IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.07.2019

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.702 of 2009

M/s.Tenzing Match Works
Boopathy Buildings
Virudhunagar Road
Sivakasi, PAN:AABFT6787A. ... Appellant

- Vs -

The Deputy Commissioner of Income Tax
Circle I, Virudhunagar. ... Respondent

Prayer : Appeal under Section 260A of the Income Tax Act, 1961, against the common order of the Income Tax Appellate Tribunal "B" Bench, Chennai in I.T.A.No.1034/2008 for the assessment years 2001-02 dated 31.03.2009, and against the order of the Commissioner of Income Tax (Appeals) II, Madurai dated 06/02/08 made in ITA No.123/07-08, against the Deputy Commissioner Income Tax, Circle I, Virudhunagar, dated 06/09/07 made in PAN/GIR-AABFT5787A assessment year 2001-02.

For Appellant : Mr.A.S.Sriraman

For Respondent :Ms.S.Premalatha
Standing Counsel

J U D G M E N T

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

This appeal by the assessee is directed against the order passed by the Income Tax Appellate Tribunal, Chennai 'B' Bench I.T.A.No.1034/2008 for the assessment years 2001-02 dated 31.03.2009. Though the assessee has raised five substantial questions of law, which have been admitted, it would suffice to answer the following question, which would cover all the substantial questions of law. Accordingly, the appeal is entertained on the following substantial question of law.

> "1. Whether the Appellate Tribunal is correct in law in confirming the order of the re-assessment framed in terms of

Section 147 read with 143(3) of the Act for the assessment year 2001-02 by the respondent in the second attempt even though there were no fresh materials in his possession justifying the action?"

2. Heard Mr.A.S.Sriraman, learned counsel for the assessee and Ms.Premalatha, learned Standing Counsel for the Revenue. The short issue which falls for consideration is whether the reopening of the assessment was valid. The assessee filed the return of income on 29.10.2001, admitting the total income at 'Nil', after claiming deduction under Section 80HHC to the extent of Rs.13,07,561/-. The return was processed under Section 143(1)(a) of the Act, by issuance of a communication dated 29.01.2004. After more than 2½ years, a notice under Section 148 was issued on 22.11.2006, alleging that the assessee, in his return of income, had made excess claim of deduction under Section 80HHC. The assessee offered his explanation, justifying the claim for deduction and requested the return of income dated 29.10.2001 to be treated as return in pursuance to the notice under Section 148 of the Act dated 29.11.2006. Nothing happened thereafter for over four months. When the assessee was issued another notice under Section 148 of the Act dated 13.03.2007 for the very same reason, alleging excess claim deduction under Section 80 HHC, the assessee offered his explanation, justifying the claim and requested the return dated 29.10.2001 to be treated as return in response to the notice under Section 148 dated 13.03.2007. The assessee further contended that the reopening of the assessment is bad in law, as the assessing officer has not recorded any reason that income chargeable to tax has escaped assessment and there was no tangible material available to the assessing officer to reopen the assessment. This contention was rejected and the assessment was completed on 06.09.2007.

3. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals), Madurai (hereinafter referred to as CIT 'A'), who dismissed the appeal by an order dated 06.02.2008 on the ground that the intimation issued under Section 143(1)(a) dated 29.01.2004 is not an order and therefore the notice issued under Section 148 dated 13.03.2007 cannot be stated to be reopening of assessment, as it is an assessment by itself, and that an intimation is not an order of assessment. Similar was the view taken by the tribunal as well, dismissing the appeal filed by the assessee. This is how the assessee is before us, by way of this appeal.

4. There is no quarrel about the legal position as laid down by the Honourable Supreme Court in the cases of "ACIT -Vs- Rajesh Jhaveri Stock Brokers P.Ltd [2007] 291 ITR 500

(SC)", "CIT -Vs- Kelvinator India Ltd (2010) 320 ITR 561 (SC)" and "Income-tax v. Zuari Estate Development & Investment Co.Ltd. (2015) 373 ITR 661 (SC)". However, the question before us in this appeal is whether the finality attached to an assessment, pursuant to a communication under Section 143(1)(a) could be disturbed by invoking the power under Section 147 and under what circumstances it can be done.

5. This issue was considered in the case of "CIT -Vs- Orient Craft Ltd (2013) 354 ITR 536", wherein the Court held as follows.

> 13. Having regard to the judicial interpretation placed upon the expression "reason to believe", and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-a-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a

distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143 (3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed."

6. This decision was followed in the case of "Principal CIT -Vs- Tupperware India (P) Ltd., (2016) 65 Taxmann.com 17 (Delhi)". Similar view was taken in "Khubchandani Healthparks (P) Ltd., -Vs- Income Tax Officer, Mumbai ", wherein it was held that notice under Section 148 could be challenged as being without jurisdiction for absence of reason to believe that income had escaped assessment even in case where assessment had been completed earlier by an intimation under Section 143(1). The decision in "CIT -Vs- Orient Craft Ltd (2013) 354 ITR 536" was followed in "TANMAC India -Vs- Deputy CIT, Pondicherry (2017) 78 Taxmann.com 155 (Madras)".

7. It is the contention of Ms.Premalatha, learned Standing Counsel that this Court, in the case of "Diebold Systems Pvt Ltd., -Vs- IT Officer (OSD)" in T.C.No.2153 of 2008 dated 11.07.2019, had distinguished the decision of "CIT -Vs- Orient Craft Ltd (2013) 354 ITR 536" and "TANMAC India -Vs- Deputy CIT, Pondicherry (2017) 78 Taxmann.com 155 (Madras)". It is true that this Court has distinguished the aforesaid decisions in the case of "Diebold Systems Pvt Ltd., -Vs- IT Officer (OSD)", on the ground that in the said case assessment was reopened based on factual material, which were available with the assessing officer subsequent to the intiation issued under Section 143(1) and to be precise, in the next assessment year, where the assessing officer found that no services were rendered by the assessee for their unit at Pondicherry. Therefore, the said decision will not aid the case of the Revenue.

8. The legal principle laid down in the above decision is that the language employed in Section 147 does not make any distinction between an order passed under Section 143(3) and the intimation issued under Section 143(1) and therefore, it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-a-vis Section 143(1) and Section 143(3). In the instant case, it is not in dispute that reopening is based upon the return of income filed by the assessee at the first instance. There is no allegation against the assessee that there was failure on the part of the assessee to make a true disclosure, nor the assessing officer had relied on any tangible material, which has come to his knowledge after the filing of the return and intimation under Section 143(1),

justifying reopening. Therefore, to reopen an assessment based on the return filed by the assessee, will clearly be a case of change of opinion and consequently bad in law.

9. In the result, the appeal filed by the assessee is allowed and the substantial question of law No.1 is answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

KST

To

1. The The Deputy Commissioner of Income Tax
   Circle I, Virudhunagar.

2. The Income Tax Appellate Tribunal, Chennai 'B' Bench.

3. The Commissioner of Income Tax (Appeals) II, Madurai

+1cc to Mr.S.Sridhar, Advocate SR.No.58790

+1cc to Ms.S.Premalatha, Advocate SR.No.59053

T.C.(A) No.702 of 2009

VG II(CO)
GMY(02/08/2019)