

(5393)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.10.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

and

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) No.2147 of 2006

M/s.EL FORGE Ltd.

338, Ambujammal St,

Alwarpet, Chennai-18.

.. Appellant

versus

The Deputy Commissioner of Income Tax

Special Range-I, Chennai.

.. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 as against the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 11.04.2005 in ITA No.1244/mds/99.

For appellant : Mr.R.Vijayaraghavan

For respondent : Mr.Arun Kurian Joseph
Standing Counsel for Income Tax

JUDGMENT

(Judgment of the Court was delivered by K.RAVICHANDRABAABU,J.)

The assessee is on appeal in respect of the assessment year 1989-90. The following are the substantial questions of law raised for consideration at the time of admission of this Tax Case Appeal:

1. Whether on the facts and circumstances of the case the Appellate Tribunal was right in law in holding that reopening of assessment u/s 147 of the Act beyond 4 years is valid?
2. Whether the Appellate Tribunal was right in law in holding that assessee failed to disclose fully and truly all material facts when the original assessment was made u/s. 143(3) after making all relevant and detailed enquiries?
3. Whether the Appellate Tribunal was right in law in holding that Explanation 1 to Section 147 are attracted in the present case?
4. Whether the Appellate Tribunal was right in law in holding that deduction under Chapter VI-A has to be allowed on the profits of eligible units after deducting therefrom the losses of other eligible units?

2. The Assessing Officer made an order of assessment under Section 143(1)(a) on 31.12.1991. Thereafter, he noticed that the assessee had claimed deduction under Section 80HH and 80I of the Income Tax Act on the total income before first setting off the unabsorbed losses of the earlier years. Therefore, according to the Assessing Officer, as the assessee was not entitled to deduction under Chapter VIA of the Income Tax Act, the assessment was reopened under Section 147 of the Income Tax Act by issuance of notice under Section 148 of the Income Tax Act. The assessee objected to the reopening of the assessment by contending that as the said reopening was made after the lapse of four years from the date of assessment under Section 143(3), the reopening was not valid and there was no failure on the part of the assessee to disclose all material facts necessary for making the assessment. Therefore, the said reopening of assessment was challenged by the assessee before the First Appellate Authority.

3. The First Appellate Authority rejected the claim of the assessee and consequently dismissed the appeal by holding that the reopening of

the assessment by the Assessing Authority was perfectly in order, against which, the assessee filed an appeal before the Income Tax Appellate Tribunal.

4. The Tribunal, after holding that the assessee did not disclose fully and truly all material facts, concurred with the finding of the Assessing Officer as well as the First Appellate Authority and consequently justified the reopening of assessment. Thus the Tribunal viewed that the reopening of the assessment was well within the period as provided for under the proviso to Section 147 of the Income Tax Act. Aggrieved by this, the assessee has come on appeal before us.

5. A perusal of the notice issued under Section 147 dated 15.12.1997 shows that there were no independent reasons disclosed therein for assessment under Section 147. In the course of the proceedings before the Assessing Officer, the assessee objected to the proceedings of reopening. The order dated 16.04.1998, passed under Section 148, shows that the assessee claimed deduction under Section 80HH and 80I on the total income before set off of unabsorbed losses of the earlier years. It is not denied by the assessee that the income was negative and the resultant on the above setting off of the unabsorbed loss is the negative figure. It is no doubt true that the assessee would not be entitled to deduction under Chapter VIC. However, as rightly pointed out by the learned counsel appearing for the assessee, with no reasons disclosed on the reopening of the assessment and that there is no denial of the fact that the details of the income computation being very much before the Assessing Officer, the assessee took the plea of reopening of the assessment not disclosing the materials as contemplated under Section 147(1). The time limit for invoking the jurisdiction under Section 147 being four years, the proceedings were time barred.

6. In the decision reported in [2010] 320 ITR 561 (Commissioner of Income Tax Vs. Kelvinator of India Ltd.), the Apex Court considered the

scheme of Section 147 both before and after amendment in 1987. On a reading of the provisions, the Apex Court observed that the expression "reason to believe" as appearing in Section 147 must be given a schematic interpretation, failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen the assessment on the basis of mere change of opinion. Pointing out that the Assessing Officer has no power to review, the Supreme Court observed as follows:

" 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. We quote herein below the relevant portion of Circular No.549 dated 31st October, 1989, 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. "

7. The facts of the case show that there was no denial of the fact that the assessee had disclosed the details as regards the carry forward of the losses as well as the income computed and all these details were very much there before the Assessing Officer; that there is no denial of the fact that there was no failure on the part of the assessee in disclosing the facts necessary for assessment and that there is no such allegation that the escapement of income was on account of the failure of the assessee in not disclosing fully and truly all material facts. In the circumstances, applying the Supreme Court decision referred to above, we have no hesitation in accepting the plea of the assessee that the assumption of the jurisdiction beyond four years is hit by limitation as provided under Section 147 proviso. Even though, on the merits of the assessment, the assessee's case has to fail, yet, on the limited question as regards the jurisdictional time limit as provided for under Section 147 of the Income Tax Act, the assessee is entitled to succeed. Since limitation is the fundamental aspect of the assessment, we have no hesitation in setting aside the order of the Tribunal, thereby allowing the appeal.

In the light of the above, the appeal is decided in favour of the assessee and the Tax Case Appeal stands allowed. No costs