

In the High Court of Judicature at Madras

Dated : 25.9.2018

Coram

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.1111 and 1112 of 2008

M/s.Aswani Enterprises, rep.by
the Managing Partner Shri.K.
Subba Reddy, Chennai-18. ...Appellant
Vs

The Assistant Commissioner of
Income Tax, Circle XV, No.122,
Mahatma Gandhi Road, Chennai-34. ...Respondent

APPEALS under Section 260A of the Income Tax Act, 1961 against the common order of the Income Tax Appellate Tribunal, A Bench, Chennai in ITA.Nos.488 and 489/Mds/2007 dated 14.3.2008 for the assessment years 1998-99 and 1999-2000.

For Appellant : Mr.T.Ramesh

For Respondent : Mr.M.Swaminathan and
Mrs.V.Pushpa

COMMON JUDGMENT

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

These appeals by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) have been directed against the common order passed by the Income Tax Appellate Tribunal, A Bench, Chennai in ITA.Nos.488 and 489 of 2007 dated 14.3.2008 relevant to the assessment years 1998-99 and 1999-2000.

2. The above tax case appeals have been admitted on 24.7.2008 on the following substantial questions of law:-

[i. Whether the Tribunal was correct in rejecting the appellant's contention that 'deemed dividend' under Section 2(22)(e), for the assessment year 1998-99, has to be computed only after deducting the advances given in the earlier assessment years and accordingly the accumulated profits of the lending company had to be reduced to that extent ?

ii. Whether the Tribunal, having held for the assessment year 1999-2000 that in the case of advances, deemed dividend cannot exceed the amount of accumulated profits after adjustment of deemed dividend for the previous assessment year 1998-99, erred in not advancing the same principle for assessment year 1998-99 as well ? And

iii. Whether the Department was correct in reopening assessment completed for the assessment year 1998-99 on a mere change of opinion ?

3. We have heard Mr.T.Ramesh, learned counsel for the assessee as well as Mr.M.Swaminathan and Mrs.V.Pushpa, learned Standing Counsel for the Revenue.

Substantial Question of Law No.3 :

4. First, we take up for consideration the third substantial question of law namely as to whether the Department was correct in reopening assessment completed for the assessment year 1998-99 on a mere change of opinion.

5. According to the learned counsel for the assessee, the reopening of the assessment was on the ground that there was no new material or information brought to the knowledge of the Assessing Officer enabling him to reopen the assessment in a valid manner and that the reopening based on the information, which was already within the knowledge of the Assessing Officer from the details filed with the return of income, would clearly amount to mere change of opinion.

6. In support of his contention, the learned counsel for the assessee has placed reliance on the decisions of

(i) the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd. [reported in (2010) 320 ITR 0561];

(ii) the Division Bench of this Court in the case of CIT Vs. ELGI Ultra Industries Ltd. [reported in (2008) 296 ITR 0573]; and

(iii) another Division Bench of this Court in the case of CIT Vs. Schwing Stetter India P. Ltd. [reported in (2015) 378 ITR 0380].

7. The legal principle, which can be culled out from the aforementioned decisions, is that after the amendment to Section 147 of the Act with effect from 01.4.1989, the Assessing Officer should have reason to believe that income escaped assessment and it confers jurisdiction to reopen the assessment. Thus, the power to reopen is much wider. However, the expression 'reason to believe' requires to be given a schematic interpretation, or else, it would give arbitrary powers to Assessing Officers to reopen the assessments on the basis of mere change of opinion, which cannot be, per se, a reason to reopen the assessment. The Hon'ble Supreme Court pointed out that the Assessing Officer has no power to review, that he has a power to reassess and that the reassessment should be based on fulfilment of certain preconditions and if the concept of 'change of opinion' is removed, then, in the garb of reopening the assessment, review would take place. Hence, after 01.4.1989, 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 and that reasons must have a live link with the formation of the belief.

8. Thus, it has to be seen as to whether there was a failure on the part of the assessee before us to disclose fully and truly all material facts necessary for the assessment for the relevant assessment years.

9. The assessment was completed under Section 143(3) of the Act vide order dated 19.3.2001. The assessment was reopened by issuance of a notice under Section 147 of the Act dated 29.3.2005. The notice for reopening was triggered on account of a letter received from the Deputy Commissioner of

Income Tax, Company Circle V(1), Chennai, who was the Assessing Officer of one M/s.Pallava Granite Industries India Private Limited (for brevity, the PGIPL) stating that the said company had made advances to its sister concerns amounting to Rs.5,64,64,418/- as on 31.3.1998, that the company had accumulated profits (surplus in profit and loss account) to the tune of Rs.2,22,34,064/- as on 31.3.1998 and that the applicability of Section 2(22)(e) of the Act may be considered in the hands of the appellant/ assessee.

10. The Assessing Officer of the appellant pointed out that since the two partners of the assessee firm were the shareholders in the PGIPL holding 46.35% and 43.02% respectively in the share capital of the PGIPL and since the PGIPL made advances to the assessee, in which, the two shareholders had substantial interest, the liability of the assessee for treating the receipt of advance from the PGIPL as 'deemed dividend' within the meaning of Section 2(22)(e) of the Act was required to be considered for the relevant assessment years.

11. The assessee's contention was that they received advances as trade advances and also purchase of mining land by the PGIPL from time to time and that those were continued to be disclosed as 'advances' in the assessee's financial statements as the transfer formalities were to be completed, which involved transfer of mining licence and other regulatory approvals. The assessee further contended that those advances were made pursuant to agreements for sale. However, it appears that those agreements were not placed before the Assessing Officer as recorded by the Assessing Officer in paragraph 11.3 of the assessment order dated 31.3.2006. The assessee also contended that it was a deposit for purchase of mining lands and that the advances received for sale of assets and procurement of material of the firm could not be treated as deemed dividend under Section 2(22)(e) of the Act.

12. The Assessing Officer considered the contention i.e. with regard to reopening of the assessment as to whether it would amount to a change of opinion and rejected the same holding that the information received from the Deputy Commissioner of Income Tax, Company Circle V(1) constituted new information, which required to be examined as regards the applicability of Section 2(22)(e) of the Act.

13. With regard to the merits of the assessment, the assessee's arguments were rejected and it was concluded that the amount was received by the assessee, in which, the two shareholders of the PGIPL had substantial interest, that the PGIPL also possessed accumulated profits by way of reserves and surplus in the profit and loss account to a substantial extent and that the condition in Section 2(22)(e) of the Act were applicable. It was further held that the advance received had to be charged to tax as such in the relevant years.

14. The assessee preferred appeals as against the assessment orders before Commissioner of Income Tax (Appeals)-XII, Chennai-34 [for short the CIT (A)]. However, the appeals were dismissed by a common order dated 05.10.2006. As against the orders passed by the CIT (A), the assessee filed appeals before the Tribunal and they were also dismissed by a common order dated 14.3.2008. Aggrieved by that, the assessee is before us.

15. As pointed out earlier, we have to ascertain as to whether there was a failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment for the relevant years. On a perusal of the factual position as recorded by the Assessing Officer as well as more elaborately by the CIT (A), we find that the Assessing Officer has full justification for reopening the assessment. At this juncture, it would be relevant to take note of the following observations made by the CIT (A) while confirming the findings of the Assessing Officer that reopening of the assessment was warranted and justified :

□From the details filed during the course of the assessment proceedings also, it is seen that no specific details have been furnished except the PAN and G.I.No. Of Pallava Granites Industries (India) Limited and other companies in the group. It is significant to note here that it was not stated

anywhere in the statements filed at the time of assessment that both the partners are even shareholders holding substantial interest in the company, Pallava Granites Industries (India) Ltd., and also no information regarding the company possessing accumulated profits during the relevant accounting periods were given. That is, the appellant firm had not furnished complete details regarding any of the loans taken or advances received by it from the connected concerns including the company, Pallava Granites Industries (India) Ltd. It is further seen from the ITMR that it is only in a letter dated 28.2.2005 addressed to the Addl. CIT, Business Range XV, the DCIT, Co. Cir. V(1), Chennai, complete details regarding the shares held by the two partners Shri.K.Subba Reddy and Smt.K.Sailaja in the company Pallava Granites Industries (India) P. Ltd. For the different accounting periods and the details of accumulated profits and the advances made by that company to its sister concerns for the different accounting periods beginning with the financial year 1997-98 and ending with financial year 2001-02 have all been furnished. In the absence of these vital details, there was no occasion for the Assessing Officer to have known about the fact that the advance amounts received by the appellant firm from the company PGIPL ought to have examined from the angle of applicability of Section 2(22)(e) till this date i.e. 28.2.2005. There were no specific details filed by the firm at the time of making the original assessment on 19.3.2001, which could have led the Assessing Officer to the thinking that the advances received by the firm from PGIPL would attract the provisions of Section 2(22)(e). So, it is only on 28.2.2005, almost after a gap of four years after completing the assessment originally on 19.3.2001 under Section 143(3) that the Assessing Officer received information regarding the shares held by the partners of the appellant firm in the other company and the details of accumulated profits of the company for the different accounting periods and this letter had triggered of the action under Section 147. It is also seen from the record that the Assessing Officer had issued the impugned notice under Section 148 after receiving due approval from the Commissioner of Income Tax, Tamil Nadu X. It is further seen from the notings in the order sheet as well as the proposals submitted to the CIT that the Assessing Officer had recorded the reasons for initiating action under Section 147. A perusal of the proposal submitted shows in fact that the Assessing Officer had clearly brought out the complete facts, which led him to the belief that income chargeable to tax had escaped assessment within the meaning of Section 147. .□

16. The CIT (A), on going through the factual position as well as the returns and the audit report, recorded a finding that the assessee failed to disclose vital details at the time when the scrutiny assessment was completed under Section 143(3) of the Act.

17. Furthermore, it was pointed out that though the assessee had given preliminary details in the sense that it had shown as 'unsecured loan' in the balance sheet as on 31.3.1998 the balances of advances received from the company □ the PGIPL, no further details were furnished. Neither the assessee firm nor its representative had furnished the details regarding the shareholders of the company nor the details of accumulated profits of the company nor the different accounting periods were filed at the time of original assessment.

18. The learned counsel for the assessee has vehemently contended that what was not called for could not be a reason for reopening the assessment, which would clearly show that it was a case of change of opinion.

19. We are unable to countenance the said submission on account of the factual details as recorded by the CIT (A). The version of the assessee that relevant documents were filed along with the returns was found to be incorrect. The following findings were recorded by the CIT (A) in this regard :

□6.2 : The return for this assessment year was filed on 02.11.1998, which was accompanied by a tax audit report in Form No.3CB and 3CD along with annexures 1, 2 and along with the statements of profit and loss account and balance sheet with their schedules as on 31.3.1998.

6.3 : The balance sheet as at 31.3.1998 filed along with the original return shows unsecured loans

and advances to the extent of Rs.6,23,93,950/-. Further, from the break up details given, it is seen that there is a credit balance of Rs.5,37,77,744.05 Ps in the name of Pallava Granites Industries (India) P. Ltd. (PGIPL). 6.4 : There is also another sum of Rs.1,19,21,549/- shown as advance received for raw materials, for which also, partywise break up is given. It is seen from the break up details that the name of the company PGIPL is not included therein.

6.5 : Almost all the columns in Form No.3CD filed have not been filled up and only "Nil" is shown. But, however, certain details of expenditure referred to in Section 40A are given in annexure 1 and the details of closing stock both in quantity and value as on 31.3.1998 were given in annexure 2.

6.6. Beyond the above details, no other information regarding the advances drawn by the appellant firm from the company PGIPL or the possession of accumulated profits by the company for the accounting period ended 31.3.1998 were furnished at the time of filing the return.

20. Further, the CIT (A) pointed out that the details regarding unsecured loans or the fact that the partners of the appellant firm were having substantial interest in the company "the PGIPL or the fact that the company possessed accumulated profits during the relevant accounting period were not furnished in the tax audit report. The CIT (A), while confirming the order passed by the Assessing Officer, held that complete facts were not filed by the appellant firm before the Assessing Officer at the stage of original assessment, from which, he could have formed the opinion as to the taxability or otherwise to the tune of Rs.2,22,34,064/- under Section 2(22)(e) of the Act. Thus, in the absence of vital facts in place before the Assessing Officer, the CIT (A) confirmed the reopening to be valid and proper.

21. The correctness of the factual findings recorded by the Assessing Officer and the CIT (A) was tested by the Tribunal. The Tribunal independently examined the matter and held that when there was no information before the Assessing Officer regarding the shareholding pattern of the company or its accumulated profits, it cannot be said that the assessee disclosed all necessary materials for the assessment in this regard. It was further held that the Assessing Officer had no occasion to examine the advances received from the company from the angle of taxability of the sum under Section 2(22)(e) of the Act and that it was not a case of change of opinion.

22. On going through the above factual matrix, we are fully satisfied that the reopening of assessment was not a case of change of opinion, but it was a case where the assessee did not disclose fully and truly the material facts necessary for the assessment. In the light of the above, substantial question of law No.3 is answered against the assessee and in favour of the Revenue.

Substantial Question of Law Nos.1 and 2 :

23. Both the questions overlap, as they are on the same point.

24. The contention of the assessee is that the amounts were received for the purposes of advances for the purchase of mining land and for supply of material. In other words, the assessee has contended that there was a business transaction between the assessee and the PGIPL and that there was an arrangement whereby the firm would sell the quarry land to the Government for a price and the advances were made towards such a deal. The CIT (A), while examining the correctness of the findings recorded by the Assessing Officer, pointed out that there was no evidence furnished to the effect that the activities were stated to have been carried on pursuant to the agreement, that if no evidence was filed, the fact remained that the advance received from the company were utilized by the firm in its own business and that no benefit accrued to the company.

25. During the course of arguments before the CIT (A), the assessee's authorized representative filed a copy of the agreement dated 01.4.1996 stated to have been entered into between the assessee and

the PGIPL. That agreement was examined by the CIT (A) and it was pointed out that the sale was to take place only after the lease period was over and that there was also a condition imposed in that agreement that the vendor i.e. the assessee firm would not take steps to renew its quarry lease with the Government Authorities. But, that agreement had not been implemented till the appeal was heard by the CIT (A). Thus, the CIT (A) concluded that the agreement was only a deal on paper between the assessee and the PGIPL, for which, advances were purported to have been received by the firm, but in actuality, there was no such deal and nothing took place.

26. Thus, after examining the said agreement, the CIT (A) held that the copy of the agreement filed by the assessee had no validity and could not be taken as a proof for business exigencies, which were supposed to have prevailed between the assessee and the PGIPL.

27. The learned counsel for the assessee has further pointed out that in the ledger account, the advances have been clearly mentioned.

28. This aspect was examined by the Assessing Officer as well as the CIT (A) and it was found that the assessee was maintaining a running account with the PGIPL and that there was nothing to indicate in the accounts statements that the amounts advanced by the PGIPL to the assessee were during the course of its business.

29. Another argument, which is put forth before us as well as before the Tribunal and the Authorities below, is that the figures of accumulated profits of the company as also the figures of balances in the loan accounts of the assessee for the different accounting periods starting from the financial year from 1995-96 to 1998-99 were produced and that the same were also extracted in the assessment orders.

30. Therefore, it was argued that by virtue of the fact that if the advances made by the PGIPL to its associate concerns were reduced from the accumulated profits every year, the balance of accumulated profits of the company would work out to NIL as on 31.3.1997, 31.3.1998 and 31.3.1999 and that no portion of the amounts drawn by the assessee from the company could be taxed as deemed dividend for the assessment years 1998-99 and 1999-2000. In support of such a contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT Vs. G.Narasimhan (died) [reported in (1999) 236 ITR 0327].

31. The CIT (A) elaborately discussed the factual position in the decision in the case of G.Narasimhan and then proceeded to examine as to whether the arguments made by the assessee were acceptable or not. The above argument was elaborately examined by the CIT (A) and it would suffice to note the findings recorded by the CIT (A) for the assessment year 1999-2000, which are as follows :

□Now, coming to the assessment year 1999, as seen earlier, the appellant had not paid any tax on the amounts of advance received by it from the company for any of the accounting periods. So, there is no question of applying the decision rendered by the Supreme Court in the case of G.Narasimhan Vs. CIT [236 ITR 327]. More over, on going through Explanation (2) appended to Section 2(22)(e), it is seen that it is nowhere stated that this kind of adjustment to the effect that the amount taxed as deemed dividend in the earlier years must be set off against the accumulated profits of the current year. This is not possible. It is not clear on going through the Supreme Court's decision in the case of G.Narasimhan Vs. CIT [236 ITR 327], whether Explanation (2) appended to Section 2(22) was considered by the Apex Court before rendering the decision in that case. As already pointed out, this decision was rendered totally in a different context of determining the accumulated profits at the time of distribution of the assets of the company when reduction in capital had happened. There is no such event that had happened in the present case. So, in the absence of any specific provision in

Section 2(22) to the effect that the amounts assessed as deemed dividend for an earlier assessment year must be set off against the accumulated profits of the current year for the purpose of working out the extent to which the advances received by a shareholder could be treated as deemed dividend, it has to be taken that this provision has to be applied for each year independently. Therefore, so long as the company possessed accumulated profits of Rs.2,22,34,064/- as at the beginning of the accounting period 1998-99 and Rs.1,99,95,657/- as at the end of this accounting period, the amounts received as advance during this period i.e. Rs.1,75,05,871/- will be the deemed dividend income of this period in the hands of the appellant.□

32. The correctness of the above findings was examined by the Tribunal and it was pointed out that no part of the advances received by the assessee before the assessment year 1998-99 was considered as deemed dividend. After referring to the decision of the Hon'ble Supreme Court in the case of Smt.Tarulata Shyam Vs. CIT [reported in 108 ITR 345], the Tribunal held that the amount that was advanced during the year was to be considered as deemed dividend and not the balance outstanding at the end of the accounting year. It was also held that there was no infirmity in the order passed by the CIT (A) for the assessment year 1998-99, as no part of the advance given had been treated as deemed dividend before this assessment year and accordingly, the finding was confirmed.

33. As regards the assessment year 1999-2000, it held that it did not agree with the view taken by the CIT (A) that the deemed dividend for the assessment year 1998-2000 should not be adjusted from the balance of accumulated profit as on the close of the assessment year 1998-99. After referring to the decision in the case of G.Narasimhan, it was further pointed out that there was no ambiguity in that regard. Hence, for the assessment year 1999-2000, the Assessing Officer was directed to compute the deemed dividend equivalent to the amount advanced during that year to the extent the PGIPL had accumulated profits after adjustment of the deemed dividend for the assessment year 1998-99.

34. We fully subscribe to the view taken by the Tribunal in affirming the order passed by the Tribunal. Thus, the factual matrix clearly shows that the findings rendered by the Tribunal and the Authorities below on the concept of 'deemed dividend' call for no interference.

35. Accordingly, substantial question of law Nos.1 and 2 are answered against the assessee and in favour of the Revenue.

36. In the result, the above tax case appeals are dismissed. No costs.

25.9.2018

Internet : Yes

To

The Income Tax Appellate Tribunal, 'A' Bench, Chennai.

RS

T.S.SIVAGNANAM,J

AND

V.BHAVANI SUBBAROYAN,J

RS

TCA.Nos.1111 & 1112
of 2008

25.9.2018