

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) Nos.1313 to 1324
and 1326 and 1327 of 2007

T.C.(A) No.1313 of 2007:-

The Commissioner of Income Tax,
Coimbatore.

... Appellant/respondent in all TC(A) Cases

-vs-

M/s.Elgi Tread (India) Ltd.,
2000, Trichy Road, Singanallur,
Coimbatore-641 005.

... Respondent/Appellant in all TC(A) Cases

Tax Case (Appeal) filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income-tax Appellate Tribunal "D" Bench, Chennai dated 24.02.2006 passed in I.T.A.No.1286/Mds/2000 for the Assessment Year 1990-91 ITA.680/Mds/2000 for the Assessment Year 1993-94 and I.T.A.No.1271/mds/2000 for the Assessment Year 1990-1991 and I.T.A.NO.1272/mds/2000 for the Assessment Year 1992-1993 and I.T.A.NO.1273/mds/2000 for the Assessment year 1993-1994 and I.T.A.NO.1274/mds/2000 for the Assessment year 1994-1995 and I.T.A.NO.1289/mds/2000 for the Assessment year 1994-1995 and I.T.A.NO.1486/mds/2000 for the Assessment year 1991-1992 and I.T.A.NO.1287/mds/2000 for the Assessment year 1992-1993 and I.T.A.NO.1288/mds/2000 for the Assessment year 1993-1994 and I.T.A.NO.1396/mds/2000 for the Assessment year 1992-1993 and I.T.A.NO.1487/mds/2000 for the Assessment year 1995-1996 and I.T.A.NO.1523/mds/2000 for the Assessment year 1991-1992 and I.T.A.NO.1524/mds/2000 for the Assessment year 1995-1996 respectively against the order to Commissioner of Income Tax (Appeals) Coimbatore dated 25.10.2000 made in I.T.A.95-C/99-2000 dated 25.10.2000, I.T.A.392-C/99-2000 dated 24.07.2000, I.T.A.94-C/99-2000 dated 24.07.2000, I.T.A.90-C/99-2000 dated 24.07.2000, I.T.A.93-C/99-2000 dated 29.05.2000, I.T.A.92-C/99-2000 dated 29.05.2000, I.T.A.91-C/99-2000 dated 29.05.2000 and I.T.A.89-C/99-2000 dated 26.05.2000 respectively against the order passed by the Joint Commissioner of Income Tax, Special

Range-I Coimbatore dated 05.10.99 in PAN/GIR.NO.49-502-CX-2236 for the Asst year 97-98 dated 25.03.1999 in PAN/GIR.NO.49-502-CX-2236 for the asst year 96-97, dated 05.03.1999 in PAN/GIR.NO.GX-2236/SR-I-CBE for the asst year 95-96, dated 05.03.1999 in PAN-GIR.NO.CX-2236/SR-I-CBE for the asst year 94-95, dated 05.03.1999 in PAN/GIR.NO.49-502-CX-2236 for the asst year 93-94, dated 05.03.1999 in PAN/GIR.NO.49-502-CX-2236 for the asst year 92-93, dated 05.03.1999 in PAN/GIR.NO.49-502-CX-2236 for the asst year 91-92, and dated 05.03.1999 in PAN/GIR.NO.CX-2236/SR-I/CBE for the assessment year 1990-91 respectively.

For Appellant : Mr.T.R.Senthil Kumar,
in all TC Appelas Senior Standing
counsel for Income Tax Department
assisted by Mr.S.Rajesh, and
Mrs.K.G.Usharani

For Respondent : Mr.M.P.Senthil Kumar for
in all TC Appellas M/s.Philip George in all TCA Cases

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

These appeals, by the Revenue, are directed against the common order passed by the Income-tax Appellate Tribunal "D" Bench, (ITAT) Chennai in I.T.A.Nos.1286/2000, 1271/2000, 1486/2000, 1523/2000, 1272/2000, 1287/2000, 1396/2000, 680/2002, 1273/2000, 1288/2000, 1274/2000, 1289/2000, 1487/2000 and 1524/2000 dated 24.02.2006.

2.The appeals have been admitted on the following substantial questions of law:

"(1) Whether the Assessing Officer is empowered to reopen an assessment based on a subsequent Supreme Court decision?

(2) Whether profits from service charges are includible in the profits of business for the purposes of Section 80 HH, 80 I and 80 IA?

(3) Whether explanation "baa" to Section 80 HHC is applicable for tyre retreating charges?

(4) Whether the Assessing Officer is entitled to restrict the depreciation of the actual cost by invoking Section 43(1)(3)?

(5) Whether the excise duty and sales tax form part of the turnover for the purpose of deduction under Section 80 HHC?

(6) Whether the net amount or the other income has to be excluded from the profits of business for the purpose of Section 80 HHC?"

3. In this batch of appeals though six substantial questions of law have been framed, what we are required to decide is the first question as framed in Tax Case (Appeal) Nos.1313 to 1324 and 1326 and 1327 of 2007, viz., whether the Assessing Officer is empowered to reopen an assessment based on a subsequent Supreme Court decision?

4. The reason for framing the other five substantial questions of law, is on account of the fact that those questions were raised by the assessee / Department before the Tribunal. Since the Tribunal decided the question relating to jurisdiction of the officer to reopen the proceedings, both in respect of reopening of assessment done beyond the period of four years and those done within the period of four years, the Department has raised these questions in these appeals.

5. By way of illustration, if we take up T.C.(A) No.1313 of 2007, the second question is with regard to whether profits from service charges are includible in the profits of business for the purpose of Sections 80 HH, 80 I and 80 IA of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). This question was raised by the assessee in their appeal before the Tribunal and the first contention was challenging the reopening. Since the assessee succeeded on the issue relating to reopening before the Tribunal, the Tribunal did not go into the issue pertaining to Sections 80 HH and 80 I of the Act. Therefore, the Revenue has raised this question before us in these appeals. Similar is a position with regard to other appeals as well.

6. A tabulated statement has been prepared by Mr.M.P.Senthil Kumar, learned counsel for the assessee, which makes things clear and for easy reference, the same is quoted hereunder:-

#	Issues	A.Y.	1990-91		1991-92		1992-93			1993-94			1994-95		1995-96		Reliance placed on
		TC.A. No.	1313/07	1315/07	1320/07	1326/07	1316/07	1321/07	1323/07	1314/07	1317/07	1322/07	1318/07	1319/07	1	1327/07	
		I.T.A. No.	1286/00	1271/00	1486/00	1523/00	1272/00	1287/00	1396/00	680/02	1273/00	1288/00	1274/00	1289/00	1487/00	1524/00	
1	Reopening on basis of subsequent Supreme Court decision	? Q 1			? Q 1		? Q 1				? Q 1		? Q 1			? Q 1	Beyond 4 years Proviso to section 147 applies Change of opinion
2	Service Charges are includible in profits of business for the purpose of Sections 80HH, 80I and 80IA	? Q 2 [80HH & 80I]			? Q 2 [80H H & 80I]		? Q 2 [80HH & 80I]		? Q 2 [80H H, 80I & 80IA]		? Q 2 [80HH, 80I & 80IA]		? Q 2 [80HH, 80I & 80IA]				Does not arise At pg 133 of Typed set
3	Explanation "baa" to section 80HHC whether applicable for Tyre Retreading Charges						? Q 3				? Q 3		? Q 3				The Tribunal annulled the reassessment proceedings and had not gone into other grounds on merits in Assessee's and dismissed Department appeals without going into any of the other grounds raised.
4	Restrict Depreciation of actual cost by invoking 43(1) (3)															? Q 4	
5	ST ED receipts to be excluded in TTO – 80HHC [66 \$2 in TCA 860 to 863/07 Typed Set]																
6	Net amount of other income has to be excluded from the profits of business for the purpose of Section 80HHC	? Q 6 [80H H & 80I]		? Q 6 [80H H]		? Q 6 [80H HC & 80I]		? Q 6 [80H H]		? Q 6 [80HHC]		? Q 6 [80H H, 80I & 80IA]				? Q 6 [80HHC, 80HH & 80IA]	

सत्यमेव जयते

WEB COPY

7. Since the substantial questions of law, to be decided in all the appeals, are identical and the factual position is also identical, we take up for consideration the facts relating to the assessment year 1990-91.

8. Before we proceed further, we observe that the appeals are in two batches, viz., one set of cases are related to the assessment years 1990-91 to 1992-93, where the reopening has been done beyond four years and so far as the assessment years 1993-94 to 1995-96 are concerned, the assessments have been reopened within four years.

9. For the assessment year 1990-91, the assessee filed the return of income on 31.12.1990 declaring taxable income of Rs.1,41,81,020/- and profit under Section 115J, the bank profit is shown as Rs.98,20,860/-. Intimation under Section 143(1)(a) of the Act was sent on 25.06.1991 accepting the returned income without making any adjustments. The assessee filed revised return on 31.12.1992 revising the income of Rs.1,38,08,720/-. In the said revised return, the assessee claimed additional benefit under Section 80 I of the Act.

10. According to the assessee, certain franchises failed to run the units and accordingly, the main company took over those concerns which produced retreaded tyres. According to the assessee, deduction under Section 80 I of the Act is available even in respect of these units. However, at the time of assessment, it was pointed out to the assessee that no cognizance could be taken to the revised return, as no revised return could be filed beyond one year from the end of the assessment year 1990-91. Accordingly, the revised return was ignored. The assessee submitted another letter dated 22.01.1993, wherein revised claim of Section 80 I of the Act was submitted in respect of which notice under Section 143(2) of the Act was issued to the assessee to produce details. After discussion, the assessment was completed and the benefit was extended to the assessee. These assessments were reopened pursuant to a notice under Section 148 of the Act dated 08.08.1997.

11. Both the Department as well as the assessee have filed paper books containing the assessment orders, Orders-in-Appeal etc., but the paper books do not contain the reasons for reopening required to be recorded in terms of Section 147 of the Act. Therefore, we perused the revised assessment orders dated 05.03.1999 for the assessment years 1990-91. The Assessing Officer states that the original assessment under Section 143(3)

of the Act was completed on 18.03.1993 and the same was revised on 21.07.1993 and to consider certain points, the assessment was reopened with the prior permission of the Commissioner of Income Tax by issue of notice under Section 148 of the Act on 08.08.1997. Thus, the respondent / Assessing Officer has not stated as to what are the reasons for reopening the assessment and how he formed an opinion that income chargeable to tax has escaped assessment. Therefore, this is a substantial ground on which the proceedings could have been terminated.

12. Nevertheless, the assessee participated in the proceedings and submitted their response. The Assessing Officer while completing the revised assessment under Section 147, has allowed the deductions under Sections 80 HH and 80 I of the Act. The Revenue, preferred appeal as against the said order before the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) noted that the main ground taken is with regard to the validity of the reopening and submitted that despite request from the appellant, the Assessing Officer did not furnish reasons for issuing the notice for reopening. Further, the assessee stated that there was no failure on their part to disclose any material and it was a change of opinion and they relied as many as 18 judgments of the Hon'ble Supreme Court and the High Courts in support of their stand.

13. The CIT(A) after considering the submissions on either side, held that this Court in the case of CIT vs. Madurai Pandian Engineering Corporation Ltd reported in 239 ITR 375 (Mad.) has held that retreading of tyres does not amount to manufacture. Therefore, if the correct provision of law was ignored in the original assessment, the same can be reopened. After rendering such finding, the CIT(A) also proceeded to take a decision on the merits of the assessment. The assessee filed appeals before the Tribunal, where the common question was regarding the validity of the reopening of the assessments, within the period of four years and beyond the period of four years. Insofar as the relief granted by the CIT (A) to the assessee, the Revenue preferred appeals before the Tribunal.

14. The Tribunal after taking note of the factual position, first took up for consideration as to whether the Assessing Officer has framed the assessment ignoring the decision of the Apex Court in the case of P.C. Cherian vs. Barfi Devi reported in AIR 1980 SC 86. After taking note of the submissions, the ITAT held that the assessment has to be reopened on the basis of the decision of the Hon'ble Supreme Court in the case of P.C. Cherian (supra) and the decision has been discussed by this Court in the case of Madurai Pandian Engineering Corporation Ltd (supra),

wherein it has been noted that one of the issues arose was whether retreading of tyres would amount to manufacture under Section 160 of the Transfer of Property Act and this clearly shows that the decision does not relate to deduction under Sections 80 HH and 80 I of the Act. In this regard, the Tribunal relied on the decisions of the Apex Court in the cases of CIT vs. Sun Engineering Works Pvt. Ltd. reported in 198 ITR 297 (SC) and Padmasundara Rao (Decd.) and Others vs. State of Tamil Nadu reported in 255 ITR 147 (SC). Therefore, it held that it cannot be said that the case of P.C.Chcrian (supra) was applicable to cases arising under Sections 80 HH and 80 I of the Act in the case of tyre retreading business.

15. Further, the Tribunal agreed with the submissions of the counsel for the assessee that from a perusal of the decision in Madurai Pandian Engineering Corporation Ltd (supra), that references were made by the Department in Tax Case Nos. 1820 to 1821 of 1986, which means, the issue was decided in favour of the assessee by the Tribunal and following those decisions, the assessee has claimed deduction under Sections 80 HH and 80 I of the Act. The Tribunal held that though a case can be reopened under Section 147/148 when a decision is ignored by the Assessing Officer in the light of the decision of the Hon'ble Supreme Court in ITO vs. Sharadbhai M. Lakhani reported in 243 ITR 1 (SC), but the same is not applicable to the cases on hand, because the decision itself was rendered under a different Act. Further, it held that Sharadbhai M. Lakhani (supra) was based on the decision of the Supreme Court in A.L.A. Firm vs. CIT reported in 189 ITR 285, and accordingly, distinguished the decision in those cases.

16. The Tribunal also referred to the decisions in the cases of Parashuram Pottery Works Co. Ltd. vs. ITO reported in 106 ITR 1 (SC); Calcutta Discount Co. Ltd. vs. ITO reported in 41 ITR 191; and the decision of this Court in Fenner India Ltd. vs. DCIT reported in (2000) 241 ITR 627 (Mad.) and after referring to Section 147 as well as the decision in the case of CIT vs. Kelvinator of India Ltd. reported in 256 ITR 1, held that the reopening was not sustainable and the reopening was mere change of opinion.

17. Mr. T.R. Senthil Kumar, learned Senior Standing Counsel for the Revenue contended that Section 147 of the Act empowers Assessing Officer to reopen the assessment as well as to reassess such income and recompute the loss or depreciation allowance or any other allowance, as the case may be.

18. Referring to Explanation 2, in Section 147, it is submitted that Clause (c)(iii) provides that when there is excessive relief granted under the Act, the Assessing Officer is justified in reopening the assessment. The learned counsel, to support his contention, relied upon the decision of the Hon'ble Supreme Court in the case of Honda Siel Power Products Ltd. vs. DCIT reported in [2012] 20 taxmann.com 5 (SC), wherein the assessee was permitted to raise all contentions with regard to the amount being offered for tax as well as its contention under Section 14A of the Act.

19. Relying on the decision of the Hon'ble Supreme Court in Girilal & Co. vs. Income-tax Officer reported in [2016] 75 taxmann.com 172 (SC), it was submitted that in the said case, the Hon'ble Supreme Court held that there was no true disclosure by the assessee and the Assessing Officer was justified in reopening the assessment.

20. Mr. M.P. Senthil Kumar, learned counsel appearing for the assessee submitted that the Tribunal rightly held that the reopening was based on change of opinion. Further, it was pointed out that the decision in the case of P.C. Cherian (supra) arose under the provisions of the Transfer of Property Act and the Calcutta High Court in the case of Addl. CIT vs. Kalsi Tyre reported in (1981) 131 ITR 0636 (Cal.), held that retreading activity is processing akin to an industrial or manufacturing activity.

21. In the case of Sixth Income Tax Officer vs. General's New Tread reported in 13 ITD 460 (SB), the Bangalore Bench of the ITAT held that the assessee, who produced an article by retreading, was entitled to investment allowance. It is submitted that the appeals filed before this Court in the case of Madurai Pandian Engineering Corporation Ltd (supra), are by the Revenue and those appeals were filed in the year 1986 and decided by this Court in favour of the Revenue on 02.03.1998. Thus, it is submitted that till the Division Bench decided the substantial question in favour of the Revenue in the case of Madurai Pandian Engineering Corporation Ltd (supra), on 02.03.1998, the decision of the Tribunal held the field, which was clearly in favour of the assessee.

22. Further, it is submitted that reopening could not have been made based upon the decision of the Division Bench, which was rendered subsequently. In support of such contention, reliance was placed on the decisions in the case of CIT vs. Baer Shoes (India) (P). Ltd. reported in (2011) 331 ITR 0435 (Madras)

and in the case of DCIT vs. Simplex Concrete Piles (India) Ltd. reported in [2013] 358 ITR 129 (SC).

23. Heard the learned counsels for the parties and carefully perused the materials placed on record.

24. The short question, which falls for consideration, is whether the reopening of the assessments both within four years and beyond four years could have been done for the reasons assigned by the Revenue. We are required to take a decision in respect of the other substantial questions of law, after deciding the first question and if this question is answered in favour of the Revenue, then we may be required to examine the other substantial questions of law. However, if we answer the said question in favour of the assessee, then nothing further remains to be decided in these appeals. As pointed out in the preceding paragraphs, the Assessing Officer, while reopening the assessment, has not disclosed the reasons for reopening. This is evident from the assessment order dated 05.03.1999, which only states that the assessment was reopened to consider certain points with prior permission of the Commissioner of Income Tax. Thus, the basic requirement for recording reasons to believe that income chargeable to tax has escaped assessment is absent in the instance case, which would be sufficient to hold that the reopening proceedings are wholly without jurisdiction.

25. Having held so, we proceed to consider the other issues, which were raised by the learned counsels.

26. The learned Senior Standing Counsel appearing for the Revenue argued that in terms of Section 147 of the Act, the Assessing Officer has power to reassess the income and he is entitled to recompute the loss of the depreciation allowance or any other allowance, as the case may be and it is submitted that the case on hand clearly falls in Clause (c)(iii) of Explanation 2 of Section 147 of the Act.

27. In our considered view, the power to assess or reassess or recompute the loss or depreciation allowance or any other allowance could be done only if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Therefore, Explanation 2 cannot be read in isolation and it has to be read harmoniously with the powers under Section 147 of the Act including the proviso under the said Section. Therefore, we are unable to accept the submission of the learned Senior Standing Counsel for the Revenue.

28. With regard to the decision in the case of Honda Siel Power Products Ltd. (supra), we find that the said decision is wholly inapplicable to the facts and circumstances of the present case. In Girilal & Co. (supra), the issue was with regard to valuation of a property and the Court found that the assessee failed to truly disclose the exact size of the plot and this information was available only in the valuation report. Therefore, the Court held that Explanation 2(c)(iv) of Section 147 of the Act will apply. The said decision can have no application to the facts of the present case, as there is no allegation, that the assessee withheld the information from the Assessing Officer.

29. One more submission, which was made, was that the Assessing Officer without application of mind, had granted the benefit of deduction and therefore, the Revenue had to file appeals before the CIT(A). On a reading of the assessment orders passed under Section 143(3) dated 18.03.1993, it is clear that there has been discussion between the assessee and the Assessing Officer and all materials have been placed before him and then the assessment has been completed granting benefit. Therefore, the order of assessment cannot not be stated to be an order without application of mind.

30. Thus, we come to the last and most important question to be decided, as to whether reopening of an assessment could be done based upon the decision in the case of Madurai Pandian Engineering Corporation Ltd (supra). As mentioned by us earlier, the decision was rendered by the Division Bench of this Court on 02.03.1998. Till such date, the decision of the Tribunal was in favour of the assessee. Apart from that, the Calcutta High Court in Kalsi Tyre (supra) has decided that business of retreading tyres is an industrial company within the meaning of Section 2(6)(d) of the Finance Act, 1968. The said decision was rendered in the year February, 1981. Thus, the law, which stood as on 02.03.1998, was in favour of the assessee. Notices, under Section 148 of the Act, were issued on 08.08.1997. Thus, the notices for reopening were issued prior to the decision in the case of Madurai Pandian Engineering Corporation Ltd (supra) and on the date when the notices were issued, the law was clearly in favour of the assessee and retreading of tyres was held to be a manufacturing activity. Based on the decision in Madurai Pandian Engineering Corporation Ltd (supra), reopening could not have been done.

31.The Hon'ble Supreme Court in Simplex Concrete Piles (India) Ltd. (supra), held that the subsequent reversal of the legal position by the judgment of the Hon'ble Supreme Court does not authorise the Department to reopen the assessment, which stood closed on the basis of law, as it stood at the relevant point of time.

32.In Baer Shoes (supra), it was held that the judgment rendered by the Supreme Court is an expression of opinion on the interpretation of statute. The power under Section 147 of the Act will have to be invoked by the Assessing Officer in accordance with the said provision and merely because a judgment has been rendered, the same cannot be a reason for reopening the assessment under Section 147 of the Act.

33.As pointed out by the Hon'ble Supreme Court in Parashuram Pottery Works Co. Ltd. (supra), it has to be kept in mind that policy of law is that there must be a point of finality in all legal proceedings and that stale issues should not be reactivated and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activities.

34.As held by this Court in the case of Fenner India Ltd. (supra), in order to reopen an assessment after expiry of four years from the end of relevant assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment, but also the default or failure of assessee to disclose fully and truly all material facts; notice issued under Section 148 of the Act after expiry of four years cannot be sustained as escapement of income, if any, is not on account of any failure on the part of assessee to disclose the material facts fully and truly. The above reasoning will be equally applicable for reopening of assessments within four years. In this regard, it is beneficial to refer to the decision in the case of Kelvinator of India Ltd. (supra), wherein it was held that the Assessing Officer has power to reopen the assessment under Section 147 of the Act provided he has reason to believe that income has escaped assessment and there is tangible material to come to the conclusion that there is escapement of income; mere change of opinion cannot per se be reason to reopen.

35.In the light of the above discussion, we hold that the reopening proceedings was wholly without jurisdiction and we

affirm the view taken by the Tribunal and accordingly, dismiss all the tax cases (appeals) filed by the Revenue by answering the first substantial question of law as framed above in favour of the assessee and hold that the Assessing Officer was not empowered to reopen the assessment for all the assessment years. Consequently the other substantial questions of law as framed are left open.

In the result, the tax cases (appeals) are dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

abr

To

1.The Income-tax Appellate Tribunal "D" Bench,
Chennai

2.The Commissioner of Income Tax(Appeals)
Coimbatore.

3.The Joint Commissioner of Income Tax
Special Range-I
Coimbatore.

4.The Assistant Registrar,
Income Tax Appellate Tribunal,
Rajaji Bhavan III Floor,
Besant Nagar,
Chennai-90

5.The Commissioner of Income Tax,
Coimbatore.

+1cc to Philip George, Advocate sr.no.43775

+1cc to Mr.T.R.Senthilkumar, Advocate sr.no.43876

T.C.(A) Nos.1313 to 1324
& 1326 and 1327 of 2007

gmr(co)
nr 06/08/2018