

**Cascade Enterprises Vs. Asstt. Cit**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Mar-17-2006

**Reported in :** (2006)101TTJ(Delhi)277

**Appellant :** Cascade Enterprises

**Respondent :** Asstt. Cit

**Judgement :**

This is the bunch of four appeals filed by the assessee against consolidated order dated 5-12-2002 of Commissioner (Appeals), New Delhi, for the assessment years 1994-95, 1995-96 and 1996-97 and another order dated 16-9-2004 of Commissioner (Appeals), New Delhi, for the assessment year 2001-02. Since the issues raised in all these appeals are identical, these were heard together and are being disposed of by this consolidated order for the sake of convenience.

First we take up appeals in ITA Nos. 678, 679 and 680 of 2003 for the assessment years 1994-95, 1995-96 and 1996-97 which arise from the same order of Commissioner (Appeals) and the issue involved is the same. In the original grounds of appeal, the assessee has taken only one ground, i.e., Commissioner (Appeals) was not justified in reducing the claim of the assessee for deduction under section 80-0 on net basis instead of gross basis claimed by the assessee. The assessee also raised two additional grounds common to these three appeals. The first additional ground relates to the assumption of jurisdiction under section 147, which according to the assessee was void ab initio. The second additional ground relates to the charging of interest under sections 234A, 234B and 234C. At

the time of hearing of appeals, the learned counsel submitted that both the grounds are legal in nature for which relevant facts are already on record. Thus, by relying on the two judgments of Hon'ble Supreme Court in the case of National Thermal Power. Co. Ltd. v. CIT (1999) 157 CTR (SC) 249: (1998) 229 ITR 383 (SC) and CIT v. Mahalaxmi Textiles Mills Ltd. (1967) 66 ITR 710 (SC), the learned counsel submitted that additional grounds deserve to be admitted by the Tribunal.

The learned Departmental Representative submitted that he has no objection to the admission of additional grounds of appeals.

We have heard both the parties and carefully considered the submissions with reference to the facts, evidence and material on record. The first additional ground relates to legality of the action for initiating reassessment proceedings under section 147 of the Income Tax Act, 1961.

The relevant facts for this ground are already on record. Similarly, the assessee has challenged the legality of action of charging interest under sections 234A, 234B and 234C for which the facts are also on record. Relying on the two judgments of Hon'ble Supreme Court in the cases of CIT v. Mahalaxmi Textiles Ltd. (supra) and National Thermal Power Co. Ltd. v. CIT (supra), the additional grounds raised by the assessee are admitted.

As regard the merits of the 1st additional ground relating to validity of initiating reassessment proceedings for the assessment years 1994-95, 1995-96 and 1996-97, the facts of the case are that in the returns of income filed for these assessment years, the assessee had declared 'nil', income after claiming deduction of Rs. 19,28,275, Rs. 43,76,709 and Rs. 45,72,672 under section 80-0 on gross basis for the assessment years 1994-95, 1995-96 and 1996-97, respectively. These returns were processed under section 143(1)(a) of the Act. However, at the time of completing the assessment for the assessment year 1997-98, -under section 143(3) of the IT Act, 1961 (hereinafter referred to as 'the Act'), the assessing officer observed that the assessee was entitled to deduction under section 80-0 only in respect of net income and not in respect of gross income as by the Hon'ble Calcutta High Court in the case of CIT v. M.N. Dastur & Co. (P) Ltd. (2000) 243 ITR 10 (Cal) and the decision of Tribunal, Special Bench (Bombay) in

the case of Petroleum India International v. Dy. CIT in ITA No.9,882/Bom/1995 (reported at (1999) 65 TTJ (Mumbai)(SB) 671Ed.). He, therefore, initiated the proceedings under section 147 by issue of notices under section 148 on 6-3-2001 duly served on the assessee on 23-3-2001. Thereafter, the assessing officer completed the assessments under section 143(3) read with section 147, on 31-1-2002 restricting the deduction under section 80-0 to net income. Accordingly, the taxable income was computed at Rs. 9,66,030, Rs. 22,13,640 and Rs. 24,49,800 for the assessment years 1994-95, 1995-96 and 1996-97, respectively.

Being aggrieved, the assessee filed appeals against the assessment orders for all these assessment years. The assessee relied on certain decisions of Tribunal before the Commissioner (Appeals) for the proposition that deduction under section 80-0 was admissible in respect of gross income and not in respect of net income. However, the learned Commissioner (Appeals) referred to the judgment of Hon'ble High Court of Calcutta in the case of CIT v. M.N. Dastur & Co. (P) Ltd. (supra), and the judgment of Delhi High Court in the case of CIT v. Marketing Research Corporation (1987) 61 CTR (Del) 204 (wrongly mentioned by Commissioner (Appeals) reported in 161 CTR 204 and the judgment of Hon'ble Apex Court in the case of Distributors (Baroda) Ltd. v. Union of India & Ors. (1985) 155 ITR 120 (SC), and held that assessing officer was justified in restricting the deduction under section 80-0 in respect of net income. Accordingly, the appeals of the assessee were dismissed. The assessee is aggrieved with the order of Commissioner (Appeals). Hence, these appeals before us.

The learned counsel for the assessee drew our attention to pp. 1 and 2 of the paper book, which is a copy of the assessment order for the assessment year 1993-94 passed under section 143(3) of the Act. He submitted that in the return of income filed (a copy placed at pp. 3-5 of the paper book), the assessee had claimed deduction under section 80-0 for the assessment year 1993-94 in respect of income on gross basis and the same was allowed by the assessing officer as it is. He further relied on the decision of Tribunal Calcutta Bench in the case of M.N. Dastur & Co. Ltd. v. Dy. CIT (1992) 40 ITD 521 (Cal) where it was held that section 80AB was not applicable for computing deduction under section 80-0 and therefore, the assessee was entitled to deduction on gross basis and not on net

basis. He submitted that returns for these assessment years were-also accepted under section 143(1). The deduction as claimed in the returns was allowed. Thus, he submitted that no new facts had come into being, there was no amendment to the provisions of the Act and no new judgment had come to last and, therefore, the reopening of the assessments by issue of notices under section 148 for these assessment years, was bad in law. He submitted that the same reflected only change in opinion, which cannot be the basis for initiating the proceedings under section 147. The learned counsel heavily relied on the judgment of the Hon'ble jurisdictional High Court of Delhi in the case of CIT v. Kalvinator of India Ltd. (2002) 256 ITR 1 (Del)(SB), where it was held that even under the amended provisions of section 147, the reassessment proceedings could not be initiated merely on the basis of change of opinion. He further submitted that principle of consistency and rule of finality demanded that reassessment proceeding could not have been initiated when the same view based on decision of Tribunal Calcutta Bench reported in (1992) 40 ITD 521 (Cal) (supra), was accepted by the assessing officer for the earlier assessment year. The learned counsel for the assessee heavily relied on the judgment of Hon'ble Apex Court in the case of Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC). Thus, he submitted that the assessing officer was not justified in initiating the reassessment proceedings under section 147 for these assessment years.

The learned Departmental Representative, Shri P.K. Prusty, on the other hand heavily relied on the orders of authorities below. He submitted that the learned counsel has relied on the decision of Tribunal Calcutta Bench in the case of M.N. Dastur & Co. Ltd. v. Dy. CIT (supra) which was reversed by the Hon'ble Calcutta High Court vide their judgment dated 14-1-2000 reported in (2000) 243 ITR 10 (Cal) (supra) where it was held that the assessee was entitled to deduction under section 80-0 in respect of net income and not in respect of gross income. This judgment is of a later date than the assessment completed by the assessing officer under section 143(3) for the assessment year 1993-94. He drew our attention to pp. 1 and 2 of the paper book which is a copy of the assessment order, which bears the date of assessment under section 143(3) of 13-12-1993. He further relied on the judgment of Hon'ble - Supreme Court in, the case of A.L.A. Firm v. CIT (1991) 189 ITR 285, (SC) where the assessing officer had not

considered High Court decision though available at the time of completing the original assessment and subsequently the assessing officer reopened the assessment by referring to such decision. On these facts, the reopening of the assessment was held to be valid. He submitted that in the present case, there was a judgment of jurisdictional High Court in the case of CIT v. Marketing Research Corporation (supra) dated 20-1-1987 directly on the issue of deduction under section 80-O in respect of net income and not in respect of gross income and the same was overlooked by the assessing officer at the time of completing the assessment under section 143(3) for the assessment year 1993-94. Therefore, the reopening of assessments in the case was valid. He further stated that even the subsequent judgment of Hon'ble Calcutta High Court in the case of CIT v. M.N. Dastur & Co. (P) Ltd. (supra) dated 14-1-2000, which has been referred to by the assessing officer for initiating proceedings under section 147 would justify the action of the assessing officer for initiating reassessment proceedings. He further stated that on merits, the learned counsel has conceded before the Bench that he has no case.

Thus, he submitted that the authorities below were justified in initiating/upholding the reassessment proceedings under section 147 for these assessment years. He further stated that the judgment of Hon'ble Supreme Court in the case of Radhasoarni Satsang (supra) is not at all applicable to the facts of the present case. He particularly drew our attention to the last paragraph of the judgment, where it was held that the decision was confined to the facts of that case alone and may not be treated as an authority on aspects which have been decided for general application.

The learned counsel submitted by way of rejoinder that the judgment of Hon'ble Supreme Court in the case of A.L.A. Firm v. CIT (supra) relied upon by the learned Departmental Representative is distinguishable on facts and, therefore, there was nothing wrong in allowing deduction under section 80-O. He further stated that the judgment of Delhi High Court in the case of CIT v. Marketing Research Corpn. (supra) is dated 20-1-1987, i.e., prior to the date when the assessing officer completed the assessment for the assessment year 1993-94 and, therefore, it should be presumed that the assessing officer had considered the ratio of the

same. He further relied on the judgment of Delhi High Court in the case of CIT v. A.R.J Security Printers (2003) 264 ITR 276 (Del) where principle of finality was emphasized by the Hon'ble High Court.

He also relied on the decision of Delhi High Court in the case of CIT v. Dalmia Promoters Developers (P) Ltd. (2006) 151 Taxman 202 (Del), where it was held that in the absence of any material change in the facts of the case, view taken for earlier years, should not be disturbed.

We have heard both the parties at length and given our thoughtful consideration to the rival submissions, gone through the evidence and material placed on record. We have also gone through the orders of authorities below and referred to the relevant pages of the paper book to which our attention has been drawn. The undisputed facts of the case are that the assessee had claimed deduction under section 80-0 in respect of entire income on gross basis. The assessing officer processed the returns under section 143(1)(a). One of the questions, which is required to be considered is, whether the processing of return under section 143(1)(a) amounts to completion of assessments or expression of an opinion on the issue. This issue has been considered by the Hon'ble Delhi High Court in the case of MTNL v. Chairman, CBDT (2000) 246 ITR 173 (Del) where, it was held that intimation under section 143(1)(a) does not amount to assessment and failure to issue notice under section 143(2) does not debar the assessing officer from initiating reassessment proceeding under section 147 in a case where the assessing officer formed 'reason to believe' that assessee was allowed excessive allowance for expenditure. Thus, reopening of the assessment was held to be valid. This issue also came to be considered by the Hon'ble Punjab & Haryana High Court in the case of Aditya & Co.

v. CIT (2005) 279 ITR 47 (P&H). In this case also return was processed under section 143(1)(a) accepting the returned income. Subsequently, the assessing officer issued a notice under section 148 on the ground that income was assessable as 'income from other sources' and assessee was not a firm, On these facts, the Hon'ble High Court upheld the action of the assessing officer for initiating proceedings under section 147 for the reason that the assessee was only sent the

intimation under section 143(1)(a), the question of examination of material by the assessing officer did not arise at this stage. The Hon'ble High Court observed that thus, there was no question of change of opinion and notice issued under section 148 was valid. The learned counsel for the assessee has heavily relied on the judgment of Delhi High Court in the case of CIT v. Kalvinator of India Ltd. (supra). But there is a material difference between the facts of the present case and the facts of the case before Delhi High Court. In the case of CIT v. Kalvinator of India Ltd. (supra), the assessment was completed under section 143(3) of the Act and the assessing officer had already decided the matter and expressed the opinion. Subsequently, the assessing officer initiated reassessment proceedings mentioning in the reasons recorded that assessee had claimed deduction of interest pertaining to earlier assessment years. On these facts, the subsequent action for initiating the reassessment proceedings was held to be bad in law, because the same was found to be merely based on the change of opinion.

But in this case returns were processed under section 143(1)(a) of the Act. Therefore, the ratio of the judgment of Hon'ble Delhi High Court is not applicable to the facts of the present case.

This case can be examined from another angle. The learned counsel for the assessee was fair enough to concede that prior to completing the assessment for the assessment year 1993-94, the judgment of Delhi High Court dated 20-1-1987 in the case of CIT v. Marketing Research Corpn.

(supra), was directly on the issue of deduction under section 80-0 on net income and was against the assessee. Admittedly, in view of such judgment, the assessee was not entitled to deduction under section 80-0 in respect of gross income and was entitled to deduction only in respect of net income. This judgment of the jurisdictional High Court binding on the assessing officer was overlooked by him at the time of completing the assessment for the assessment year 1993-94. It is also a fact that the decision of Tribunal, Calcutta Bench in the case of M.N.Dastur & Co. Ltd. v. Dy. CIT (supra) was reversed by the Hon'ble Calcutta High Court in the case of CIT v. M.N. Dastur & Co. (supra) and this judgment was delivered on 14-1-2000, i.e., much after the completion of assessment for the assessment year

1993-94. This has been referred to by the assessing officer for initiating reassessment proceeding for these assessment years. Besides, the assessing officer has also referred to the subsequent assessment completed by the assessing officer under section 143(3) for the assessment year 1997-98 where the deduction under section 80-0 was allowed in respect- of net income and not on the basis of gross income. In fact, the order of assessing officer for the assessment year 1997-98 was also subsequently upheld by the Commissioner (Appeals). In the case of A.L.A. Firm v. CIT (supra), the Hon'ble Apex Court had held that in case the assessing officer had not considered the High Court decision, though available at the time of original assessment, subsequent reopening of assessment on consideration of the judgment of High Court would be valid. Now in this case the assessing officer has overlooked the direct judgment of jurisdictional Delhi High Court in the case of CIT v. Marketing Research Corpn. (supra) at the time- of completing assessment for the assessment year 1993-94. Admittedly, the assessee was not entitled to deduction under section 80-0 in respect of gross income in view of the judgment of Delhi- High Court where the Hon'ble High Court has also relied on the judgment of Hon'ble Supreme Court in the case of Distributors (Baroda) (P) Ltd. v. Union of India (supra). Moreover, expression of the opinion by the assessing officer for the assessment year 1993-94 does not amount to expression of opinion for the assessment years in question because the assessments were completed under section 143(1)(a) and not under section 143(3). Thus, even by relying on the. judgment of Hon'ble Supreme Court in the case A.L.A.Fkm v. CIT (supra), the action of the assessing officer for reopening of the assessment is to be held as valid.

Further, the attention of learned counsel was drawn to Expln. 2 to section 147, which refers to the deemed cases of escapement of income within the meaning of section 147. Clause (c) of Explanation 2 of section 147 refers to case of deemed escapement where an assessment has been made but income has been made the subject of excessive relief under this Act or excessive loss or depreciation allowed or any other allowance under this Act. Allowing excessive. relief under section 80-0 than what was admissible would fall in the category of deemed escapement of income within the meaning of section 147 read with Explanation 2. Therefore, on this ground also, reopening of assessment would be valid and



justified.

The learned counsel has heavily relied on the principle of consistency and finality. Such principle is ' applicable if the facts of the case remain the same. Admittedly, in the present case, the assessing officer failed to notice the judgment of Delhi High Court in the case of CIT v. Marketing Research Corpn. (supra) at the time of completing assessment for the assessment year 1993-94. Moreover, the judgment of Calcutta High Court in the case of CIT v. M.N. Dastur & Co. (P) Ltd. (supra) which is of later date, i.e., dated 14-1-2000 and this has been relied on by the assessing officer for initiating action under section 147 would show that there was change in the facts of the case of assessment years under reference, than the facts as available before the assessing officer at the time of completing the assessment under section 143(3) on 13-12-1993 for the assessment year 1993-94. Thus, the judgment of Hon'ble Apex Court in the case of Radhasoami Satsang v. CIT (supra) and two judgments of Delhi High Court in the case of CIT v. A.R.J. Security Printers (supra) and CIT v. Dalmia Promoters & Developers (P) Ltd. (supra) are also of no help to the assessee as there was a change in facts and, therefore, these judgments are not applicable to the facts of the case, Moreover, the processing of returns under s. 143(1)(a) for the assessment years under reference does not mean that the assessing officer had applied his mind and considered the judgment of Delhi High Court in the case of CIT v. Marketing Research Corpn. (supra). Thus, we do not find any merit in the submissions of the assessee.

Thus, in the light of these facts and circumstances of the case and the legal position discussed above and also by relying on the ratio of aforesaid judgments, we are of the considered opinion that authorities below were justified for initiating/upholding the action of the assessing officer for initiation of proceedings under section 147 for these assessment years.. We confirm the order of Commissioner (Appeals) and reject the additional ground of appeal of the assessee for all these assessment years.

As regards the merits of original ground taken in these appeals, the learned counsel for the assessee was fair enough to concede that in view of the judgments

of Hon'ble Delhi High Court in the case of CIT v. Marketing Research, Corpn. (supra), Calcutta High Court in the case of CIT v. M.N. Dastur & Co. (P) Ltd. (supra) and the decision of Tribunal Special Bench (Bombay) in the case of Petroleum India International v. Dy. CIT (supra) and the judgment of Hon'ble Supreme Court in the case of Distributors (Baroda) (P) Ltd. (supra), the ground of appeal for all the assessment years deserves to be dismissed. Thus, the respective ground of appeals of the assessee for these assessment years are dismissed and the findings of the assessing officer for allowing deduction only in respect of net income and not in respect of gross income, are upheld. Now, the only additional ground relating to these assessment years is for charging of interest under sections 234A, 234B and 234C. It was conceded before us that the assessing officer has passed specific orders for charging of interest under sections 234A, 234B and 234C in the assessment orders itself. Therefore, there is no objection to the same. However, the learned counsel for the assessee submitted that liability of interest under sections 234A, 234B and 234C has arisen only because of allowing of deduction under section 80-0 in respect of net income instead of gross income. The learned counsel particularly advanced arguments in respect of interest charged under section 234B. He submitted that at the time when advance tax was due to be paid, the assessee was under a bona fide belief and justified impression that advance tax is to be paid after claiming deduction under section 80-0 in respect of gross income. He submitted that such claim of assessee was also accepted by the assessing officer at the time of completing the assessment under section 143(3) for the assessment year 1993-94 and further supported by the decision of Tribunal Calcutta Bench in the case of M.N. Dastur & Co. Ltd. v. Dy. CIT (supra). He relied on 'the decision' of Uttaraanchal High Court in the case of CIT v. Reading & Bates.

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