

Handloom Intensive Development Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT Lucknow

Decided On : Oct-31-2007

Reported in : (2008)114TTJLuck416

Judge : H Karwa, D Agrawal

Appellant : Handloom Intensive Development

Respondent : Assistant Commissioner of Income

Judgement :

1. This appeal, filed by the assesses, is directed against the order of CIT(A)-II, Kanpur, dt. 31st March, 2003 relating to asst. yr. 1997-98.

1. That the learned CIT (A) II has erred in law and on facts in upholding the proceedings under Section 147 of the Act, without properly applying his mind to the fact that the proceedings leading to the above assessment are without jurisdiction and void as the conditions precedent for acquiring jurisdiction under the said Section are absent in assessee's case.

3. Vide above ground, the assessee has challenged the validity of reassessment proceedings under Section 147 of the IT Act, 1961 and has also challenged the decision of CIT(A) in upholding the proceedings under Section 147 of the Act, as valid.

4. Briefly stated, the facts of the case are that the assessee company filed its return of income on 28th Nov., 1997 declaring a loss of Rs. 30,000. The assessee has also filed Form No. 30 along with the return of income (see Rule 41 of IT Rules 1962) whereby request for refund of Rs. 1, 72,000 was made. The AO has processed the return dt. 28th Nov., 1997 under Section 143(1) of the IT Act, 1961 on 15th Nov., 1999 at returned loss of Rs30, 000. However, the AO issued notice Under Section 148 of the Act dt. 27thMay, 1999 after recording following reasons on same day: 27th May, 1999--From the perusal of assessment record for the asst.

yr. 1986-87, it is found that as per ITNS-150 dt. 10th March, 1997, interest Under Section 244 amounting to Rs. 24,60,225 was allowed to the assessee and the same was adjusted along with other refund against the demand for asst. yr. 1988-89. The intimation of interest allowed was sent to the assessee in Form No. 7 which was served on the assessee on 19th March, 1997. Accordingly, the interest amount of Rs. 24,60,225 should have been shown in the return of income for asst. yr. 1997-98, which the assessee has not shown. I have, therefore, reason to believe that by reason of omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for the assessment, the income chargeable to tax is escaped assessment Under Section 147 of the IT Act to the tune of Rs. 24,60,225. Issue notice Under Section 148.

Notice Under Section 148 of the Act was issued on 27th May, 1999 and was duly served on 1st June, 1999. In compliance to this notice, the assessee filed revised return on 4th Sept., 2000 reiterating loss at Rs. 30,000. Thereafter, the AO issued notice Under Section 143(2) and 142(1) of the Act to the assessee. The AO required the assessee to explain why interest of Rs. 24,60,225 should not be added to its income. The AO also required the assessee to furnish details of interest claimed at Rs. 6,81,703 towards income from house property.

Certain details of investment in the construction of building were also required. The assessee, vide his reply dt. 20th Feb., 2002, stated that interest of Rs. 24, 60,225 Under Section 244A not been received by it during this year. The AO observed that the assessee failed to provide any proof that interest claimed at Rs.

6,81,703 related to loan borrowed from the Government for the purpose of construction of the building. The AO also stated that assessee had claimed that interest Under Section 244A was disclosed in the return of income for asst. yr.

2000-01 submitted on 30th Nov., 2000. The AO, after considering the explanation of the assessee co., added the sum of Rs. 24,60,225 to the total income of the assessee. He has also disallowed interest claimed at Rs. 6,81,703 stating that no proof has been submitted that this interest has been paid. against the loan borrowed from the Government for construction of rented building. Accordingly, the AO determined the taxable income at Rs. 30,47,828.

5. Aggrieved by the Order of the AO, the assessee carried the matter in appeal before the CIT (A). As regards the validity of the proceedings initiated Under Section 147 of the Act, the CIT (A) held that the AO was justified in invoking the provisions of Section 147 of the IT Act, 1961 and notice under Section 148 of the IT Act, 1961 was valid in law.

6. Now the assessee is in second appeal before this Bench of the Tribunal.

7. Before us, Shri Pradeep Seth, learned Counsel for the assessee submitted that return has been filed on 28th Nov., 1997 and the said return has been processed only on 15th Nov., 1999. The reasons for issuing notice Under Section 148 have been recorded on 27th May, 1999 and notice Under Section 148 was issued on said date. Thus, notice for reassessment Under Section 147 has been issued while original return and claim for refund i.e. proceedings Under Section 237 of the IT Act were still pending for disposal and hence, there could be no escapement of income from the above facts on the basis of settled principles of law. Accordingly, it was submitted that notice Under Section 148 proposing to reassess the income is bad in law. Reliance was placed on the decision of Hon'ble Supreme Court in the case of: Trustees of H.E.H. The Nizam's Supplemental Family Trust v. CIT (2000) 159 CTR (SC) 114 : (2000) 242 ITR 381 (SC); and (ii) CIT v. Ved and Co. (2007) 209 CTR (Del) 455 : (2007) 162 Taxman 366 (Del).

In view of the above, Shri Pradeep Seth, learned Counsel for the assessee submitted that assessment proceedings terminated Under Section 143(1) of the

Act only on 15th Nov., 1999. He further submitted that on 27th May. 1999 when the AO made up his mind to issue notice to the assessee Under Section 147/148 of the Act, a valid return of income along with claim for refund filed in Form No. 30 of the IT Rules, were still pending before him, which could have been processed. Accordingly, it was submitted that the reassessment made by the AO is bad in law and, therefore, same may be quashed.

8. On the other hand, Shri Anadi Verma. senior Departmental Representative, argued that Hon'ble Supreme Court judgment cited by the assessee, reported in (2000) 159 CTR (SC) 114 : (2000) 242 ITR 381 (SC) (supra) is not applicable to the facts of the present case since the law with regard to reassessment of escaped income has undergone substantial change w.e.f. asst. yr. 1989-90 by Direct Tax Laws (Amendment) Act, 1987. He further submitted that in the above case, assessment year involved was 1962-63. He further submitted that as per Expln 2(b) to Section 147. pendency of proceedings Under Section 143(1) docs not amount to pendency of assessment in the scheme of assessment, contemplated Under Section 143(3) of the Act. In the instant case, the AO had no option but to resort to Clause (b) of Expln. 2 to Section 147 of the Act for initiating reassessment proceedings. As per above provision, even where a return was filed and no assessment had been made, notice Under Section 148 could be issued under Clause (b), Expln.

2 to Section 147 of the Act. This Clause reads as under: (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return.

In view of the above, Shri Anadi Verma, senior Departmental Representative, submitted that the notice issued Under Section 148 of the IT Act is valid in law. He also relied on the following decisions: that the reassessment proceedings Under Section 148 were not vitiated merely because the AO failed to invoke the power to correct the assessment already completed Under Section 143(1) by issuing a notice Under Section 143(2).

(ii) Ranchi Club Ltd. v. CIT (1995) 129 CTR (Pat) 385 : (1995) 214 1TR 43 (Pat), wherein it has been held that in view of the provisions contained in Section 147 of the IT Act, 1961, and Expln.

2(b) thereto, even if assessment for the asst. yr. 1991-92 had not been made in terms-of Section 143 and only intimation had been sent to the assessee in response to the return filed by him, notice could be issued Under Section 148.

(iii) Punjab Tractors Ltd. v. Jt. CIT wherein it has been held that the notice Under Section 147/148 issued to the petitioner was not vitiated merely for the reason that notice Under Section 143(2) had not been issued to it.

(iv) Bharat V. Patel v. Union of India (2004) 186 CTR (Guj) 639 : (2004) 268 ITR 116(Guj).

(v) Aditya and Co. v. CIT wherein writ petition was dismissed stating that it is not on the basis of facts of each case that it has to be decided whether a particular income falls under the heads "Business income" or the "Income from other sources". The assessee was only sent an intimation Under Section 143(1) of the Act and the question of examination of material, by the AO did not arise at that stage. Thus, there was no question of change of opinion. The notice Under Section 148 was valid.

(vi) Pradeep Kumar Har Saran LaL v. AO , wherein it has been held that intimation Under Section 143(1)(a) is different from assessment. Failure to proceed Under Section 143(2) would not preclude the AO from initiating reassessment proceedings.

9. In view of the above, it was urged by learned Departmental Representative that the AO was justified in issuing notice Under Section 148 the Act and the same may be held as valid.

10. In rejoinder, Shri Pradeep Seth, learned Counsel for the assessee submitted that the proposition laid down by the Hon'ble Supreme Court in the case of Trustees of H.E.H. The Nizam's Supplemental Family Trust (supra) it is to be noticed that the crucial words in Section 147, namely, "has reason to believe that

income chargeable to tax has escaped assessment" were also present in the original Section 147 as enacted by IT Act, 1961, which came into force w.e.f. 1st April, 1962.

Thus, the asst. yr. 1962-63, which was involved in the above case before the Hon'ble Supreme Court, was the first year under the present IT Act, 1961 and the provisions of Section 147 as it stood in above assessment year, were as per the relevant extracts of the provisions as appearing in . Section 147 applicable at the relevant time read as under: (a) the ITO has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for assessment year to the ITO or to disclose full and truly all material facts necessary for his assessment for that year, 'income chargeable to tax has escaped assessment' in that year.

11. As regards the second issue, as raised by learned Departmental Representative, namely, that no proceedings were pending when the notice under Section 148 was issued, Shri Pradeep Seth, learned Counsel for the assessee submitted that the assessment proceedings commenced under this Act when the voluntary return is filed under Sub-section (i) of Section 139 or individual notice under Sub-section (2) of Section 139 is served. According to him, in the present case when the original return was filed by the assessee on 28th Nov., 1997, the assessment proceedings had commenced. Therefore, no reassessment proceedings could be taken until the said proceedings terminated as held by the Supreme Court in the case reported in (2000) 159 CTR (SC) 114 : (2000) 242 ITR 381 (SC) (supra). Shri Pradeep Seth, learned Counsel for the assessee also referred to the decision of Hon'ble Allahabad High Court in the case of S. P. Kochhar v. ITO wherein it has been held that income cannot be said to have escaped assessment within the meaning of this Section of assessment proceedings in respect of that income which are still pending and not yet have terminated in a final Order. Therefore, in respect of pending assessment, initiation of reassessment proceedings under Section 147 for assessing income escaping assessment and consequent issue of notice Under Section 148 are not valid. As regards the reference to Explanation Under Section 2(b) to Section 147 by the learned Departmental Representative, it is stated by the learned Counsel for the

assessee that the proposition that no notice Under Section 148 can be issued against the assessee so long as a return validly filed by him remains pending and not disposed of, is not effected by Clause (b) of Expln. 2 to the amended Section 147. Shri Pradeep Seth, learned Counsel for the assessee also submitted that the above view is also supported by the Circular No. 549 dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1] issued by the CBDT clarifying the amendments by the Direct Tax Laws (Amendment) Act, 1987 relating to new procedure for assessment and the amendment made in Section 147 . In view of above, learned Counsel for the assessee submitted that even after the amendment made by Direct Tax Laws (Amendment) Act, 1987, it is still a condition precedent that before reassessment proceedings can be resorted to the original proceedings commencing with the filing of return must have terminated either by way of processing of return and issue of intimation under Section 143(1) or by a assessment Order passed under Section 143(3), and if assessment proceedings are still pending before the AO, he cannot resort to the provisions of Section 147.

12. We have carefully considered the rival submissions and have also perused the materials available on record. There is no dispute as far as facts of the present case are concerned. Return on income was filed on 28th Nov., 1997 declaring a loss of Rs. 30,000. Without processing the return, the AO recorded the reasons and issued notice under Section 148 of the Act on 27th May, 1999. We have already reproduced hereinabove the reasons recorded by the AO on 27th May, 1999. The notice under Section 143(2) could have been issued upto 30th Nov., 1998 but no notice under Section 143(2) of the Act was issued to the assessee. There is no dispute that alongwith the return, the assessee also submitted the Form No. 30 (see Rule 41 of IT Rules, 1962) i.e.

claim for refund of tax amount of Rs. 1,72,000 which reads as under: I, A.K. Gupta, Director of Handloom Intensive Dev. Project (Bijnore) Ltd. do hereby state that my total income computed in accordance with the provisions of the IT Act, 1961, during the year ending on 31st March, 1997 being the previous year for the assessment year commencing on the 1st April, 1997 amounted to Rs. 30,000 loss that the total income-tax chargeable in respect of such total income is Rs. Nil and that the total amount of income-tax paid, or treated as paid Under Section 199, is

Rs. 1,72,000.

Relevant to the assessment year to which this claim relates and that what is stated in the application is correct. dt. 28th Nov., 1997 (Signature) Thus, it is clear that when the original return was filed by the assessee on 28th Nov., 1997 along with Form No. 30, the assessment proceedings had commenced. Therefore, no reassessment proceedings could be taken until the said proceedings terminated, as held by Hon'ble Supreme Court in the case of Trustees of H.E.H. The Nizam's Supplemental Family Trust (supra). In the instant case not only assessment proceedings but proceedings under Section 237 of the Act for determination of the claim for refund made vide application in Form No.30 were pending. It is apparent from the record that Order Under Section 237 was passed by the AO on 15th Nov., 1999 when an intimation of refund was issued. In the case of Trustees of H.E.H. The Nizam's Supplemental Family Trust (supra), it has been held (headnote) as under: It is settled law that unless the return of income already filed is disposed of, notice for reassessment under Section 148 of the IT Act, 1961. cannot be issued, i.e. no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. A return of income filed in the form prescribed along with an application for refund under Section 237 of the Act is a valid return. Filing of return in the form prescribed under Section 139 of the Act along with the application for refund is not an empty formality. It assumes importance if such return had not been filed earlier.

We are, thus, of the opinion that during the pendency of the return filed under Section 139 of the Act along with the refund application under Section 237 of the Act, action could not have been taken under Section 147/148 of the Act.

14. In the instant case also, the return was filed under Section 139 of the Act along with the refund application Under Section 237 of the Act, action could not have been taken Under Section 147/148 of the Act.

15. In the case of Ved and Co. (supra), the facts of the case before the Hon'ble Delhi High Court were that the assessee had filed its return of income on 29th Sept. 1994 declaring an income of Rs. 17,88,833. Without processing the return,

the AO on 5th June, 1996 recorded the reasons for issuing a notice to the assessee for reassessment on the ground that income has escaped assessment.

Thereafter, on 11th June, 1996, the return of income was processed by the AO under Section 143(1)(a) of the Act and on the same date notice was issued to the assessee under Section 148 of the Act requiring it to file its return of income. In the said case, the assessment year involved was 1994-95. The Hon'ble Delhi High Court has referred to the decision of Hon'ble Supreme Court in the case of Trustees of H.E.H. The Nizam's Supplemental Family Trust (supra) and held as under: 10. We are of the opinion that in view of the decisions that we have mentioned above, for the purposes of initiating reassessment proceedings, the AO could not have made up his mind that the income of the assessee has escaped assessment while a valid return was still pending before him. If the AO had allowed the time to elapse for taking action Under Section 143(2) of the Act, it was entirely his own doing. What the AO is now trying to do in an indirect (and incorrect) manner is what he could not have done directly.

16. In our considered view, the decisions of Hon'ble Supreme Court in the case of H.E.H. The Nizam's Supplemental Family Trust (supra) and the decision of Hon'ble Delhi High Court in the case of Ved and Co.

(supra) are directly applicable to the facts of the present case. We agree with this contention of learned Counsel for the assessee that the principle laid down by the Hon'ble Supreme Court in the case of H.E.H. The Nizam's Supplemental Family Trust (supra), it is to be noticed that the crucial words in Section 147, namely, "has reason to believe that income chargeable to tax has escaped assessment" were also present in the original Section as enacted by IT Act, 1961 which came into force w.e.f. 1st April, 1962. Thus, the asst. yr. 1962-63 which was involved in the above case before the Hon'ble Supreme Court was the first year under the present IT Act, 1961. It is relevant to state that we have already reproduced the provisions of Section 147 (hereinabove) as it stood in above assessment year. Learned Departmental Representative referred to Expln. 2(b) to Section 147 of the Act, which says that where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has

understated the income or has claimed excessive loss, deduction, loans or relief in the return shall also be deemed to be case where income chargeable to tax has escaped assessment. We find that the learned author Acharya Suklendra in his book "Law of income-tax. Third Edition p. 4049, has stated that the proposition that no notice under Section 148 can be issued against the assessee so long as a return validly filed by him remains pending and not disposed of is not affected by Clause (b) of Explan. 2 to amended Section 147. One of the contentions of learned Departmental Representative was that no proceedings were pending when the notice under Section 148 was issued.

At this stage, a useful reference can be made to the commentary by Kanga and Palkiwala, 8th Edition, Vol.-I p. 1101 where the learned authors have categorically opined that the assessment proceedings commence under this Act when the voluntary return is filed under Sub-section (1) of Section 139 or individual notice under Sub-section (2) of Section 139 is served. Thus, in the present case, when the original return was filed by the assessee on 28th Nov., 1997, the assessment proceedings had commenced. Therefore, no reassessment proceedings could have been taken until the said proceedings terminated. In the case of S.P. Kochhar v. ITO , the Hon'ble Allahabad High Court has held that "so long an assessment is pending, the assessing authority cannot have reason to believe that income for the relevant assessment year has escaped assessment.

Therefore, in respect of a pending assessment, initiation of reassessment proceedings under Section 147 for assessing income escaping assessment and consequent issue of notice under Section 148 are not valid." 17. In our considered view, there is merit in this contention of learned Counsel for the assessee that even after the amendment made by Direct Tax Laws(Amendment) Act, 1987, it is still a condition precedent that before reassessment proceedings can be resorted to the original proceedings commencing with the filing of return must have terminated either by way of processing of return and issue of intimation under Section 143(1), and if assessment proceedings are still pending before the AO, he cannot resort to the provision of Section 147.

18. The decisions relied upon by the learned Departmental Representative are distinguishable on facts. Even otherwise also, it is well-settled law that if contrary views of Courts are available on a particular issue then a view in favour of the assessee should be taken.

In view of the above discussion, we hold that the initiation of reassessment proceedings by the AO by issuing notice Under Section 148 of the Act during the pendency of a valid return along with the application Under Section 237 of the Act, was not justifiable and as such was not a valid action in law. Hence, we quash the reassessment proceedings initiated by the AO under Section 148 of the Act.

Accordingly, we allow ground No. 1 of the assessee's appeal.

19. Since we have quashed the reassessment proceeding on legal issue and, therefore, we do not think it necessary to discuss the merits of the case. Hence, no findings are given on merits.

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