

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2018

CORAM:

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM
and
THE HON'BLE MRS. JUSTICE BHAVANI SUBBAROYAN

T.C.(A).No.1548 of 2008

M/s.Tractors and Farm Equipment Limited,
No.35, Nungambakkam High Road,
Chennai – 34.

.. Appellant

Vs

The Assistant Commissioner of Income Tax,
Company Circle III (2),
Chennai – 34.

.. Respondent

Prayer : Tax Case (Appeal) is filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench, dated 11.04.2008 in ITA No.966/Mds/2007, Assessment year 1997-98.

For Appellant

: Mr.Vikram Vijaya Raghavan
for M/s.Subbaraya Aiyar Padmanabha
& Ramamani

For Respondent

: Ms.S.Premalatha
for Mr.M.Swaminathan

JUDGMENT

(Judgment of the Court was delivered by
T.S.SIVAGNANAM, J.)

This appeal filed by the assessee is directed against the order passed by the Income Tax Appellate Tribunal, Madras 'C' Bench, in ITA No.966/Mds/2007, dated 11.04.2008. This appeal was admitted on 03.11.2008, on the following substantial questions of law:-

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the reopening of assessment u/s.147 beyond four years is valid when there is no failure on the part of the assessee to disclose fully and truly all the material facts?

2. Whether the assessment can be reopened on the same set of facts that were available at the time of completing the regular assessment u/s.143(3)?

3. Whether on the facts and in the circumstances of the case the Tribunal was right in holding that interest received from dealers for belated payments cannot be included in the business profits for the purpose of deduction u/s.80 HHC of the Act.?

2. The first two substantial questions of law pertain to the validity of the reopening of the assessment and the third substantial question of law is with regard to deduction claimed by the assessee under Section 80 HHC of Income Tax Act.

3. Heard Mr.Vikram Vijayaraghavan, assisted by Mr.R.Venkatanarayanan, for M/s.Subbaraya Aiyar Padmanabha and Ramamani, learned counsel appearing for the assessee and Mrs.S.Premalatha, learned junior standing counsel, for Mr.M.Swaminathan, learned Senior standing counsel for the Revenue.

4. The first issue is to be considered as to whether the reopening of the assessment was valid and proper. The assessee are engaged in the business of manufacturing farm equipments and for the assessment year under consideration (1997-98), they filed a return of income on 28.11.1997 admitting a total income of Rs.81,72,97,700/-. The return was processed under Section 143(1)(a) accepting the income returned resulting in a demand of Rs.2,74,746/-. The case was selected for scrutiny and a notice under Section 143(2) was issued and thereafter, assessment under Section 143(3) was completed on 28.02.2000,

determining the total income of Rs.83,10,51,940/-. While computing the assessment, the Assessing Officer, among other things, restricted the claim of deduction under Section 80 HHC of the Act. Subsequently, a notice under Section 148 of the Act was issued on 30.03.2004, well beyond the period of 3 years for the reason that the Assessing Officer proposes to disallow the contribution to welfare fund of Rs.3,51,682/- as it is not an approved fund. In response to the notice, the assessee filed a return of income on 22.11.2004 and the assessment was completed under Section 143(3) read with Section 147 by order dated 28.12.2004, determining the total income at Rs.82,22,49,660/-.

5. Though the Assessing Officer proposed to disallow the contribution to the welfare fund of Rs.3,51,682/- on the ground that it was not an approved fund, the contention raised by the assessee was accepted and the assessment was not reopened on the said ground. However, while completing the assessment, the Assessing Officer restricted the claim of deduction under Section 80 HHC of the Act by excluding 90% of interest received from dealers for the bleated payment from the profits of the business under Clause (baa) to Explanation 4 of Section 80 HHC.

6. The assessee's contention is that there was no allegation that the assessee has failed to disclose fully and truly all the material facts necessary for assessment and therefore, reopening itself is bad.

7. The revenue, on the other hand, would contend that though the reopening was to disallow the contribution to welfare fund as it was not an approved fund, in terms of Explanation 3 to Section 147 of the Act, the Assessing Officer is entitled to assess or reassess the income in respect of any issue which has escaped assessment, and when such issue comes to his notice, subsequently, in the course of the proceedings under Section 147, notwithstanding that the reasons for such issues have not been included in the reasons recorded under sub-section 2 of Section 148. Therefore, the Assessing Officer, after considering the deduction claim under Section 80 HHC of the Act, found that the assessee has to necessarily exclude 90% of the interest receipts for computing the eligible profits and therefore, the assessment was validly reopened and the assessment order dated 28.12.2004 is just and proper.

8. Before considering as to whether explanation 3 to Section 147

would be attracted, it is to be seen as to whether Section 147 was rightly invoked by the Assessing Officer. To consider this question, we have to decide as to whether there has been full and true disclosure of all material facts necessary for assessment. We need not labour much to decide this controversy since the reason for reopening gives the answer.

9. The Assessing Officer, while issuing notice dated 30.03.2004, assigned the following reasons for reopening:-

"To disallow the contribution to welfare fund of Rs.3,51,682/- as it is not an approved fund."

On a reading of the above reason makes it clear that the proposal to disallow the contribution to welfare fund was on the ground that it is not an approved fund. There is no allegation of the assessee's failure to disclose fully and truly all material facts necessary for assessment. Thus, the proposal to disallow the contribution to the welfare fund was on a technical ground that it is not an approved fund. This is the manner in which the Assessing Officer has interpreted the materials, which were disclosed by the assessee at the time of filing the original return.

10. The earliest of decision as regards whether the disclosure of the assessee was fully and truly made is the decision of the Hon'ble Supreme Court in *Calcutta Discount Co. Ltd. Vs. ITO [(1961) 41 ITR 191 (SC)]*, wherein the Hon'ble Supreme Court observed as follows:-

"From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts interred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

11. Thus, if the material facts are in the possession of the Assessing Officer as disclosed by the assessee, it is for the Assessing Officer to draw a proper legal inference and ascertain the correct interpretation of the statutory provision for levying the proper tax. It is not for the assessee to say as to how the Assessing Officer should arrive at a conclusion based on the facts disclosed before him by the assessee. In other words, what legal inferences can be drawn from the material facts disclosed by the assessee is not the duty of the assessee

but that of the Assessing Officer and in the instant case, we find that the facts have been disclosed and the Assessing Officer proposed to disallow the said contribution to the welfare fund on a technical ground that it is not an approved fund. Therefore, it is clear that it is a legal inference, which was arrived at by the Assessing officer based on the facts, which have been disclosed. Therefore, we hold that there was no failure on the part of the assessee to disclose fully and truly all the material facts. Hence, reopening of the assessment under Section 147 of the Act is bad in law.

12. Though we have held so, we have also considered the arguments advanced by the learned counsel for the Revenue by referring to Explanation 3 to Section 147 of the Act. The counsel for the assessee is right in his submissions that Explanation 3 would stand attracted only upon the Court being satisfied that there has been no fully or truly disclosure of all the material facts necessary for assessment. For the sake of argument, if we consider the submission of the Revenue, we are not persuaded to accept the same for the reasons that (a) a notice issued to the assessee under Section 148 of the Act dated 30.03.2004 was to disallow the contribution to the welfare fund as it was not an approved fund; and (b) on hearing the submissions of the assessee, the Assessing

Officer accepted the case of the assessee and dropped the proposal.

13. In such circumstances, the question would be as to whether the Revenue can fall back to Explanation (3) to Section 147 and proceed to make roving enquiry into some other matter, in the instant case, with regard to computing eligible profits for the purpose of Section 80 HHC of the Act. This issue is no longer res-integra and considered by the Hon'ble Division Bench of the Bombay High Court in the case of *Commissioner of Income Tax Vs. Jet Airways (I) Ltd.* [(2011) 331 ITR 0236].

14. The Tribunal, while considering the said issue, had referred to the decisions in the case of *ITO Vs. K.L. Srihari (HUF) and others* [250 ITR 193] and the judgment of the Hon'ble Supreme Court in the case of *CIT Vs. Sun Engineering Works Pvt. Ltd.* [198 ITR 297 (SC)]. The decision in the case of *K.L.Srihari (cited supra)* was referred to in the decision of the Hon'ble Supreme Court in the case of *V.Jaganmohan Rao Vs. CIT* [(1970) 75 ITR 373 (SC)].

15. In *Jet Airways (cited supra)*, the Hon'ble Division Bench of the

Bombay High Court took note of the decisions in the case of *Sun Engineering Works and V.Jaganmohan Rao (cited supra)* and examined the effect of Explanation (3) in a case of somewhat similar to the case on hand. The operative portion of the judgment reads as follows:-

"18. The effect of the amended provisions came to be considered in two distinct lines of precedent on the subject. The first line of authority, to which a reference has already been made earlier, adopted the principle that where the AO has formed a reason to believe that income has escaped assessment and has issued a notice under s.148 on certain specific issues, it was not open to him during the course of the proceedings for assessment or reassessment to assess or reassess any other income, which may have escaped assessment but which did not form the subject-matter of the notice under s. 148. This view was adopted in the judgment of the Punjab & Haryana High Court in Vipan Khanna (supra) and in the judgment of the Kerala High Court in Travancore Cements Ltd. (supra), This line of authority, would now cease to reflect the correct position in law, by virtue of the amendment which has been brought in by the insertion of Expln. 3 to s. 147 by Finance (No. 2) Act of 2009. The effect of the Explanation is that once an AO has formed a reason to believe that income chargeable to tax has

escaped assessment and has proceeded to issue a notice under s. 148, it is open to him to assess or reassess income in respect of any other issue though the reasons for such issue had not been included in the reasons recorded under s. 148(2).

21. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under s. 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the AO could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Expln. 3 by the Finance Act (No. 2) of 2009. However, Expln. 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of s. 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Sec. 147 has this effect that the AO has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess

or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under s.148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under s. 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

22.....We agree with the submissions which has been urged on behalf of the assessee that s. 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the AO may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Explan. 3 to s. 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in *Shri Ram Singh*

(supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of s. 147(1) as they stood after the amendment of 1st April, 1989 continue to hold the field."

16. The decision in the case of *Jet Airways (cited supra)* was referred to by the High Court of Delhi in the case of *Ranbaxy Laboratories Limited Vs. Commissioner of Income Tax [(2011) 336 ITR 136]*, wherein it was held that the legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under [Section 147](#) regarding assessment or reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. Further, it was held that for every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under Section 148 of Act. Thus, it was held that the Assessing Officer had jurisdiction to reassess the income other than the income in respect of which the proceedings under Section 147 were initiated,

but, he was not justified in doing so when the reasons for the initiation of those proceedings ceased to survive. Therefore, the argument advanced by the Revenue placing reliance on Explanation 3 to Section 147 is of little avail.

17. Having thus come to a conclusion that reopening of the assessment itself was bad in law, we may not be required to decide other issue as to whether the finding of the Assessing Officer with regard to computation of eligible profits for the purpose of 80 HHC of the Act was correct or not. However, in this regard, learned counsel appearing for the Revenue placed reliance on the decision of the Punjab and Haryana High Court in the case of *Commissioner of Income Tax-III, Ludhiana Vs. Malwa Cotton Spinning Mills Ltd. [(2008) 166 Taxman 457 (Punjab & Haryana)]*.

18. Learned counsel for the assessee would point out that the assessee does not concede to the point that interest on belated payment from the customer is a business income, but would agree with the decision in the case of *Mal Cotton Spitting Mills Ltd. (cited supra)*, wherein the Court held that interest received by the assessee on delayed payment from the customer has been assessed as business income and it is at the time of determination of profits of

business for the purpose of clause (baa) as referred to above, that the interest component added therein is to be excluded to give effect to the provisions in its true letter and spirit. The above finding was rendered by the Court by placing reliance on the decisions of the Hon'ble Supreme Court in the case of *CIT Vs. Govinda Choudhury & Sons [(1993) 203 ITR 881]* and *CIT Vs. B.N. Agarwala & Co. [(2003) 259 ITR 754]*.

19. The argument of the learned counsel for the assessee is that gross interest cannot be taken into consideration. However, we are of the considered view that this issue is academic, because of the fact that we are not going into the computing of eligible profits for the purpose of Section 80 HHC as done by the Assessing Officer, as we are convinced that reopening of the assessment on the said ground itself was unsustainable for the reason that in the scrutiny of assessment under Section 143(3) of the Act, this very issue, namely, regarding deduction under Section 80 HHC was considered by the Assessing Officer and a detailed working had been done and the tax payable was calculated. Therefore, if the Assessing Officer is to reopen the finding rendered in the scrutiny assessment, then it would clearly amount to change of opinion, which is impermissible.

20. Thus, for the above reasons, we are of the considered view that the view taken by the Tribunal confirming the orders of the Assessing Officer and the Commissioner of Income Tax (Appeals) calls for interference. In the result, the tax appeal is allowed and the substantial questions of law framed for consideration are answered in favour of the assessee and against the Revenue.

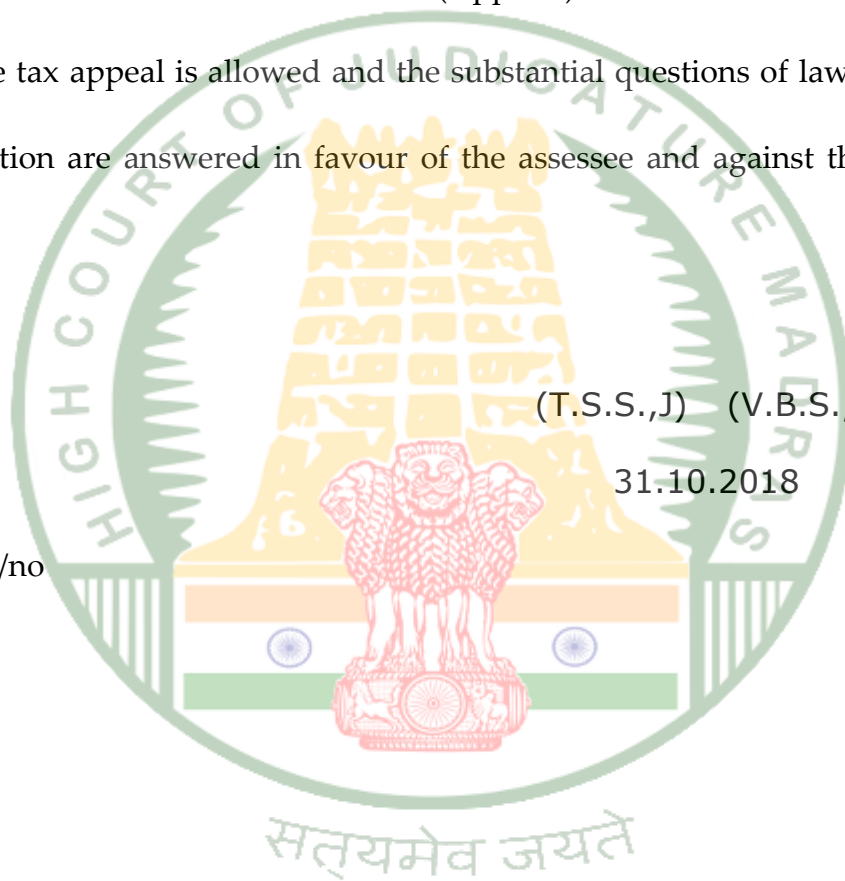
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(T.S.S.,J) (V.B.S.,J)

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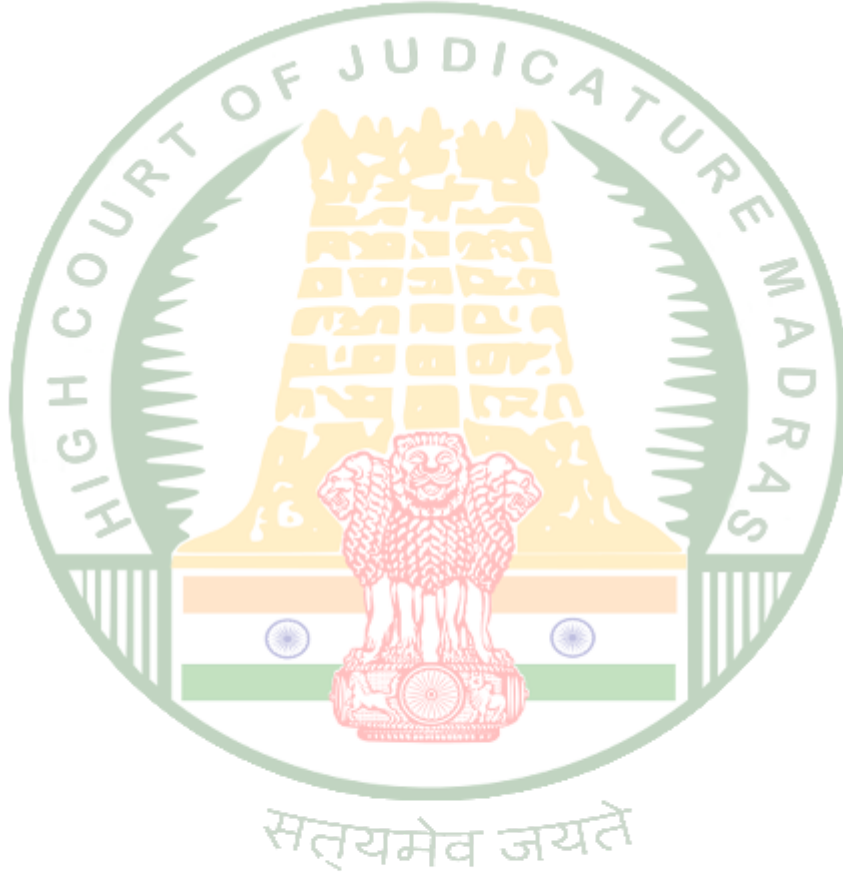
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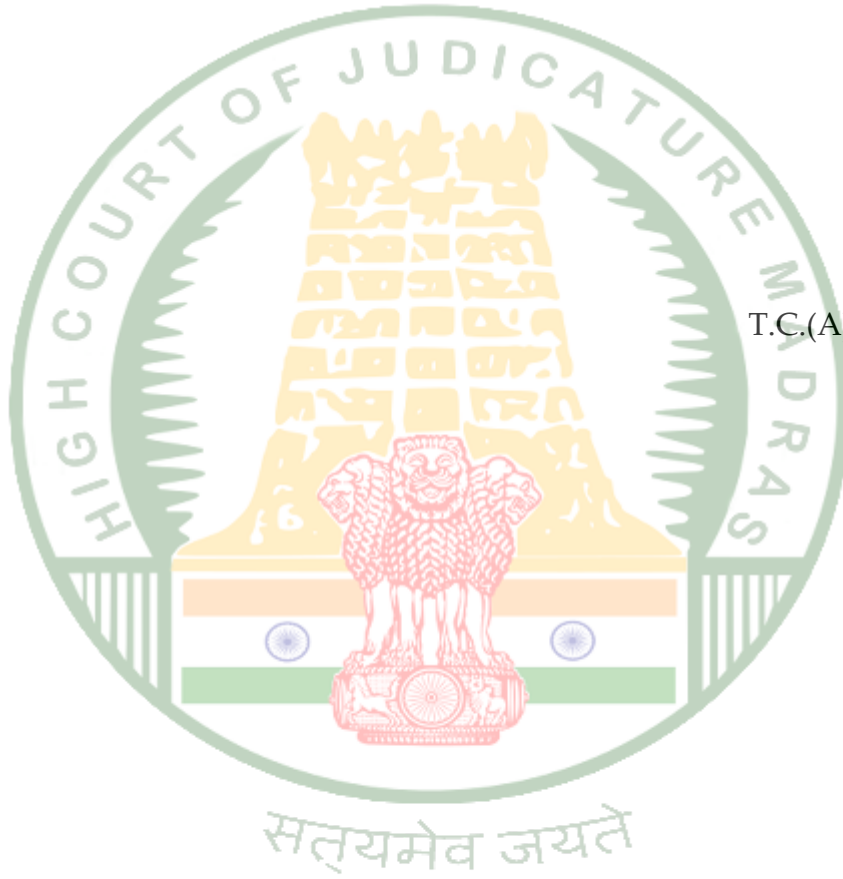
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**T.S.SIVAGNANAM, J.
AND
V.BHAVANI SUBBAROYAN, J.**

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