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Court : Allahabad

Decided On : Aug-27-2010

Judge : Rajes Kumar; Bharati Sapru, JJ.

Appeal No. : CIVIL MISC. WRIT PETITION NO. 1603 (TAX) OF 2006.

Appellant : ShamsuddIn Ansari

Respondent : Union of India and Another

Advocate for Pet/Ap. : Sri. S.D. Singh

Judgement :

y1. By means of the present petition under Article 226 of the Constitution of India the petitioner is challenging the validity of the notice dated 24.6.2006 under Section 148 of the Income Tax Act (called the 'Act' for short) issued by the Income-Tax Officer, Bhadohi, for the assessment year 2003-04.

2. The petitioner was enjoying the share income from M/s. Delux Carpet Company, Bhadohi, rental income from house property and income from other sources. The petitioner has furnished the return disclosing the income for the assessment year 2003-04. Admittedly, during the year under consideration, the petitioner has constructed a house in which a sum of Rs. 3,00,000/- has been shown invested. During the course of the assessment proceeding the assessing authority made a query from the petitioner to explain the source of Rs. 3,00,000/- invested in the construction of the house. The petitioner explained the investment

out of savings. However, such explanation has not been accepted by the assessing authority and the sum of Rs. 3,00,000/- has been added as unexplained investment in the construction/renovation of the building. The assessing authority has passed the order on 21.2.2006.

3. It appears that to ascertain the quantum of investment made in the building construction the assessing authority had referred the matter to the valuation officer under Section 142-A of the Act. The Valuation Officer has given its report on 9.5.2006 and has valued the investment as under :

F.Y. A.Y. Investment declared Investment Difference

By assessee valued by V.O.

2002-03 2003-04 300000 505300 205300

2003-04 2004-05 576000 970300 394300

2004-05 2005-06 531900 896000 364100

2005-06 2006-07 70000 117900 47900

4. As the investment shown by the petitioner was less than the investment estimated by the valuer report, notice under Section 148 of the Act has been issued for the assessment year 2003-04 to reopen the assessment on the ground that there was an escaped assessment. It appears that the petitioner has filed a reply to the notice under Section 148 of the Act, vide reply dated 5.7.2006, which is Annexure '4' to the writ petition.

8. Heard Sri S.D. Singh, learned counsel for the petitioner, and Sri A.N. Mahajan, learned Standing Counsil.

6. Leaned counsel for the petitioner submitted that the reference to the Valuation Officer after passing the assessment order was not justified and, therefore, the valuation report cannot be relied upon. He further submitted that in the valuation report the estimate of the investment in the construction of the house was only an opinion of the Valuation Officer and could not constitute the material to form the

belief of escaped assessment to reopen the proceeding under Section 147 of the Act. In support of the contention he relied upon the decision of the Calcutta High Court in the case of Britannia Industries Ltd. v. Deputy Commissioner of Income-Tax and others reported in 238 ITR 57, the decision of the Andhra Pradesh High Court in the case of S. Sreeramachandra Murthy and another v. Deputy Commissioner of Income-Tax and another reported in 243 ITR 427 and the decision of the Calcutta High Court in the case of Smt. Tarawati Debi Agarwal v. Income-Tax Officer reported in 162 ITR 606.

7. Sri A.N. Mahajan, learned Standing Counsel, submitted that the reference has been made to the Valuation Officer during the course of assessment proceeding, which is apparent from the letter of the Income-Tax Officer, Bhadohi, dated 1.8.2006. He further submitted that the reference to the valuation cell has not been challenged by the petitioner at any stage. Even in the reply dated 5.7.2006 to the notice under Section 148 of the Act, the reference to the Valuation Officer has not been challenged. Therefore, it is not open to the petitioner to raise this issue at this stage. He further submitted that the valuation report reveals that lesser investment has been shown in the construction of the house and, therefore, it is a case of escaped assessment. He submitted that the valuation report constitute the material to form the belief as escaped assessment and, therefore, the notice issued under Section 148 read with Section 147 of the Act is in accordance to law and the writ petition is liable to be dismissed. Reliance is placed on the Division Bench decision of this Court in the case of Ram Swarup Cold Storage and Allied Industries v. Assistant Commissioner of Income-Tax and another reported in 192 ITR 537.

8. We have considered the rival submissions of learned counsel for the parties and perused the record. The notice under Section 148 read with Section 147 of the Act has been issued on the basis of valuer report in which it is reported that as against the disclosed investment in the construction of house in the year under consideration at Rs. 3,00,000/- a sum of Rs. 5,05,300/- has been estimated resulting less disclosure of investment by Rs. 2,05,300/-. A perusal of the assessment order under Section 143(3) reveals that the assessing authority has not adjudicated the issue relating to investment in the construction. The assessing

authority has made the query from the petitioner asking him to explain the source of investment towards construction, which was shown at Rs. 3,00,000/- and made an addition of Rs. 3,00,000/- towards unexplained investment in the building and being not satisfied with the explanation to the source of investment but no query doubting the investment had been made. A perusal of the letter dated 1.8.2006 reveals that the reference to the Valuation Officer under Section 142-A of the Act was made during the course of assessment proceeding. However, the report has been received after passing the assessment order, which is dated 9.5.2006. The petitioner at no stage has challenged the reference to the Valuation Officer as illegal and without jurisdiction, inasmuch as participated in the proceeding. Therefore, it is not open to the petitioner to challenge the reference to the Valuation Officer under Section 142-A of the Act.

9. Now the question for consideration is whether the valuation report constitute material to form a belief of escaped assessment and the case can be reopened under Section 147 of the Act. In the valuation report as against the disclosed investment at Rs. 3,00,000/- a sum of Rs. 5,05,300/- has been estimated resulting a lesser disclosure of the investment by Rs. 2,05,300/-. Therefore, as per valuation report, less investment has been shown by the petitioner by Rs. 2,05,300/- and as such there was an escaped assessment.

Section 147 of the Act after 1.4.1989, which is relevant for the year under consideration, reads as follows :

> **"147. 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 sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153**

referred to as the relevant assessment year:

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation I.- Production before the Assessing Officer of account of books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.- For the purposes of the this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but--

(i)income chargeable to tax has been underassessed; or

(ii)such income has been assessed at too low rate; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has

been computed.

Explanation 3.-- For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

10. Section 147 of the Act came up for consideration before the Hon'ble Supreme Court in the case of Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers P. Ltd. reported in 291 ITR 500. Relying upon the various earlier decisions of the apex Court, it has been held that The expression "reason to believe" in section 147 would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, he can be said to have reason to believe that income had escaped assessment. The expression cannot be read to mean that the Assessing Officer

should have finally ascertained the fact by legal evidence or conclusion. What is required is "reason to believe" but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at that stage. This is so because the formation of the belief is within the realm of the subjective satisfaction of the Assessing Officer.

11. Section 147 of the Act further came up for consideration before the apex Court in a latest decision dated 18.1.2010 in Civil Appeal No. 2009-2011 of 2003 (Commissioner of Income Tax, Delhi v. M/s. Kelvinator of India Ltd.). The apex Court held as follows :

> **"On going through the changes, quoted above made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment 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 1st April, 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re- assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-**

opening the assessment, review would take place. 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 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

12. In the case of Ram Swarup Cold Storage and Allied Industries v. Assistant Commissioner of Income-Tax and another (supra) the assessee has disclosed investment in the construction of cold storage plant amounting to Rs. 9,13,900/-. Subsequently, the matter has been referred to the Departmental Valuation Cell. The report of the Departmental Valuation Cell was received subsequent to the completion of the assessment for the assessment year 1980-81. The valuation report has estimated the investment towards construction at Rs. 20,80,000/- upto 31.3.1980 and on the objection of the assessee it was revised to Rs. 18,20,470/-. On the basis of the valuer report notice under Section 148 of the Act was issued and the validity of the notice under Section 148 of the Act was challenged. The Division Bench of this Court has declined to interfere in the matter.

13. Let us examine the decisions relied upon by learned counsel for the petitioner. In the case of Britannia Industries Ltd. v. Deputy Commissioner of Income-Tax and others (supra), on the basis of the report of the Valuation Officer determining the fair market value of the property, re-assessment proceeding was initiated on the ground that lesser capital gain has been assessed. The learned Single Judge of the Calcutta High Court has held that after deletion of Section 52(2) of the Act

share market value was irrelevant for the purposes of capital gain and, therefore, it has been held that initiation of proceeding on the basis of the report of the Valuation Officer estimating the fair market value was not justified. The learned Single Judge has, however, observed that the position would be different if there will be a case of investment in the construction or any fact is suppressed and the income escaped from the assessment. Therefore, this decision of of no help to the petitioner, rather it goes against the petitioner.

14. In the case of Smt. Tarawati Debi Agarwal v. Income-Tax Officer (supra) the assessment years involved were 1966-67 and 1967-68 prior to the amendment in Section 147 of the Act and, therefore, this decision has no relevance.

15. In the case of S. Sreeramachandra Murthy and another v. Deputy Commissioner of Income-Tax and another (supra) the notice under Section 148 of the Act was issued beyond four years. In view of the proviso to Section 147 of the Act, notice beyond four years could be issued only in case if there was a failure to disclose primary fact by the assessee. The assessee has disclosed the primary fact relating to the construction of the commercial complex and the cost of the construction which has been considered by the assessing officer. Proceeding under Section 147 of the Act was issued on the basis of estimate of the cost of construction by the Departmental Valuer after four years. The Division Bench of the Andhra Pradesh High Court has held that initiation of proceeding under Section 147 of the Act was bad in law, inasmuch as there was no failure on the part of the assessee to disclose the primary fact and the proceeding could not be initiated on the basis of the report of the Departmental Valuer beyond the period of four years. This decision is also not relevant to the present case. In the present case, admittedly, the notice was issued within four years.

16. Therefore, the only consideration is that whether there was any material to form the belief about the escaped assessment.

17. On the facts and circumstances, stated above, and the law laid down by the apex Court, we are of the view that the valuation report constitutes material to form a belief that some income has escaped assessment, inasmuch as in the present case, as against the disclosed investment in the construction of the house at Rs.

3,00,000/-, the Valuation Officer has estimated the investment in the construction at Rs. 5,05,300/-. In the circumstances, we decline to interfere in the matter. However, it will be open to the petitioner to contest the estimate of the investment in the construction of the house in the re-assessment proceeding by adducing necessary evidences, which shall be considered by the assessing authority in accordance to law.

18. In the result, the writ petition is dismissed. There shall be no order as to cost.