

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date:- 08.03.2011

Coram

The Honourable Mr. Justice ELIPE DHARMA RAO

and

The Honourable Mr. Justice M. VENUGOPAL

T.C.(A) No.41 of 2008

M/s. Kone Elevator India Pvt. Ltd. ... Appellant

..Vs..

The Income-tax Officer,

Company Circle-II (4),

121, Mahatma Gandhi Road,

Chennai _x0016_ 600 034. .

.. Respondent

Tax Case Appeal filed against the order dated 15.10.2007 passed by the Income Tax Appellate Tribunal, Chennai Bench 'B' in I.T.A. No.1340 (MDS)/2006.

For Appellant : Dr. Anita Sumanth

For Respondents : Mr. K. Subramanian,

Sr. Standing Counsel for Income-tax

JUDGMENT

(Judgment was delivered by ELIPE DHARMA RAO, J.)

The above Tax Case Appeal is filed against the order dated 15.10.2007 passed by the Income Tax Appellate Tribunal, Chennai Bench 'B' in I.T.A. No.1340 (MDS)/2006.

2. The brief facts necessary for the disposal of the case are that the assessee-Company had filed its return of income for the assessment year 1998-1999 on 30.10.1998 admitting 'Nil' income, which was processed under Section 143(1)(a) of the Income-tax Act, 1959 (hereinafter referred to as "the Act") on 10.5.1999. Subsequently, the assessee filed a revised return on 26.11.1999 admitting 'Nil' income by enclosing some more TDS certificates that were omitted to be enclosed along with the original return of income, which were also processed on 29.3.2001. Again a revised order was passed on 27.6.2002 giving credit to some more TDS certificates which resulted in an additional refund of Rs.8,86,226/-.

3. Thereafter, it was noticed that on a perusal of records, the assessee-Company had not computed the income under Section 115 JA of the Act properly. Therefore, on facts, there was a reason to believe that the income assessable to tax has escaped assessment. In view of the same, a proceeding under Section 147 of the Act was initiated by issuing notice under Section 148 of the Act on 23.12.2003. In response to the said notice, the assessee's representative M/s.N.C.Rajagopal & Co. Chartered Accountants vide their letter dated 5.1.2004 informed that the original return filed for the Assessment Year 1998-99 may be treated as the one filed in response to the notice issued under Section 148 of the Act. Further, notice for hearing under Section 143(2) of the Act was issued to the assessee on 16.12.2004. In response to this notice, Shri. R. Niranjana Chawala of M/s. N.C. Rajagopal & Co., Chartered Accountants appeared on behalf of the assessee.

4. After hearing the representative of the assessee, the Assessing Officer has given his reasons for re-opening the assessment for the assessment Year 1998-99 as follows:-

"(A) The assessee Company has not admitted income under section 115JA under the pretext of having unabsorbed depreciation and unabsorbed loss.

(B) The provisions for bad and doubtful debts was omitted to be considered for arriving the book profit u/s. 115JA of the Act.

(c) The assessee company has not credited the Royalty written back in the P & L A/c which were written back by the collaborator which is clearly a taxable income.

Therefore, the aforesaid reasons are the basis leading to the conclusion that income otherwise taxable has escaped assessment and hence, the notice u/s. 148 has been issued to you for the A.Y. 1998-99."

5. The Assessing Officer, on a consideration of the facts and circumstances of the case, held that as per Section 115JA, the assessee did not have any business loss or unabsorbed depreciation to be carried out to Assessment Year 1998-99. Further, the assessee claims that provision for bad and doubtful debts amounting to Rs.3,14,37,439/- is an ascertained liability and hence this is not liable for inclusion in book profit for the purpose of Section 115JA. However, as per the decision of this Court in the case of DEPUTY CIT v. BEARDS SHELL LTD. reported in 244 ITR 256, provision for bad and doubtful debts not written off in the Profit and Loss Account does not represent 'ascertained liability' and this is certainly liable for inclusion in book profit. But for such a claim which is not an ascertained liability the book profit would have been higher. By resorting to such claim, the assessee has clearly tried to suppress its income.

6. Further, the assessee has claimed that an accumulated royalty of Rs.2,61,18,013/- which was debited in the P & L account for the Assessment Years 1991-92 to 1997-98 was written back to the P & L Account for this assessment year since the royalty was waived by their Collaborator M/s. Kone OY Finland. The assessee considered this royalty written back in the 'P & L Account Appropriation Account', instead of crediting the same in the P & L Account. Since the royalty had been debited to P & L Account from the accounting year ending 31.3.1991 onwards, the waiver of royalty is clearly a taxable income and has to be treated as income and the book profit u/s. 115JA of the Act has to be arrived at accordingly.

7. As against the said order, the assessee filed an appeal before the Commissioner of Income-tax (Appeals)-III and the said appeal was allowed by an order dated 17.2.2006, holding as follows:-

"I have considered the various submissions made by the appellant's representative both on the issue of jurisdiction and on merits. After going through the documents furnished in support of the facts that a valid notice u/s 143(2) has been issued within the time limit permitted under the Act and allowing the proceedings to remain inconclusive, the Assessing Officer does not get jurisdiction to initiate action u/s. 148 of the Act as held by the apex court in the two cases relied on by the appellant. I, therefore, hold that the assessment has not been validly reopened and hence the impugned order passed is ab initio void. In as much as the reassessment proceedings

have been struck down as not valid in law, other grounds of appeal are not considered. The appellant succeeds on this ground."

8. As against the said order, the Department filed an appeal before the Income Tax Appellate Tribunal and the Tribunal, by its order dated 15.10.2007, reversed the findings of the Commissioner of Income Tax (Appeals)-III, holding as under:-

" We have heard the rival submissions. The Commissioner (Appeals) quashed the assessment order on the ground that the Assessing Officer issued notice under section 143(2) within the time permitted under the Act and allowed the proceedings to remain inconclusive. According to the Commissioner (Appeals) under such circumstances the Assessing Officer cannot assume jurisdiction to initiate action under section 148 of the Act. It was made clear before us that the time for completing the assessment under section 143(3) did expire. No proceedings in this regard were pending before the Assessing Officer. As such there was no error in the issuance of notice under section 148. We have taken into consideration the entire conspectus of the case. In our opinion the Commissioner (Appeals) was not correct in quashing the assessment on the ground that the proceedings pursuant to the notice under section 143(2) were inconclusive. Since no proceedings were pending in this regard we hold that the initiation of the reassessment proceedings was valid under the law. Accordingly we set aside the impugned order and restore the issue to the file of the Commissioner (Appeals) with a direction to decide the issue afresh."

As against the said order, the assessee has filed the present tax case appeal.

9. While admitting the appeal, this Court formulated the following substantial question of law:-

" Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the issuance of notice under Section 148 of the Income-tax Act is valid in law when notice issued under Section 143(2) is pending consideration?"

10. Learned counsel appearing for the assessee submitted that the Income-tax Appellate Tribunal erred in holding that the proceeding under Section 148 of the Act has been validly initiated and that the assessment is not liable to be annulled on the ground of lack of jurisdiction.

11. The learned counsel also submitted that the Income Tax Appellate Tribunal failed to notice that the jurisdiction under Section 147 of the Act can be invoked only if the proceedings under Section 143 (2) of the Act has resulted in an assessment or in the alternative, proceedings for enquiry under Section 143(2) of the Act has not been initiated by issuing notice. Once a notice under Section 143(2) is issued, proceedings under Section 147 of the Act cannot be initiated, so long as the said notice has not fructified in an order under Section 143(3) of the Act.

12. Learned counsel further submitted that the Income Tax Appellate Tribunal erred in holding that since the time for completing the assessment under Section 143(3) of the Act had expired after issuing notice under Section 143(2) of the Act, proceedings under Section 147 of the Act could be initiated.

13. In support of her submissions, the learned counsel relied on the decision of the Hon'ble Supreme Court reported in the case of TRUSTEES OF H.E.H. NIZAM'S TRUST v. C.I.T. ((2000) VOL. 242 I.T.R. 381), wherein the Hon'ble Supreme Court has held as under:-

" It is settled law that unless the return of income already filed is disposed of, notice for reassessment under section 148 of the Income-tax Act, 1961, cannot be issued, i.e. no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. A return of income filed in the form prescribed along with an application for return under section 237 of the Act is a valid return. Filing of return in the form prescribed under section 139 of the Act along with the application for refund is not an empty formality. It assumes importance if such return had not been filed earlier."

In the instant case, for the Assessment Year 1998-99 the assessee filed its return of income on 30.10.1998 which was processed under Section 143(1)(a) of the Act on 10.5.1999. The assessee filed its revised return of income on 26.11.1999, which was also processed on 29.3.2001 and final order was passed on 27.6.2002. Thereafter, on a perusal of records, it was noticed that the assessee-Company has not computed the income under Section 115 JA of the Act properly. Therefore, on facts, there was a reason to believe that the income assessable to tax has escaped assessment. In view of the same, proceedings under Section 147 of the Act was initiated by issue of notice under Section 148 of the Act on 23.12.2003, which is within the prescribed time limit.

14. To fortify the aforesaid contention, in the decision reported in the case of ASSISTANT COMMISSIONER OF INCOME-TAX v. RAJESH JHAVERI STOCK BROKERS P. LTD. ((2007) 291 ITS 500), the Hon'ble Supreme Court has held in paragraph 17 as under:-

"The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."

15. Therefore, applying the aforesaid ruling of the Apex Court to the facts and circumstances of the case, the Assessing Officer came to the subjective satisfaction as indicated in his letter dated 7.2.2005 referred to above. Therefore, it cannot be stated that the contention of the learned counsel for the appellant that the Assessing Officer has no jurisdiction to reconsider the matter or to initiate reassessment proceedings once the proceedings are concluded. As laid down by the Supreme Court, the condition precedent is that the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment. As could be seen from the assessment order, it is seen that as per Section 115JA of the Act, the assessee did not have any business loss/unabsorbed depreciation to be carried out to Assessment Year 1998-99.

16. With regard to inclusion of book profit, the assessee claims that the provision for bad and doubtful debts amounting to Rs.3,14,37,439/- is an ascertained liability and

hence this is not liable for inclusion in book profit for the purpose of Section 115JA of the Act. But, according to the Assessing Officer, as per the decision of this Court in the case of DEPUTY CIT v. BEARDS SHELL LTD. reported in 244 ITR 256, provision for bad and doubtful debts not written off in the Profit and Loss Account does not represent 'ascertained liability' and this is certainly liable for inclusion in book profit. But for such a claim which is not an ascertained liability the book profit would have been higher by this amount. By resorting to such a claim, the assessee has clearly tried to suppress its income.

17. With regard to the claim of accumulated royalty, the assessee has claimed that accumulated royalty of Rs.2,61,18,013/- which was debited in the P & L account for the assessment years 1991-92 to 1997-98 was written back to the P & L Account for this assessment year since the royalty was waived by their Collaborator M/s. Kone OY Finland. The assessee considered this royalty written back in the 'P & L Account Appropriation Account'. Instead of crediting the same in the P & L Account, since the royalty had been debited to P & L Account from the accounting year ending 31.3.1991 onwards, the waiver of royalty is clearly a taxable income and has to be treated as income and the book profit u/s. 115JA of the Act arrived accordingly.

18. Considering the above reasons given by the Assessing Officer, we consider it appropriate to hold that it is not proper to accept the contention of the learned counsel for the assessee that there is no material before the Assessing Officer for coming to the subjective satisfaction that he has reason to believe that certain income assessable to tax has escaped assessment for the Assessment Year 1998-99.

19. As per the decision of the Hon'ble Supreme Court, once the Assessing Officer has come to the conclusion that the taxable amount has escaped assessment, two conditions were required to be satisfied on the basis of the materials placed before him. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of the first condition alone is suffice. In other words if the Assessing Officer has reason to believe that certain income assessable to tax has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. Hence, we are not able to appreciate the contention of the learned counsel for the appellant that the Assessing Officer has no jurisdiction to reopen the assessment.

20. The finding of the Assessing Officer is that as per Section 115JA, the assessee did not have any business loss or unabsorbed depreciation to be carried out to

Assessment Year 1998-99. Further, the assessee has claimed that an accumulated royalty of Rs.2,61,18,013/- which was debited in the P & L account for the Assessment Years 1991-92 to 1997-98 was written back to the P & L Account for this assessment year since the royalty was waived by their Collaborator M/s. Kone OY Finland. The assessee considered this royalty written back in the 'P & L Account Appropriation Account', instead of crediting the same in the P & L Account. Since the royalty had been debited to P & L Account from the accounting year ending 31.3.1991 onwards, the waiver of royalty is clearly a taxable income and has to be treated as income and the book profit u/s. 115JA of the Act has to be arrived at accordingly. In the facts and circumstances of the case, the Assessing Officer has rightly assessed the matter and passed the assessment order. In such circumstances, the tax case appeal stands dismissed. We answer against the assessee and in favour of the Revenue.

To

The Income-tax Officer,

Company Circle-II (4),

121, Mahatma Gandhi Road,

Chennai 600 034