

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.06.2015

CORAM

**THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI**

T.C.A. NO. 1363 OF 2007

Commissioner of Income Tax
Chennai.

.. Appellant

- Vs -

Arvind Remedies Ltd.
190, Poonamallee High Road
Chennai.

.. Respondent

Appeal filed under Section 260-A of the Income Tax Act against the order dated 19.1.07 passed by the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, made in ITA No.707/Mds/2005.

For Appellant : Ms. Hema Muralikrishnan

For Respondents : Mr. S.Sridhar

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. Vide order dated 24.10.07, this Court, while admitting the appeal, framed the following substantial question of law for consideration :-

"Whether in the facts and circumstances of the case,

the Tribunal was right in holding that the reopening of assessment is bad in law and setting aside the reassessment proceedings?"

2. The facts, in a nutshell, are as hereunder :-

The respondent/assessee is engaged in the business of manufacture and sale of drugs. The assessment pertains to the assessment year 1996-1997. The assessee filed return of income on 29.11.1996 admitting total income of Rs.14,45,260/=. The return was subsequently selected for scrutiny and income was assessed at Rs.17,16,211/= by order dated 31.3.96. Subsequently, after expiry of four years, Section 147 proceeding was initiated by issue of notice dated 4.2.03 under Section 148 of the Income Tax Act. According to the department, the assessee company purchased software package and the expenses incurred in this regard was claimed as revenue deduction, which is contrary to Section 37 of the Income Tax Act, whereas the said deduction should have been allowed under Section 35D of the Act. This amount, according to the department, is capital in nature. Insofar as project appraisal fee paid to ITCOT is concerned, claim for revenue deduction was totally allowed, though one-tenth of the expenditure alone is eligible for being claimed as revenue expenditure. On the basis of this proceeding, the income was determined and reassessment was ordered, which was challenged in appeal.

3. The CIT (Appeals), vide order dated 24.12.04, dismissed the appeal filed by the assessee and, thereafter, the matter was taken up before the Tribunal by the assessee. The Tribunal accepted the assessee's plea that there was no failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment and action taken under Section 147 r/w Section 148 of the Act has been taken in this case after expiry of four years from the end of the relevant assessment year despite the fact that the original assessment was filed under Section 143 (3) of the Act. Further, the Tribunal held that it was never the case of the Revenue that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the relevant assessment year. In such view of the matter, the Tribunal allowed the appeal filed by the assessee. Aggrieved by the said order of the Tribunal, the Department has filed the present appeal on the above substantial question of law.

4. Learned standing counsel appearing for the appellant/Revenue vehemently contended that the finding of the Tribunal that the reopening is bad as there was no failure on the part of the assessee to disclose the material facts at the time of regular assessment is totally wrong. It is further submitted that in the original assessments, the Assessing Officer had no occasion to consider the issue of disallowance in respect of the amount paid to ITCOT towards integrated system package. The Tribunal failed to appreciate that Explanation 1 to Section 147 is applicable to the facts of the

present case. On the above contentions, learned standing counsel for the Revenue prayed for setting aside the order of the Tribunal.

5. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the respondent/assessee and perused the materials available on record.

6. Before going into the merits of the case, for better appreciation, we first consider the scope of Section 147 and the first proviso, which reads as follows:-

"Income escaping assessment.

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.

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

Explanation 1.—Production before the Assessing Officer of account 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 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 a 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."

(emphasis supplied)

7. A plain reading of the above provision reveals that if the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment, in exercise of his power under Section 147 of the Income Tax Act, he may pursue the matter in accordance with the said provision by issuing notice to the assessee within a period of four years. Admittedly, in the present case, the proceedings initiated is beyond the period of four years from the end of the relevant assessment year. It is not the case of the Department that the assessee has failed to file a return under Section 139 or failed to respond to the notice issued under Section 142 or Section 148 of the Income Tax Act . The only other issue is whether there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year.

8. A cursory look at the order of the Tribunal reveals that the Tribunal has taken into consideration all the aspects surrounding the invocation of proceeding under Section 147 r/w 148 of the Income Tax Act and has arrived at its finding. Assuming for the moment that the claim in respect of those two heads has not been properly made, if at all it could be a ground for the Department to initiate proceeding under Section 263 of the Act and not under Section 147 of the Act.

9. Explanation (1) to Section 147 of the Income Tax Act cannot be pressed into service by the Department in the instant case, because the details of such claim has been revealed during the regular assessment and complete details have been provided before the Assessing Officer. If the Assessing Officer has not considered the same at the time of passing an order under Section 143(3) of the Income Tax Act, the assessee cannot be fastened with any liability for the same. Therefore, Explanation (1) Section 147 does not get attracted to this case. In this case, we find that the finding of the Tribunal is that the Proviso to Section 147 of the Income Tax Act does not get attracted since it is clear from the order of the Tribunal that it was failure on the part of the Assessing Officer to consider the material and the assessee had placed all the materials before the Assessing Officer during the regular assessment.

10. We find from the order of the Tribunal and also on the facts as has been culled out from the assessment order in question that there is no element of failure to disclose fully and truly all material facts necessary for assessment. Therefore, there was no justification for the department for invocation of proceeding under Section 147 r/w 148 of the Income Tax Act.

11. Our stand is further fortified by the decision of this Court in TCA No.217/2015 dated 2.6.2015, wherein in a similar matter, this Court has

held as under :-

*"16. Our view is fortified by the decision of the Full Bench of the Delhi High Court in the case of **Commissioner of Income Tax V. Kelvinator of India Ltd. reported in [2002] 256 ITR 1 (Del)**, wherein, the Delhi High Court held as follows:*

"We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the Income-tax Officer, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself.

We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding with out anything

further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

17. The above said decision of the Full Bench of the Delhi High Court was upheld by the Supreme Court in the decision reported in [2010] 320 ITR 561 (SC) Commissioner of Income-Tax - Vs - Kelvinator of India Ltd., wherein the Supreme Court held that the concept of "change of opinion" on the part of the Assessing Officer to reopen the assessment did not stand obliterated after the substitution of Section 147 of the Income Tax Act. The Supreme Court also held that the Assessing Officer has power to reopen the assessment, provided there is "tangible material" to come to a conclusion that there was an escapement of income from assessment. For better appreciation, the relevant portion of the said decision reads as follows:

" 6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment 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 reopen the assessment. Therefore, post-1st April, 1989, power to reopen 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 reopen assessments on the basis of " mere change of

*opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of " change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening 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, the Assessing Officer has power to reopen, 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 reintroduced the said expression and deleted the word " opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1,29), which reads as follows :*

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression ' reason to believe' in section 147.—A number of representations were received against the omission of the words ' reason to believe' from section 147 and their substitution by the ' opinion' of the

Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

(emphasis supplied)

18. Similar view has been taken by this Court in the decision reported in [2009] 309 ITR 110 (Mad) Commissioner of Income-Tax - Vs - Cholamandalam Investment and Finance Co. Ltd., wherein it was held as follows:

"In those circumstances, it could not be regarded that the assessee had failed to disclose fully and truly all material facts relevant for the assessment. As the facts revealed that the Assessing Officer who made the original assessment order has called for all the details regarding the case where 100 per cent. depreciation were claimed and the assessee had furnished the invoices for purchase of assets on which 100 per cent. depreciation were claimed, there was no failure on the part of the assessee and if at all there was any failure, according to the Commissioner of Income-tax (Appeals), it was on the part of the Assessing Officer, who made the original assessment without going behind the nature of the transactions accepting the details furnished by the assessee. The Tribunal also extracted that portion of the order and found on the fact that there was no fault on the part of the assessee so as to enable the Department to reopen the assessment as

the proviso to section 147 of the Income-tax Act would squarely apply to the case of the assessee. We find no infirmity in the order passed by the Tribunal. Hence, the appeal is dismissed."

*19. In an identical circumstances, a learned single Judge of this Court considered the issue in the decision reported in **[2000] 241 ITR 672 (Mad) Fenner (India) Ltd. - Vs - Deputy Commissioner of Income-Tax**, wherein, it was observed as follows:*

"The pre-condition for the exercise of the power under section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the Assessing Officer that any income chargeable to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further pre-condition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return under section 139 or in response to a notice issued under section 142 or section 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the Assessing Officer does not acquire jurisdiction to initiate any proceeding under section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the

entire proceedings. The relevant words in the proviso are,

" . . . unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee"

Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment. Whenever a notice is issued by the Assessing Officer beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons referred to in the main paragraph of section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the Assessing Officer to record that any one or all the circumstances referred to in the proviso existed before the issue of notice under section 147....

.....

The duty of an assessee is limited to fully and truly disclosing all the material facts. The assessee is not required thereafter to prepare a draft assessment order. If the details placed by the assessee before the Assessing Officer were in conformity with the requirements of all applicable laws and known accounting principles, and material details had been exhibited before the Assessing Officer, it is for the Assessing Officer to reach such conclusions as he considered was warranted from such data and any failure on his part to do so

cannot be regarded as the assessee's failure to furnish the material facts truly and fully. Any lack of comprehension on the part of the Assessing Officer in understanding the details placed before him cannot confer a justification for reopening the assessment, long after the period of four years had expired. On the facts of this case, it is clear that the escapement of income, if any, on this account is not on account of any failure on the assessee's part to disclose the material facts fully and truly. The notice issued by the Assessing Officer in exercise of his power under section 147, therefore, cannot be sustained.

As the error here is one of jurisdiction it is not necessary for the assessee to have recourse to the remedies by way of appeal, revision, etc. It is well settled that when a jurisdictional error is brought to the notice of this court such errors are capable of being corrected by this court in exercise of the court's powers under article 226 of the Constitution of India. The Supreme Court in the case of CIT v. Progressive Engineering [1993] 200 ITR 231 (sic), held that when all the relevant facts were before the court and the law is clear on the subject, it is the duty of the High Court to interfere. That was also a case where the proceedings were sought to be initiated against the assessee under section 147 of the Act.

20. In the case of **ICICI Securities Ltd. V. Assistant Commissioner of Income Tax 3(2), Mumbai**, the Bombay High Court vide order dated 22.08.2006 in W.P.No.1919 of 2006, while dealing with the issue on the reopening of assessment, held as follows:

"7. In the facts of the present case, there is nothing new which has come to the notice of the revenue. The accounts had been furnished by the Petitioner when called upon.

Thereafter the assessment was completed under section 143(3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record.

8. In the circumstances, we allow this petition in terms of prayer (a) and quash and set aside the notice dated 27th March 2006 directing reopening of the assessment for the year 1999-2000.

21. The above-said view of the Bombay High Court was affirmed by the Supreme Court in Civil Appeal No.5960 of 2012.”

12. In the light of the above, we hold that when the Assessing Officer had failed to record anywhere his satisfaction or belief that the income chargeable to tax had escaped assessment on account of the failure of the assessee to disclose truly and fully all material facts necessary for assessment. On the contrary, it was the Assessing Officer, who failed to consider the materials placed before him at the time of regular assessment for which the assessee cannot be found fault with. Therefore, the notice issued under Section 147 of the Income Tax Act beyond the period of four years was wholly without jurisdiction and cannot be sustained. Accordingly, for the reasons stated above, the **substantial question of law is**

answered in favour of the respondent/assessee and against the appellant/Revenue.

13. Accordingly, this appeal filed by the appellant/Department fails and the same is dismissed confirming the order passed by the Tribunal. In the circumstances of the case, there shall be no order as to costs.

(R.S.J.) (K.B.K.V.J.)

08.06.2015

Index : Yes/No

Internet : Yes/No

GLN

To

1. Commissioner of Income Tax
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