2018-TIOL-547-HC-KERALA-IT

IN THE HIGH COURT OF KERALA

AT ERNAKULAM

ITA No. 12 of 2009

M/s BABY MARINE EXPORTS
KALUVILA, THANGASSERY P O, KOLLAM, REPRESENTED BY ITS MANAGING PARTNER, MR K C BABU

Vs

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-1, KOLLAM

K Vinod Chandran & Ashok Menon, JJ

Dated: February 20, 2018

Appellant Rep by: Sri Anil D Nair Smt Nivedita A Kamath Sri J R Prem Navaz
Respondent Rep by: Sri Jose Joseph, SC, For Income Tax

Income Tax - Sections 80HHC, 147 & 148 - CBDT's Circular No. 466 dated Aug 14, 1986

Keywords: Change of opinion - Certificate from export house - Information as contemplated u/s 147 - Reasons for reopening.

The Assessee, one of the leading global producers in seafood industry with the towering presence of prolific factories situated along the Indian Coast line. Its original assessment for AYs 1987-88 & 1988-89 was completed by the AO, wherein deduction claimed u/s 80HHC was allowed despite there being no certificate produced from the export house. Since the said allowance was contrary to the CBDT's Circular No. 466, dated 14.08.1986. After completion of assessment, the AO was served with an appellate order of the CIT(A) for the AYs 1985-86 and 1986-87, wherein dis-allowance of deduction u/s 80-HHC, in the absence of production of certificate of export house, in contravention of the mandate as prescribed by the Circular, was affirmed. The said order in appeal was received by the AO on 09.03.1990. The said appellate order in the earlier AYs, was taken as an information as contemplated u/s 147 to proceed with there opening. Thus, this appeal had been preferred challenging the reopening as a mere change of opinion.

On appeal, the HC held that,

Whether the AO can use an appellate order passed by the CIT(A) as an "information" contemplated u/s 147 in order to initiate a re-opening proceeding - YES: HC

Whether accidental allowance of deduction u/s 80HHC to a manufacturer in absence of any certificate from export house, can be rectified by the ITO by means of reopening - YES: HC

++ the questions to be answered are whether the AO had initiated proceedings u/s 147 merely on change of opinion and whether the appellate order could be taken as an information as contemplated u/s 147. The Kelvinator of India Ltd. case as decided by the Full Bench of Delhi High Court and affirmed by the Supreme Court set aside the re-assessment made u/s 147 on the ground of a mere change of opinion. However, in case of Kerala State Industrial Development Corporation Limited, a deduction was allowed by the ITO in a particular year and the same was dis-allowed in a subsequent year by another officer. On an appeal filed by the Assessee for the subsequent year, the appellate authority confirmed the dis-allowance made by

ITO. On the basis of the appellate order of the subsequent year, the assessment by which deduction was allowed, was reopened, which was upheld by the Division Bench of this Court;

++ in the context of the declaration made by the Supreme Court and this Court, it cannot be said that the re-assessment was merely based on a change of opinion. The appellate authority had for the other years affirmed the findings of AO that a deduction u/s 80-HHC could be claimed successfully only if there were produced certificate of the export house. Admittedly, no certificates were produced by the assessee and inadvertently the AO had allowed the deduction for the said two AYs. On receipt of information by way of the appellate order, the AO realised the escapement of assessment in the AYs 1987-88 and 1988-89. The appellate order has already been held to be coming within the ambit of information as contemplated u/s 147. Hence, there could be no vitiating factor found in the re-assessment having been carried out.

Assessee's appeal dismissed

Cases followed:

Sea Pearl Industries v. C.I.T - 2002-TIOL-955-SC-IT-LB

Commissioner of Income-tax, U.P v. Gurbux Rai Harbux Rai - 2002-TIOL-1686-SC-IT

United Mercantile Co.Ltd v. Commissioner of Income-tax, Kerala - [1979] 116 ITR 158

JUDGEMENT

Per: K Vinod Chandran:

The above appeals are concerned with the assessment years 1987-88 and 1988-89. The issue is only with respect to the re-opening of assessment and whether the appellate order issued in the earlier year would constitute information under Section 147 of the Income Tax Act. The questions of law are re-framed as follows:

> *(i)Ought not the Tribunal have held that the re-opening of assessment under Section 147 of the Income Tax Act, 1961 is a mere change of opinion ? and;*
>
> *(ii) Ought not the Tribunal have held that the appellate order relied on by the Assessing Officer to carry out the re-opening would not constitute an information as contemplated under Section 147 of the Income Tax Act?*

2. Both the assessment years were earlier before this Court in ITR Nos.107 to 110 of 1999. The two questions urged before this Court were as to the entitlement of the deduction under Section 80 HHC and the sustainability of the re-opening carried out under Section 147. A Division Bench of this Court by judgment dated 18.01.2007 found, on the question of entitlement under Section 80 HHC, that the same can be availed of only if there is a certificate produced from the export house as has been held by the Hon'ble Supreme Court in *Sea Pearl Industries v. C.I.T. (SC) (247 ITR 578) =* ***2002-TIOL-955-SC-IT-LB***. The second question was directed to be re-considered by the Commissioner of Appeals. On re-consideration, the Commissioner of Appeals found that the appellate order as relied on by the Assessing Officer constituted information and that re-assessment is permissible under Section 147. The assessee appealed to the Tribunal which confirmed the order of re-assessment. The assessee is before this Court with the aforestated questions of law.

3. For both the assessment years 1987-88 and 1988-89, the original assessment was completed on 02.03.1990. The deduction claimed under Section 80 HHC was allowed despite there being no certificate produced from the export house/trading house. The said allowance was contrary to the CBDT's Circular No. 466 dated 14.08.1986. After completion of assessment, the Assessing Officer was served with an appellate order of the Commissioner of Income Tax (Appeals) for the assessment years 1985-86 and 1986-87, wherein dis-allowance of deduction under Section 80 HHC, in the absence of production of certificate of export house, in contravention of the mandate as prescribed by the Circular, was affirmed. The said order in appeal was received by the Assessing Officer on 09.03.1990. The said appellate order in the earlier assessment years, was taken as an information as contemplated under Section 147 to proceed with there-opening.

4. The learned Counsel for the assessee relied on a decision of the Full Bench of the Delhi High Court in *[2002] 256 ITR 1 (Delhi) (Commissioner of Income-tax v. Kelvinator of India Ltd.) =* ***2003-TIOL-179-HC-DEL-IT-LB***, which has been affirmed by the Hon'ble Supreme Court in *[2010] 320 ITR 561 (SC) (Commissioner of Income-tax v. Kelvinator of India Ltd.) =* ***2010-TIOL-06-SC-IT-LB***. The dismissal of

appeal to the Supreme Court, by the revenue, was in a Civil Appeal in which event, the judgment of the Delhi High Court would stand merged with that of the Hon'ble Supreme Court. Reliance is also placed on another decision of the Delhi High Court in *[2002] 253 ITR 83 (Delhi)* (*Bawa Abhai Singh v. Deputy Commissioner of Income-tax)* which was relied on by the Full Bench in the earlier cited decision.

5. The learned Standing Counsel for the Government of India (Taxes) relies on the decisions of the Hon'ble Supreme Court in *Commissioner of Income-tax, U.P v. Gurbux Rai Harbux Rai [1972] 83 ITR 86* **= *2002-TIOL-1686-SC-IT*** *and [1967] 64 ITR 218*,*United Mercantile Co.Ltd v. Commissioner of Income-tax, Kerala, [1979] 116 ITR 158* (*Commissioner of Income-tax, Kerala v. Kerala State Industrial Development Corporation Limited)*.

6. The questions to be answered are whether the Assessing Officer had initiated proceedings under Section 147 merely on a change of opinion and whether the appellate order could be taken as an information as contemplated under Section 147. Kelvinator of India Ltd. (Supra) as decided by the Full Bench of Delhi High Court and affirmed by the Hon'ble Supreme Court set aside the re-assessment made under Section 147 on the ground of a mere change of opinion. Therein, on re-assessment, the expenses incurred on the maintenance of guest houses were disallowed and added to the total income. There were other grounds alleged for re-opening of assessment, but the dis-allowance was confined to that of expenses incurred on maintenance of guest houses. The Assessing Officer purportedly relied on the order of the Commissioner of Appeals for the assessment years 1986-87. The assessment year which was considered by the Delhi High Court was 1987-88. The Court found that the appellate order relied on in the final re-assessment order was passed on 27.07.1990, while the re-opening was on 20.04.1990. Hence the appellate order was not the information on which the reopening was initiated. In that case, the re-opening was found to have been attempted on the basis of a tax audit report which was available in the files of the Income-tax officer at the time of original assessment itself. Hence the reopening was a mere change of opinion was the finding. It was held by the Delhi High Court in Paragraph 22 that "...It is one thing to say that the Assessing Officer had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself"(sic). When the audit report was already available with the ITO when the original assessment was completed, the same cannot be relied upon to make a re-assessment; since then the reopening would be vitiated for reason of it being a mere change of opinion.

7. Apposite would be reference to Gurbux Rai Hurbux Rai (Supra) wherein on the strength of an appellate order, proceedings were taken under Section 10A of the Act for assessment of excess profits tax liability by a re-opening carried out under Section 15 of the Act as it existed then. Section 15 of the Act, as it existed then provided, if in consequence of definite information, which has come into possessions of the Excess Profits Tax Officer, he discovers that profits on any chargeable accounting period have escaped assessment, etc. he may at any time serve a notice containing all or any of the requirements which may be included in a notice under Section 13 and may proceed to assess or reassess the amount of such profits liable to excess profit tax. On the specific defense raised as to no definite information having come into possession of the Tax Officer, from which it could be deduced that profit of the relevant chargeable accounting period had escaped assessment; the Hon'ble Supreme Court said so:

> *"We are unable to agree. The Appellate Assistant Commissioner had made an order on October, 10, 1947, in the proceedings relating to the assessment of income-tax of the assessee that there had been only a partial partition in respect of the movable property (business) of Gurbuxrai. That was certainly on information which came into the possession of the Excess Profits Tax Officer not because of any change of opinion by himself but because of the decision of the Appellate Assistant Commissioner in the income-tax proceedings. This Court has consistently held that the Income-tax Officer would have jurisdiction to initiate proceedings under Section 34(1)(b) of the Income-tax Act, 1922, which is in pari materia with section 15 of the Act if he acted on information received from the decision of the superior authorities or the Court even in the assessment proceedings (RS Bansilal Abirachand Firm v. Commissioner of Income tax and Assistant Controller of Estate Duty, Hyderabad v. Nawab Sir Osman Ali Khan Bahadur, Hyderabad."*

8. In Kerala State Industrial Development Corporation Limited, a deduction was allowed by the Income-tax officer in a particular year and the same was dis-allowed in a subsequent year by another officer. On an appeal filed by the assessee for the subsequent year the appellate authority confirmed the dis-allowance made by the ITO. On the basis of the appellate order of the subsequent year, the assessment by which deduction was allowed, was reopened, which was upheld by the Division Bench of this Court.

9. In the context of the declaration made by the Hon'ble Supreme Court and this Court it cannot be said that the re-assessment was merely based on a change of opinion. The appellate authority had for the other years affirmed the findings of the Assessing Officer that a deduction under Section 80 HHC could be claimed successfully only if there were produced certificate of the export house. Admittedly, no certificates were produced by the assessee and inadvertently the Assessing Officer had allowed the deduction for the two years which are before us. On receipt of information by way of the appellate order, the Assessing Officer realised the escapement of assessment in the assessment years 1987-88 and 1988-89. The appellate order has already been held to be coming within the ambit of information as contemplated under Section 147. Hence there could be no vitiating factor found in the re-assessment having been carried out.

We answer the questions of law in favour of the revenue and against the assessee and reject the appeals without any order as to costs.