the effect and consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or color the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the ITO." 9.1 In view of the aforesaid decision, it is beyond the competence of the audit party to make interpretation of the law. The Assessing Officer cannot act on the basis of such an interpretation. However, if the audit party finds that some factual errors have crept in the assessment, necessary advice can be rendered to the Assessing Officer apropos the same. If the material

available on record is already considered by the Assessing Officer, merely on the basis of the audit party's objection, he cannot proceed again. It will amount to change of opinion.

9.2 Therefore, it is important to examine that whether the information supplied by the audit party was in regard to the factual position or in regard to the interpretation of law.

9.3 The concept of 'capital and revenue' created chaos in the judicial cosmos. There is no clear cut formula to ascertain that whether a particular expenditure is of capital nature or of revenue nature.

Various theories were propounded to settle the point, but the yardstick for determination of the nature could not be fixed and the decisions were rendered differently depending upon the facts. The word "capital" connotes permanent and capital expenditure is, therefore closely akin to the concept of securing something tangible or intangible property, or for corporeal right, so that they could be of lasting or enduring benefit to the enterprises in issue. Revenue expenditure, on the other hand, is operational in its perspective and solely intended for the furtherance of the enterprise. This distinction though candid, and well accepted, yet is susceptible to modification under peculiar and distinct circumstances.

9.4 Assessing Officer gave a particular tax treatment to the expenditure in question. Audit party made a comment on that. From such comment whether it can be said that the Assessing Officer had 'reason to belief What is reason to belief The expression 'reason to belief' postulates belief and the existence of reasons for that belief.

The belief must be held in good faith. It cannot be merely a pretence.

The expression does not mean a purely subjective satisfaction of the Assessing Officer. The expression predicates that the Assessing Officer holds the belief induced by the existence of the reason for holding such belief. It contemplates existence of reasons on which the belief is founded. Such a belief must not be based on mere suspicion. It must be well founded on information. There should be

a fact before the Assessing Officer that reasonably gives rise to such belief.

9.5 In the case of CIT v. Bush Boake Allen (India) Ltd. [1997] 226 ITR 919 (Mad.), reassessment was based on audit note which was erroneous, reopening was held to be invalid.

9.6 Reopening of a concluded assessment is not permissible simply on the ground that a new view may be entertained on the same facts. This is so because if it is permitted, litigation will have no end except when legal ingenuity is exhausted. It has been well said declared Lord Coke : Interest Republica UT sit finis Litum (It concerns the State that law suits be not protracted, otherwise great oppression might be done under the colour and pretence of law).

9.7 We find that there was no omission or failure on the part of the assessee-company to make the return. All the relevant facts, necessary for making the assessment, were disclosed by the assessee. The bona fide of the claim cannot be doubted. Assessing Officer changed his opinion on the basis of the objection raised by the audit party. The case of the assessee therefore stands covered by the decision of the Apex Court rendered in the case of Indian & Eastern Newspaper Society (supra).

9.8 We have perused the order of the CIT (Appeals). We find that correct view was taken in the matter and his order calls for no interference. Accordingly, we uphold the same.

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