

GAHC010124662019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3727/2019

M/S. DHANSRI ROLLER FLOUR MILLS
A PARTNERSHIP FIRM, HAVING ITS PRINCIPAL PLACE OF BUSINESS AT
MAKUM ROAD, TINSUKIA, ASSAM, PIN-786125, REP. BY ONE OF ITS
PARTNERS SRI AMIT MODI, S/O. SRI KAILASH MODI.

VERSUS

THE UNION OF INDIA AND 3 ORS.
REP. BY THE SECRETARY TO THE MINISTRY OF FINANCE, GOVT. OF
INDIA, NEW DELHI.

2:THE COMMISSIONER OF INCOME TAX

DIBRUGARH
DIST. DIBRUGARH
ASSAM.

3:THE ADDL. COMMISSIONER OF INCOME TAX

RANGE TINSUKIA
P.O. TINSUKIA
DIST. TINSUKIA
ASSAM.

4:THE INCOME TAX OFFICER

WARD NO. I
TINSUKIA
DIST. TINSUKIA
AAYKAR BHAWAN
ASSAM
PIN-786125

Advocate for the Petitioner : MR. O P BHATI

Advocate for the Respondent : ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 17.05.2023

Heard Mr. O.P. Bhati, learned counsel for the petitioner. None appeared for any of the respondents even on second call.

2. The case of the petitioner is that in the petitioner company's income tax return electronically filed on 27.11.2014 for assessment year 2014-15, deduction of Rs.47,15,369/- was claimed under Section 80-IC of the Income Tax Act, 1961. During scrutiny, the petitioner company had produced its books of accounts and other required details. Thereafter, upon verification, the Income Tax Officer, Ward-I, Tinsukia passed an assessment order dated 30.09.2016, *inter alia*, allowing the deduction, wherein reference has been made as follows:—

“5. As reported in the F.No. 10CCB, the date of commencement of operation by the industrial unit was 2500302004 and the deduction has been claimed from the assessment year 2005-06 being the initial assessment year. Perusal of F No. 10CCB as well as audited statement of accounts shown that total sales/ turnover of the undertaking for the period ended on 31-03-2014 reported at Rs.6,60,72,210/- and corresponding profit & gains from eligible business ascertained at Rs.47,15,369/- for the period under consideration.”

3. Accordingly, in the computation of income, the deduction under Chapter-VIA, Section 80-IC to the extent of Rs.47,15,309/- was assessed under Section 143(3) of the Income Tax Act, 1961.

4. Thereafter, in respect of the assessment year 2014-15, the Income Tax Officer, Ward-I, Tinsukia issued a notice dated 01.01.2019 to the petitioner company under section 148 of the Income Tax Act, 1961 intending to re-assess the income/ loss in respect of the said assessment year 2014-15 on the ground that the said authority *had reasons to believe* that the income of the petitioner company, chargeable to income tax, had escaped the assessment within the meaning of Section 147 of the Income Tax Act, 1961. In response, the petitioner requested the Income Tax Officer, Ward-I, Tinsukia to provide them the *reasons to believe* by annexing thereto a copy of the Income Tax return in Form ITR-V. The *reasons to believe* was supplied by the Income Tax Officer, Ward-I, Tinsukia by letter dated 06.05.2019. Thereupon, the petitioner company gave a reply dated 10.05.2019, questioned the jurisdiction of the Income Tax Officer, Ward-I, Tinsukia for taking recourse to Section 147 and 148 of the Income Tax Act, 1961 for re-assessment. The Income Tax Officer, Ward-I, Tinsukia, by his letter dated 20.05.2019, rejected the contention of the petitioner regarding *change of opinion* on the ground that the petitioner company was eligible to claim deduction only upto 10 assessment years i.e. upto 2013-14 as the activity commenced in the unit of the petitioner company from 25.03.2004, for which there was a *mistake apparent from the record which was left out during the earlier assessment proceeding*.

5. In support of his submissions, the learned counsel for the petitioner has cited the case of (i) *Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd.*, (2010) 2 SCC 723: (2010) (302) ITR 561 (Full Bench decision), and (ii) *Tractebel Industry Engineering v. Asstt. Director of Income Tax International Taxation*, (2011) 198 Taxman 408 (Delhi High Court Division Bench decision).

6. In their affidavit-in-opposition filed on 07.12.2020, the respondent nos. 2, 3 and 4 have taken a plea that factual error was committed by the then assessing officer for which the assessment was sought to be re-opened under Section 147 of the Income Tax Act, 1961. It was stated that the petitioner was having erroneous concept of *change in opinion* of assessing officer. However, deduction under Section 80-IC was not available for the 11th year. Reliance is placed on the case of *G.K.N. Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC)*.

7. In this case, the assessment of the petitioner company was not done under Section 143(1) of the Income Tax Act, 1961, but the assessment has been done under Section 143(3) of the said Act. As per the contents of the assessment order dated 30.09.2016, a proceeding was initiated under Section 143(2) of the Income Tax Act, 1961 in view of claim for deduction under Section 80-IC of the said Act. The said provision enables the Income Tax Officer, Ward-I, Tinsukia to assure to himself that the assessee has not understated his income or has not under-paid tax in any manner. It has been mentioned in the said order that the petitioner was asked to produce books of accounts and other details/ particulars. The order also reflects that in response to the notice under Section 143(2), the petitioner company's Chartered Accountant and the Accountant - cum- authorised representative had attended the hearing and filed the ITR-V. , bank statement, etc. auditor's report, etc. A part of the said order, whereby the deduction was allowed, has already been referred to herein before.

8. Thus, when an assessment is made by taking recourse to Section 143(2) and 143(3) of the Income Tax Act, 1961, it cannot be open to

the Income Tax Officer, Ward-I, Tinsukia to project that income had escaped assessment. The contents of the assessment order dated 30.09.2016 clearly discloses that as the deduction claimed by the petitioner under Section 80-IC was found questionable, by issuing notice under Section 143(2), the Income Tax Officer, Ward-I, Tinsukia had applied his mind on the defence taken by the petitioner and accepted the deduction claimed to be admissible and/or allowable. Therefore, the indelible impression of the Court is that the proceeding under Section 148 of the Income Tax Act, 1961 to re-open the assessment is actuated merely by a *change of opinion*.

9. In the notice issued under Section 148, the Income Tax Officer, Ward-I, Tinsukia has not taken a stand that the petitioner Company had failed to make full and true disclosure of facts at the time of original assessment. In the considered opinion of the Court, a duty is cast on the assessee to make full and true disclosure of facts at the time of original assessment and the assessee has no duty beyond that. It is for the assessing officer to draw correct inference from the primary facts. Therefore, if subsequent to assessment made under Section 143(3) of the Income Tax Act, 1961, the assessing officer draws an inference that assessment made by him was erroneous, such a *change in opinion* would not justify action for re-opening assessment.

10. In respect of the such opinion, the Court finds support from the decision of the Full Bench of the Delhi High Court in the case of *CIT v. Kelvinator of India Ltd., (2002) 256 ITR 1 (Delhi)*, which was approved by the Supreme Court of India in the case of *Kelvinator of India Ltd. (supra)*, and *Macrotech Developers Limited v. Assistant Commissioner of Income Tax, Central Circle 7(3), W.P. No. 3452/2019*, decided on 17.01.2022 by Division Bench of

Bombay High Court, and reported in (2022) 0 Supreme(Bom) 370.

11. It would be pertinent to observe that the assessing officer, i.e. Income Tax Officer, Ward-I, Tinsukia did not form an opinion that he had committed a mistake in making the assessment order, and therefore, the said authority had not taken recourse to the provision of Section 154 of the Income Tax Act, 1961 to amend his assessment order.

12. The second ground on which the notice dated 01.01.2019 in respect of proceeding under section 148 of the Income Tax Act, 1961 has been challenged is that it is barred by limitation.

13. In respect of the said submission made by the learned counsel for the petitioner, it may be mentioned that as per the Income Tax Act, 1961 (Bare Act by Universal's "2022-23"), the provision of Section 149 of the Income Tax Act, 1961 has been amended on several occasions. The provision was previously amended by Finance Act, 2012 w.e.f. 01.07.2012. Later on, the provision of Section 149 was substituted by the Finance Act, 2021.

14. The said provision of Section 149 as it stood prior to its substitution by Finance Act, 2021 is quoted below:-

“149. Time limit for notice. – (1) No notice under section 148 shall be issued for the relevant assessment year-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to

tax, has escaped assessment.

Explanation. In determining income chargeable to tax which has escaped assessment shall for the purposes of this sub-section, the provisions of Explanation 2 of section 147 apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of six years from the end of the relevant assessment year.

Explanation. For the removal of doubts, it is hereby clarified that the provisions of sub- sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

15. In this case, the income which has allegedly escaped assessment is Rs.47,15,369/-. Therefore, under the provision of Section 149(1)(b) of the Income Tax Act, 1961 as amended vide by Finance Act, 2012 w.e.f. 01.07.2012 (quoted above), which was in force when notice dated 01.09.2019 was issued by the Income Tax Officer, Ward-I, Tinsukia, the period of limitation to issue notice under Section 148 of the Income Tax Act, 1961 would be "*four years, but not more than six years*". Therefore, the notice dated 01.01.2019 cannot be said to be issued after the expiry of the prescribed period of limitation. The said point is decided against the petitioner.

16. The third point urged by the learned counsel for the petitioner was that the notice under Section 148 of the Income Tax Act, 1961 was issued after receiving necessary satisfaction from the Addl. Commissioner of Income Tax, Range Tinsukia. However, as per the provision of Section 151(1) of the said Act as it stood prior to its substitution by the Finance Act, 2021 was that "*No*

notice shall be issued under section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice." However, the notice was issued after obtaining the satisfaction of the Additional Commissioner of Income Tax. Thus, it *prima facie* appears that in view of the prescription of Section 151(1) of the Income Tax Act, 1961, by necessary implication, the "Additional Commissioner of Income Tax" would not be same as "Principal Chief Commissioner" or "Chief Commissioner" or "Principal Commissioner" or "Commissioner" of Income Tax. Therefore, on the ground that the Income Tax Officer, Ward-I, Tinsukia had obtained satisfaction of Additional Commissioner of Income Tax, an authority who is not covered by the provision of Section 151(1) of the Income Tax Act, 1961, as it stood on 01.01.2019, the proceeding initiated against the petitioner company by issuance of notice under Section 148 of the Income Tax Act, 1961 is held to be not in accordance with law.

17. The gist of the decision in the case of *G.K.N. Driveshafts (supra)* has been provided in para 7 of the affidavit-in-opposition. In this case, the petitioner has responded to the notice under section 148. Therefore, it does not appear that the guidelines referred to in para 7 of the affidavit-in-opposition was not adhered to by the petitioner. Therefore, the said case would not help the respondent nos. 2, 3 and 4.

18. Therefore, in light of the discussions above, the proceeding initiated against the petitioner company under Section 148 of the Income Tax Act, 1961 is found vitiated on two counts, viz.,

a. In this case, the petitioner (assessee) had made full and true disclosure of facts at the time of original assessment and also at the time of scrutiny proceeding under section 143(2) and 143(3) of the Income Tax Act, 1961. The assessee had no duty beyond that. It was for the assessing officer to draw correct inference from the primary facts. Therefore, if subsequent to assessment made under Section 143(3) of the Income Tax Act, 1961, the assessing officer draws an inference that assessment made by him was erroneous, such a *change in opinion* would not justify action for re-opening assessment.

b. The said notice was issued after obtaining the satisfaction of the Additional Commissioner of Income Tax. Thus, it *prima facie* appears that in view of the prescription of Section 151(1) of the Income Tax Act, 1961, by necessary implication, the "Additional Commissioner of Income Tax" would not be same as "Principal Chief Commissioner" or "Chief Commissioner" or "Principal Commissioner" or "Commissioner" of Income Tax. Therefore, on the ground that the Income Tax Officer, Ward-I, Tinsukia had obtained satisfaction of Additional Commissioner of Income Tax, an authority who is not covered by the provision of Section 151(1) of the Income Tax Act, 1961, as it stood on 01.01.2019, the proceeding initiated against the petitioner company by issuance of notice under Section 148 of the Income Tax Act, 1961 is held to be not in accordance with law.

19. A possible plea could have been raised by the Income Tax authorities that this writ petition would not be maintainable as the petitioner could avail ordinary remedy of filing an appeal against the order of re-assessment. However, in this regard, the Court is of the considered opinion that

under the unique facts of this case, this writ petition under Article 226 of the Constitution would be maintainable because the two pre-conditions for exercise of power under Section 148 of the Income Tax Act, 1961 does not exist in this case. However, this observation is *qua* this case and is not to be considered as a precedent in any other case.

20. Therefore, this writ petition deserves to be allowed and is accordingly, allowed. In light of the discussions above, the Court is inclined to set aside and quash the impugned notice no. ITBA/AST/S/148/2018-19/1014682545(1) dated 01.01.2019, issued by the Income Tax Officer, Ward-I, Tinsukia (respondent no. 4). Consequently, letter bearing F. No. AADFD6077B/94 dated 20.05.2019 issued by the same authority is also set aside and quashed. It is needless to mention that the interim order dated 13.06.2019, passed in this writ petition would stand merged with this order

21. No costs.

JUDGE

Comparing Assistant