

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms JUSTICE J.UMA DEVI

Writ Petition Nos.36483, 37209, 37213, 37270,
37469, 37478, 37479, 37524 and 37555 of 2016

Common Order: (per V.Ramasubramanian, J.)

The petitioners in all these writ petitions are engaged in the business of retail vending of Indian-made foreign liquors purchased by them from the Andhra Pradesh State Beverages Corporation. The petitioners are aggrieved by the reopening of assessment sought to be made by the Assessing Officers under Section 147 of the Income Tax Act, 1961.

2. Heard Mr. K.Vasantkumar, learned counsel for the petitioners and Mr. B.Narasimha Sarma, learned Standing Counsel appearing for the respondents.

3. The petitioners in these writ petitions were issued with notices under Section 148 of the Act on various dates. In the notices which were in the printed form, it was stated that the Assessing Officers had reason to believe that there was income chargeable to tax relating to the relevant assessment years which had escaped assessment within the meaning of Section 147 of the Act and that therefore the petitioners should file a return in the prescribed form.

4. In response to the said notices, the petitioners sent individual replies indicating that they had already filed their returns of income electronically admitting income to a particular extent. In the replies, the petitioners also sought the reason for issuance of the notice.

5. Thereafter, the Assessing Officers sent a rejoinder indicating the reasons for reopening. Except the figures indicated therein, the reasons stated in all the notices were identical and hence the reasons stated in respect of one case alone is extracted as follows as a model:

“It is observed that your gross receipt was Rs.2,28,48,838/- for the AY 2013-14 and you have admitted total income amounting to Rs.4,16,840/- which is 2.10% of your total receipt, and the income admitted is also very less compared to others who are in the same line of business.”

6. The petitioners filed objections to the reasons indicated by the Assessing Officers contending that the cases would not fall under Section 147(1), as everything turned upon presumptions and surmises without any factual basis. The objections were rejected by the Assessing Officers by the orders impugned in these writ petitions forcing the petitioners to come up with the above writ petitions.

7. The orders rejecting the objections, are also identically worded and hence the relevant portion of one of those orders is extracted for easy appreciation as follows:

“3(ii) It may be specifically mentioned here that there is nothing in Section 147 of the I T Act, 1961 to suggest that an AO cannot reopen an assessment where he had failed to investigate and find out fact of the case truth at initial stage. Reliance is placed on the decision of Hon’ble High Court in the case of Ramprasad vs. AO (1995) 82 Taxman 199 (Allahabad). The Hon’ble Supreme Court in the case of ACIT Vs Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500 has clearly held that intimation u/s 143(1) is not ‘assessment’, so there is no question of treating the re-assessment in such cases as based on change of opinion. Here in the instant case of assessee, the case is covered by

the main provision and not by 1st proviso to section 147. The assessee has ignored the substantial changes made to 143(1) w.e.f. 01.06.1999. Further Hon'ble Supreme Court has held in the cited case that w.e.f. 1.6.1999, the acknowledgement of return is deemed to be an intimation except as provided in 1st proviso. Therefore, there being no "assessment" u/s 143(1), in this case for A.Y. 2012-13, the question of change of opinion as contended by assessee does not arise.

(iii) In the above context, attention is also drawn to the provisions of section 147 in general, and explanation-2(b) as under:

Explanation 2 "For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax escaped assessment, namely

(a)-----

(b) where a ROI has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the FOI.

5. The notice was issued after obtaining approval from the competent Authority. The Joint Commissioner of Income Tax, Nizamabad Range has given approval vide F.No.51/JCIT/ NZB/u/s 148/2015-16 dated 12.02.2016.

6. In view of the above the objections of the assessee fail and there is no reason for dropping the case. Hence, the proceedings shall continue."

8. Though the learned counsel for the petitioners as well as the learned Standing Counsel for the respondents raised several contentions, we are of the considered view that one contention of the petitioners is sufficient for the disposal of all these writ petitions. Admittedly, the notices under Section 148 was issued on the sole ground that the total income admitted by each of these petitioners, constituted a very small percentage of their gross receipts for the relevant assessment year and that therefore there was income that

escaped assessment. The Assessing Officers had drawn presumably a comparison to others in the same line of business, as indicated in the reason for reopening.

9. But the reasons for reopening owefully fall short of the reasons that could form the basis for reopening of assessments. There is no indication in the reasons as to who are the assesseees with whom any comparison was made. If the Assessing Officers had compared the gross receipts of yet another assessee in the same line of business and pointed out as to how the income returned by such assessee was at a consistently higher rate of the total receipts, the petitioners could have been in a position to point out how the admitted total income in their cases fell for short. Without making an actual comparison with named assesseees in the same line of business, the Assessing Officers cannot leave it to presumptions and surmises.

10. The learned Standing Counsel for the respondents/ Department took us through various decisions of the Tribunal where the similar reopening of assessments made on the same line of reasons were upheld, wherever books of accounts were not maintained, estimating the income to be 5% of the gross receipts. But it appears that in those cases, the very rationale for reopening of assessment and the very jurisdiction of the Assessing Officer to reopen assessments on the basis of such flimsy reasons, was not considered. Therefore, we cannot make a comparison of the cases on

hand with cases of persons who reconciled themselves to the estimation of income at 5% of either the gross receipts or the stock available on trade.

11. Under Section 147(1), the Assessing Officer is entitled to reopen assessment, if he has reason to believe that any income chargeable to tax has escaped assessment for the assessment year. Two conditions ought to be satisfied for the invocation of the power under Section 147. They are: (1) the existence of a reason to believe and (2) the escapement of any income chargeable to tax from assessment. The reason to believe on the part of the Assessing Officer, should arise out of concrete facts which could at least form the foundation for reopening. Without any concrete facts, reopening cannot be ordered merely on the presumption that the returned income is very shockingly lower than the total gross receipts. Therefore, we are of the considered view that the Assessing Officers completely erred in reopening assessments on the basis of either a suspicion that there is suppression of income or on the basis that persons in the same line of business are returning a higher income. Without even mentioning the comparables, no initiation of proceedings under Section 147 can be made.

12. In the order rejecting the objections, the Assessing Officer has relied upon Clause (b) under Explanation 2 to Section 147. Clause (b) under Explanation 2 to Section 147 deals with cases where a return of income has been furnished

by the assessee but no assessment has been made and the Assessing Officer notices that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return. Admittedly, the cases of none of these petitioners fall under the category of claiming excessive loss or deduction or allowance or relief in the return. The cases of the assesseees are attempted by the Assessing Officers to be brought within the category of “understatement of income”, so as to invoke Clause (b) under Explanation 2.

13. But to come to the conclusion that there was understatement of income, it is not sufficient for the Assessing Officers to just arrive at the percentage of gross receipts that were declared as income, without even referring to other assesseees whose admitted income was at a better percentage of the gross receipts than the petitioners. Therefore, the invocation of the jurisdiction under Section 147 on the basis of suspicions and presumptions cannot be sustained. Therefore, the writ petitions are allowed. The miscellaneous petitions, if any, pending in these writ petitions shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

J.UMA DEVI, J.

13th February, 2017.
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