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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : May-29-2003

Reported in : (2004)88ITD533(Delhi)

Judge : B Jain, Y Kapur

Appellant : Prince Gutka Ltd.

Respondent : Dcit

Judgement :

1. This appeal by the assessee has been preferred against the order dated 23.2.2002 of the Id. CIT(A)-III New Delhi on the following grounds:- 1. "That the Id. CIT(A) has grossly erred, both on the facts of the case and as per law, in upholding the reassessment of the income of the assessee company Under Section 147 without appreciation that the initiation of reassessment proceedings Under Section 147 were time barred in view of proviso to Section 147." 2. That the Id. CIT(A) has grossly erred, both on the facts of the case and as per law, in reassessing the income of the appellant company Under Section 147 since by restoring to provisions of Section 147, the AO has reviewed the order of his predecessor, which is in contravention of the decision of jurisdictional High Court in the case of Jindal Photo Films Ltd. 234 ITR 170." 3. "That the Id. CIT(A) has grossly erred in upholding the reassessment of the income of the appellant company Under Section 147, inspite of the fact brought to her notice during appellate proceedings that no notice Under Section 148 of the Income Tax Act was served on the appellant company," 4. That the Id. CIT(A) has grossly erred in

not a adjudicating ground No. 4 of the grounds of appeal wherein the appellant company challenged the observations by the AO in the assessment order wherein it was alleged that the appellant company lodged false claim of deduction Under Section 88HH of Income Tax Act on the basic of the circular published in Income Tax Commentary and the said claim was scrutinized by the AO." 5. "That the Id. CIT(A) has grossly erred, both on the facts of the case and as per law, in upholding the levying of interest Under Section 234A, 234B and 234C of the Income Tax Act." 2. In ground No. 2 the assessee has challenged validity of initiation of reassessment proceeding Under Section 147 by reviewing the order of his predecessor. Since the appellant challenges the very initiation of proceedings, this ground is taken up first.

3. The appellant is a limited company engaged in the manufacturing of Pan Masala, Supari and Fragrances etc. The original return was filed declaring an income of Rs. 5,17,320/- on 31.12.1992. The assessment was completed vide order dated 27.3.95. The assessee in the original assessment claimed deduction Under Section 80HH of the Income Tax Act on account of its industrial unit situated in Noida. During the course of assessment proceedings the assessee has filed a copy of notification No. SO 165 dated 19.12.1986 and also a certificate from NOIDA authorities stating that Noida was part of Bisrakh Block. The copy of the notification so filed shows Bisrakh Block covered in the list of backward areas post filed Under Section 80HH(2) w.e.f. 1.4.1983. The AO accepted the claim of eligibility for deduction Under Section 80HH of the Act made by the appellant.

4. On transfer of records from Central Circle-8 to Central Circle-1, New Delhi the AO discovered that text of Notification relied upon and furnished by the assessee for claiming deduction of Rs. 5,28,324/- was completely false. He was not working in the backward area was excluded from the purview of the backward area specified in the correct Notification. Another reason taken by the AO is that excess deduction Under Section 80I has been claimed by Rs. 1,25,472/-. The AO recorded his satisfaction that there is a failure on the part of assessee to fully and truly disclose the material facts and there has been escapement of income as such.

5. Copy of the reasons recorded for initiating proceedings Under Section 147 are placed at assessee's paper book page 1. The same are reproduced hereunder:- "Assessment in this case was completed on 27.3.1995 at a total income of Rs. 14,52,900/-. During the course of assessment the assessee made a claim of deduction Under Section 80HH of IT Act, 1961 and in support of its claim, the director of the company along with letter dated 15.3.95 allegedly, filed copy of Notification No. SO 165 dated 19.12.1986 and a certificate that the Industrial Unit of the company being located in Noida and was part of Bisrakh Block and therefore eligible for deduction under the said section. In view of the certificate the AO accepted the claim of the assessee and allowed the deduction claimed by the assessee. This issue, therefore was not a subject matter of appeal before CIT(A). On transfer of case records from Central Circle-8 to Central Circle-1 the current and past records of the assessee were reviewed and during this review it was found that the text of the Notification relied upon and furnished by the assessee was false.

The Notification furnished by assessee with regard to backward area of Uttar Pradesh read as under:"14. UTTAR PRADESH:- The districts of Almora, Azamgarh, Baduan, Bahraich, Ballia, Banda,"21. UTTAR PRADESH:- The districts of Almora, Azamgarh, Badaun, Bahraich, Ballia, Banda, It will be seen from above that the assessee has falsely claimed that its Industrial Undertaking was functioning in a backward area whereas the fact is that it is functioning in an area covered by exceptions to the backward areas as identified in the Notification.

Thus the false claim made by the assessee has led to escapement of income to the tune of Rs. 5,28,324/-. Since there has been a failure on part of the assessee to fully and truly disclose all material facts.

It also noticed that assessee has been allowed excess deductions Under Section 80-I of IT Act, 1961 to the tune of Rs. 1,25,472/- because unexplained investment in the form of unaccounted purchases amounting to Rs. 5,01,888/- (total unexplained purchases as per 143(3) Rs. 6,70,174/- less Rs. 1,68,640/- relief allowed by CIT(A)) have been treated as the business profit while calculating deduction Under Section 80-I which is incorrect." 6. At the outset the Id. DR Sh.

R.R. Prasad objected to the rising of ground 1 to 3 by the assessee for the reason that the appellant had given up his claim before the CIT(A)-21, New Delhi in Appeal No. 13 & 14/2001 dated 19.3.2001 when the order was set aside with a direction for taking up the assessment proceeding afresh after giving full opportunity to the assessee to represent the case.

7. Sh. Jain the Id. counsel for the assessee relying on the judgment of Hon'ble Gujarat High Court in the case of Doshi (PV) v. CIT 113 ITR 22 contends that jurisdictional provisions which were mandatory and included in public interest could never be waived and the question of finality could not arise because the mandatory conditions for initiating reassessment proceedings had not been fulfilled.

8. In this case the perusal of the remand order reveals that the assessee had not (SIC) ground of validity of notice Under Section 148 before the Id. CIT(A). However after the reassessment was completed the appellant in the impugned order had challenged the legality of the proceedings initiated Under Section 148 and the matter of jurisdiction thereto. The same has been adjudicated by the Id. CIT(A) in the pugned order. The ground so taken by the assessee do arise from the impugned order. Also the matter of jurisdiction of the assessing authority for initiation of valid proceedings cannot be held to have acquired finality as the assessee can always agitate the issue of jurisdiction on the ground of fulfillment of mandatory conditions. On this issue the preliminary objection raised by the Id. DR is therefore rejected.

9. The first contention of the assessee's counsel is that it had disclosed all basic and material facts. There was no new information with the AO. The AO has reviewed the material which was there in the original assessment for allowing deduction Under Section 80HH of the Act to the appellant on the basis of reliable and authentic Notification, copy of which was placed before him during the course of original assessment proceedings. A certificate from the concerned authorities shoeing that NOIDA zone falls under Bisrakh Block was also given. Due and proper application of mind was there by the assessing authority before allowing deduction to the appellant. Under such circumstances initiation of action Under

Section 147 was nothing but a mere change of opinion. Basis taken cannot be a ground for reassessment. Amendment of Section 147 w.e.f. 1.4.1989 has not altered the position. Reliance has been placed on the decision of jurisdictional High Court in the case of CIT v. Kelvinator of India 256 ITR 1(Del.) (FB) and also to the case of Jindal Photo Films Ltd. v.DCIT and Anr. 234 ITR 170 (Del.). Reliance has also been placed on the decision rendered by Hon'ble Kerala High Court in the case of Pala Marketing Cooperative Society Ltd. v. State of Kerala and another 236 ITR 604 (Ker.) where the primary facts in support of his claim for depreciation were not furnished. It was not the duty of the assessee to point out that he had made a wrong claim in the rate of depreciation.

Primary facts stood disclosed. Notice issued for reassessment, therefore was not valid. The assessee's counsel also placed reliance on the decision of Praful Chunilal Patel and Ors. v. ACIT 236 ITR 832 (Guj.) where complete disclosure of all relevant facts were there.

Subsequent discovery of mistake in assessment, no reassessment was possible in view of the provisions of Section 147. It was therefore contended that the very jurisdiction was vitiated and proceedings so taken needs to be annulled.

10. On the other hand the Id. DR contends that the assessee had made a false claim. If the assessing officer had accepted lie in good faith it does not debar him to bring to tax the correct income. Assessee cannot be allowed to take benefit of his own lies. Information was there in the possession of the assessing officer at the time of issuance of notice. The assessee had reasons to believe that there was escapement of income on the failure of the appellant. This was sufficient to initiate action against the assessee. It is not a case of change of opinion as the appellant did not furnish correct and material facts for making his claim. Once it is found that the deduction has been claimed on the basis of wrong Notification, assessment could be reopened as the AO has reasons to believe that income had escaped assessment. This test therefore stood satisfied. Assessee's reliance to various decisions on persual of the same material on which a different conclusion was drawn it was inferred as a case of mere change of opinion whereas in the appellant case the document on the strength of which the deduction was claimed

was not the correct Notification. The correction notification was different. Hence it would not be termed as the case of a mere change of opinion. The reasons recorded by the assessing officer shows satisfaction at the threshold and it for bonafide and good reasons.

Reliance has been placed on various decisions in support of the claim that the proceedings initiated are valid. *Phool Chand Bajrang Lal and Anr. v. ITO and Anr.* 203 ITR 456(SC), *Dr. Amin's Pathology Laboratory v. JCIT and Ors.* 252 ITR 673 (Bombay), *G. Suresh v. DCIT* 252 ITR 230 (Ker.) 11. We have heard the parties with reference to the precedents relied upon by them and taken ourselves through the record. During the course of assessment proceedings the appellant furnished a copy of Notification dated 19.12.1986. This Notification contained list of backward areas specified w.e.f. 1.4.1983 Under Section 80HH(2) of the Income Tax Act, 1961. Under the heading "Uttar Pradesh" Bisrakh Block, Ghaziabad was shown to have been covered by the list of backward areas.

The assessee also furnished a certificate from NOIDA authorities showing that NOIDA is a part of Bisrakh Block. The assessing officer hereinafter referred as "AO" allowed deduction of Rs. 5,28,324/- Under Section 80HH of the Act, considering the appellant eligible for deduction on account of its industrial unit located in backward area.

It is the location of the industrial unit in backward area which is a material fact which has been found falsely claimed on the basis of the said Notification as in the authentic Notification the AO found that Bisrakh Block, Ghaziabad is excluded from the list of backward area for this purpose. This fact has been stated in the reasons recorded. The appellant does not say that there is no such Notification which the revenue contends to be an authentic Notification. It is therefore evident from the reasons that the time at which reasons are recorded for initiating proceedings Under Section 147, the material fact of location of the industrial unit in the backward area was not disclosed correctly and was not in accordance with the authentic Notification.

The formation of belief by the AO is not a judicial decision but it is administrative decision. It does not determine anything at this initial stage. His reasoning may be

the result of official information or his own investigation or may come from any source that he considers reliable unless the ground or material on which his belief is based, is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason, cannot be overridden. The Hon'ble Gujarat High Court in Parful Chunilal Patel (supra) relied upon by the appellant himself reveals that under the aforesaid facts and circumstances what is to be ascertained is whether the alleged reasons really existed and if it did whether it was so irrational as to be outside the limits of administrative discretion with which the AO is invested so as to be really in disregard of the statutory conditions. If the AO honestly comes to a conclusion that a mistake has been made, it matters nothing so far as the jurisdiction to initiate the proceedings Under Section 147 is concerned, that he may have come to an erroneous conclusion whether on laws or facts, jurisdiction in proceedings Under Section 147 for reassessment in such case would be correct and rightly exercised.

In the case before us the AO based his belief on the authentic Notification which excluded the Bisrakh Block, Ghaziabad from the list of backward areas on the basis of which the claim of deduction Under Section 80HH is dependent. This was a rational belief. The authentic Notification stated is not in doubt. The AO honestly came to the conclusion that the assessee has falsely claimed that its industrial undertaking was functioning in a backward area, whereas the fact is that it is functioning in an area covered by the exceptions to the backward area. Once it has been found that the particular statement or information furnished of facts stated are false, untrue or incorrect, which in this case are stated in the reasons itself, the assessment is liable to be reopened and it is no answer to say that the assessee has stated basic and primary facts. It is not that the assessee is under obligation to state all information and particulars but he is under obligation to state them truly and correctly. This having not been done the action to reopen cannot be held to be vitiated.

12. In Phool Chand Bajrang Lal v. ITO 203 ITR 456 (SC) page 473 referred by the Id. DR it has clearly been observed that acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of the

original assessment is different from drawing a fresh inference from the same fact original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "tree" and "full" facts in the case and the Income tax Officer would have the jurisdiction to reopen the concluded assessment in such a case.

13. In *Jindal Photo Films Ltd. v. DCIT* (supra) the jurisdictional High Court pinned that where nothing new has happened and there is no change in law, no new material came on record, no information has been received, in such circumstances it can be said that it is merely a fresh application of mind by the same AO to same set of facts and thus a case of mere change of opinion. However, in the case of the appellant the position is contrary. It is not the appreciation of the same facts.

The Notification filed for eligibility for deduction is found not be authentic and material facts of the eligibility in the authentic information was also not correct. In the reasons recorded, fresh material had come which shows that the appellant's industrial unit is not situated in the backward area eligible for deduction. It was therefore not a case of mere change of opinion.

14. In the case of *CIT v. Kelvinator of India Ltd.* the Hon'ble Court observed that in the reasons recorded the Income tax Officer has said that he was not right in allowing deduction Under Section 80I because he had allowed the deduction wrongly and therefore he was of the opinion that the income had escaped assessment. Between the date of order of assessment and recording of reasoning nothing new has happened. There was no change of law, no new material has come on record, no information has been received. It was merely a fresh application of mind by the same AO to the same set of facts which resulted into the conclusion that was a case of mere change of opinion which does not provide jurisdiction to the AO to initiate proceedings Under Section 147 of the Act. In the case at hand primary and material facts were not truly disclosed. Another Notification which stated that the area under which the industrial undertaking of the

appellant was situated was excluded from the list of industries eligible for deduction Under Section 80HH and this fact stood clarified by another circular No. 484 dated 1.5.1987 a date prior to filing of original return of income by the appellant. It is therefore not a case of fresh application of change of opinion. We therefore are of the opinion that both the decisions of the jurisdictional High Court in the case of Jindal Photo Films Ltd. and Kelvinator of India Ltd. (supra) do not apply to the facts and circumstances of the case for the reasons stated hereinbefore. In the light of the aforesaid findings the decision of Pala Marketing Cooperative Society Ltd. is also found distinguishable.

15. The persual of reasons recorded clearly reveals that there has been a failure on the part of the assessee to fully and truly disclose all the material facts necessary for his assessment, with which we agree.

This has led to formation of bonafide belief that income of the appellant has escaped assessment. The reasons therefore cannot be held as vitiated nor as a mere change of opinion. The ground of the assessee therefore is liable to be dismissed.

16. In ground No. 1 the assessee challenged the proceedings as barred by limitation in view of proviso to Section 147. It has been contended that as per proviso to Section 147 the action Under Section 147 could not have been taken after the expiry of four years. The proceedings are for assessment year 1992-93 which according to proviso could not have been taken up after 31st March 1997 but the assessing officer has taken action on 9.12.1999. The same therefore needs to be quashed.

17. After hearing the parties with reference to precedents and in view of our findings at para 15 hereinbefore it is evident that the income chargeable to tax has escaped assessment for the impugned year by reasons of the failure on the part of the assessee to disclose fully and truly all material facts. Proviso to Section 147 under such circumstances was not applicable to the facts of the case. The action was subject to the limitation as prescribed Under Section 149 of the Act. The action was initiated on 9.12.1999 by issuance of the notice Under Section 148. The same is within the limitation provided under that section. Accordingly ground

No. 1 of the assessee stands rejected.

18. In ground 3 the assessee's counsel states that the notice was not made in the name of Principal Officer as required Under Section 282 of the Act nor the same has been served as per procedure prescribed. The revenue has sent the notice by speed post. This is not a registered post and therefore there can be no presumption of service. Reference has been drawn to the commentary of Chaturvedi and Pithisaria page 9240 Vth Edition Vol. VI. It was therefore contended that it is not a correct presumption of valid service on the assessee. Section 148 prescribed service of notice on the assessee. This condition has not been satisfied. Accordingly the notice so issued has to be quashed.

19. On the other hand the Id. DR states that the assessee in remand proceedings had given up the claim of validity of issuance of notice Under Section 148 by not pressing the same. The order was therefore set aside and reassessment proceedings taken up afresh after giving full opportunity to the appellant to represent his case. The notice was sent through speed post. The same is also not denied. It is, therefore, to be presumed that there has been a valid service of the notice on the appellant and there is no violation of the conditions contained in Section 148 of the Act. The action so taken needs to be upheld.²⁰ Parties have been with reference to material on record, case law referred and the commentary of renowned authors referred by the assessee's counsel. In this case the assessee has come up with the issue of validity of notice Under Section 148 before the Cit(A)-XXI, New Delhi who has set aside the original assessment order and remanded the matter back to the AO with a direction to take proceedings afresh after giving full opportunity to the appellant. At least at this stage the assessee can be said to have taken notice of the proceedings. Mere denial made by the appellant also without making any affidavit was not sufficient to rebut the presumption relating to service of notice on him as the notice was sent through speed post which is a service rendered by the Indian Posts Department. In the modern days quickest mode of service by speed post by the same Postal Department through whom the registered post is done does not alter the position of effective service on a person. Only a plea of denial of service has been raised without bringing any material on record. Also because the name of the Principal

Officer was not mentioned on the notice will not render the notice invalid as the same was only a minor irregularity.

Such a minor irregularity does not prejudice the interests of the individual and such a notice therefore cannot be termed as illegal. In *Rajmani Devi v. CIT* 1937 AIR (All.) 771 it has been held that a minor irregularity in the notice does not prejudice the interest of the individual but a substantial irregularity will. In view of our finding that this was a minor irregularity and notice having been drawn in the name of the appellant, we do not find any merit in the plea raised by the appellant. This ground also stands rejected.

21. In ground No. 4, the assessee has agitated that the Id. CIT (A) did not render any decision for allowing deduction Under Section 80HH of the I.T. Act.

22. After hearing the parties and on careful perusal of the impugned order, we find that the Id. CIT (A) has rendered a decision holding that the assessing officer has rightly brought to tax the excess claim allowed Under Section 80HH. Under such circumstances, we do not find any merit in the ground raised by the assessee. The same is, therefore, dismissed.

23. The last ground in appeal is regarding charging of interest Under Section 234A, 234B and 234C of the I.T. Act without making any order.

The reliance has been placed on the decision of the Supreme Court in the case of *Ranchi Club* 247 ITR 209.

24. Parties have been heard with reference to material on record and the precedents relied upon. On persual of the order it is revealed that the assessing officer did not make any specific order for charging the interest nor any provisions of statute has been mentioned in the main order before charging of interest under the aforesaid section from the assessee. Having regard to the Apex Court's decision, charging of such interest was unjust and the same is directed to be deleted.