IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 858 of 2006

INDUCTOTHERM (INDIA) PVT.LTD. (FORMERLY INDUCTOTHERM INDIA - Petitioner(s)

Versus

M.GOPALAN,DY.COMMISSIONER OF INCOME-TAX OR HIS SUCCESSOR - Respondent(s)

Appearance :
MR RK PATEL for Petitioner
MR MANISH BHATT for Respondent

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 06/08/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged a notice dated 20.12.2004 issued by the respondent – Deputy Commissioner of Income Tax under section 148 of the Income Tax Act, 1961 ("the Act" for short). The petitioner has also challenged the subsequent notices issued by the respondent under section 143(2) of the Act. However, the principal challenge of the petitioner is to the notice dated 20.12.2004 issued by the Assessing Officer seeking to reopen the assessment of the petitioner for the assessment year 2002-03.

2. The petition arises in following factual background.

2.1 The petitioner is a Company registered under the Companies Act, 1956 and is regularly assessed to tax under the Act. For the assessment year 2002-03, the petitioner filed its return of income on 28.10.2002. On such return, the Assessing Officer sent intimation under section 143(1) of the Act on 16.1.2003.

2.2 It is not in dispute that during the statutory period envisaged under section 143 of the Act, the Assessing Officer issued no notice under section 143(2) of the Act. Such period

expired on 1.11.2003. The return of income, thus, remained at the stage of intimation under section 143(1) of the Act and was never taken in scrutiny.

2.3 The Assessing Officer, however, issued the impugned notice on 28.12.2004 seeking to reopen the assessment for the assessment year 2002-03. In response to such notice, the petitioner issued a communication dated 30.12.2004 and besides objecting to the reopening of the assessment, also demanded that the reasons recorded by the Assessing Officer may be supplied. The respondent – Assessing Officer did not supply the reasons. Instead, he issued a notice dated 21.10.2005 under section 143(2) of the Act, stating that there were certain points with respect to return of income for the assessment year 2002-03 on which he would like to have further information.

2.4 The petitioner thereupon wrote a letter dated 8.11.2005 and reiterated the request for supply of the reasons recorded by the Assessing Officer for reopening the assessment. He referred to the decision of the Apex Court in case of ***GKN Driveshafts (India) Ltd.*** reported in 259 ITR 19 (SC). He also relied on the decision of this Court in case of ***Arvind Mills Ltd.*** reported in 270 ITR 470 (Guj.) in support of such a prayer.

2.5 In response to such letter, the Assessing Officer supplied the reasons recorded under his communication dated 8.11.2005. Such reasons read as under :

> "*In this case, the assessee company has filed its return of income for A.Y. 2002-03 on 28th October, 2002 showing total income at Rs.7,23,29,973/-. The case was processed under section 143(1) on 16th January, 2003. On perusal of the case records, it is noticed that there is escapement of income chargeable to tax on the following points.*
>
> *[1] The assessee company has claimed deduction under section 80HHC at Rs.59,86,965/-. The involvement of CST & ST in the total turnover and other income in the net profit should not be allowable for the purpose of deduction under section 80HHC calculation relying on the decision in the case of Sterling Foods Ltd.*
>
> *[2] Admissibility of bad debts written off at Rs.74,73,003/- is to be verified.*
>
> *[3] The assessee had debited warranty expenses at Rs.1,43,48,347/- to the P & L Account, out of which an amount of Rs.1,05,48,633/- has actually incurred during the financial year under consideration. Therefore, the remaining amount of Rs.37,99,714/- is not allowable expenses under the I. T. Act.*
>
> *[4] Admissibility of Royalty claimed at Rs.62,92,773/- is to be verified.*
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> *However, due to wrongful claim of deduction under section 80HHC, excess claim of warranty expenses etc. income chargeable to tax has escaped assessment within the meaning of section 147 of the I. T. Act, 1961. Under the circumstances,*

the assessment for Assessment Year 2002-03 is hereby reopened. Issue notice under section 148 of the I. T. Act, 1961."

2.6 Upon receipt of such reasons, the petitioner raised detailed objections to the notice of reopening under communication dated 16.11.2005. It was contended that in absence of any material to tax the income, even in proceedings under section 147 of the Act, it would not be open for the Assessing Officer to proceed. The petitioner placed considerable reliance on the expression "reason to believe" used in section 147 of the Act. Such objections were disposed of by an order dated 12.1.2006. At that stage, the petitioner filed the present petition and challenged the impugned notice issued by the respondent – Assessing Officer.

3. Appearing for the petitioner, Shri R. K. Patel contended that the notice is invalid. The Assessing Officer has assumed jurisdiction not vested in him. He, therefore, submitted that the notice be quashed. This contention the counsel sought to support on the following four arguments :

[1] That the reasons were not recorded by the Assessing Officer before issuing notice. In this respect, counsel pointed out that though immediately upon receipt of notice under section 148 of the Act, the petitioner demanded a copy of the reasons recorded by the Assessing Officer, such reasons were not supplied for a long time. In the meantime, notices were issued under section 143(2) of the Act.

[2] The counsel contended that the assessment proceedings cannot be reopened to circumvent time limit for issuing the notice under section 143(2) of the Act. He submitted that time-limit provided in the proviso to section 143(2) of the Act, must be given its due weightage. If the Assessing Officer for any reason failed to issue such a notice within the time-limit, he cannot proceed under section 147 for taking such a return in scrutiny.

In support of this contention, counsel relied on the following decisions :

[a] In case of ***Deputy Commissioner of Income Tax v. Maxima Systems Ltd.***, reported in (2012) 344 ITR 204, wherein a Division Bench of this Court observed that assessment which was framed under section 143(3) of the Act pursuant to a notice under section 143(2) which was served beyond the period of limitation prescribed under the proviso, was not a valid assessment.

[b] In case of ***Assistant Commissioner of Income Tax and another v. Hotel Blue Moon***, reported in (2010) 321 ITR 363 wherein the Apex Court held that notice under section 143(2) of the Act was mandatory even in the block assessment proceedings if the Assessing Officer desired to complete such assessment under section 143(3) of the Act.

[c] In case of ***Kanubhai M. Patel (HUF) v. Hiren Bhatt or His Successors to Office and others***, reported in (2011) 334 ITR 25 (Guj.), wherein a Division Bench of this Court had the occasion to interpret the term "to issue" the notice in context of the provisions contained under sections 147, 148 and 149 of the Act.

[3] The third contention of the counsel was that the reasons recorded by the Assessing Officer were not germane. Such reasons only recorded that the Assessing Officer wanted to verify certain claims made by the assessee. Counsel submitted that for a fishing inquiry or for mere verification of the claims made, reopening cannot be permitted even in the assessment which was accepted under section 143(1) of the Act.

In support of this contention, counsel relied on following decisions :

[a] In case of ***Bakulbhai Ramanlal Patel v. Income Tax Officer***, reported in (2011) 56 DTR (Guj) 212, wherein a Division Bench of this Court finding that all reasons recorded by the Assessing Officer for reopening of assessment, only provided that the Assessing Officer desired to carry out a detailed investigation/verification to bring the assessee in the tax net, held that the notice for reopening the assessment was not valid. We may record that this was also a case where the return filed was accepted under section 143(1) of the Act without any scrutiny.

[b] In case of ***BalKrishna Hiralal Wani v. Income Tax Officer and others***, reported in (2010) 321 ITR 519 (Bom), wherein a Division Bench of the Bombay High Court, also in relation to reopening of assessment which was previously accepted without scrutiny, quashed the notice on the premise that the Assessing Officer could not have any reason to believe that the income chargeable to tax has escaped assessment.

4. On the other hand, learned counsel Shri Manish Bhatt for the Department, opposing the petition, contended as under :

[1] In the present case, the Assessing Officer had recorded reasons for reopening of assessment. Such reasons were recorded before issuance of notice. He took us through the documents on record in the original file to contend that though the reasons recorded did not carry a specific date, from the record, it can be ascertained that such reasons were recorded before issuance of notice.

[2] In the present case, notice for reopening has been issued after recording proper reasons. The return of the assessee was previously not taken in scrutiny. In that view of the matter, in view of the decision of the Apex Court in case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***, reported in (2007) 291 ITR 500 (SC), the revenue would have much greater latitude for reopening the assessment.

[3] He further submitted that the reasons recorded by the Assessing Officer would demonstrate that he had valid reasons to believe that the income chargeable to tax had escaped assessment.

5. Having, thus, heard the learned counsel for the parties and having perused the documents on record, we may first deal with the question of recording of the reasons before issuance of notice. It is undoubtedly true that to re-open an assessment, the

Assessing Officer must record his reasons before issuing notice for re-opening. In that view of the matter, the question of such reasons having been recorded before issuance of notice assume significance. As noted, counsel for the petitioner contended that such reasons were not recorded before issuance of notice. For this purpose, he highlighted that such reasons were not supplied immediately though the petitioner demanded the same. Such reasons when produced before the Court showed that they do not carry any date.

6. We have perused the original file in context of this controversy. The file reveals that the reasons recorded by the Assessing Officer and signed by himself are found at page 324 which is immediately after page 323 which is the notice for reopening of the assessment. Immediately after the reasons recorded at page 325, is the acknowledgment receipt of service of the notice dated 20.12.2004 issued under section 148 of the Act. Further we find that the Assessing Officer had drawn a note-sheet in which on 20.12.2004, he recorded that, *"Notice u/s 148 issued after recording reasons for reopening."* Such note-sheet also contains reference to subsequent notice under section 143(2) issued on 8.11.2005 and other details.

7. We also notice that the audit party had brought certain discrepancies to the notice of the Assessing Officer. The Assessing Officer thereupon examined such issues and wrote to the Commissioner of Income Tax on 17.10.2003 that in view of such issues, remedial action is required to be taken. He noted that the assessment was accepted under section 143(1) of the Act and therefore, remedial actions available would be proceedings under section 263 of the Act, under section 147 of the Act or under section 154 of the Act. In the concluding portion of his letter, he stated thus, *"Sections 263 and 254 do not appear to be applicable to the facts of the case. Therefore, in my humble submission, the most proper remedial action to set right the audit objections appears to be recourse to section 147. Approval may kindly be accorded."*.

7.1 Such approval was granted by the Commissioner under communication dated 16.2.2004. Thereupon, the impugned notice came to be issued.

8. In addition to above materials emerging from the original files, we also have an affidavit in-reply filed on one Shri James Kurian, Assistant Commissioner of Income Tax, Circle-4, Ahmedabad on behalf of the respondent in which he has stated that the reasons were recorded before issuance of notice for reopening. He pointed out that a proposal of reopening of the assessment was sent for approval of the Commissioner and the Commissioner had accorded such approval and thereafter, the notice was issued.

9. From such materials, we are of the opinion that it cannot be stated that the Assessing Officer had not recorded reasons before issuance of the notice. Firstly, the reasons recorded are found on the file immediately after the original notice under section 148 of the Act. Though such reasons are not dated, the note-sheet maintained by the Assessing Officer concerned recorded that the notice is issued after recording reasons. Further, as noted, the issue arose when the audit party brought certain discrepancies to the notice of the Assessing Officer. He mulled over various options available to the revenue and suggested to the Commissioner that the best option would be to exercise powers under

section 147 of the Act. These factors coupled with the affidavit in-reply filed by the respondent would convince us that in exercise of writ jurisdiction, it would not be open for us to hold that reasons were not recorded by the Assessing Officer before issuance of notice.

10. This brings us to the second limb of the petitioner's challenge namely, that the power under section 147 of the Act cannot be exercised to circumvent the proceedings under section 143(3) of the Act because the notice under section 143(2) of the Act has become time barred and further that in any case, reasons recorded would not permit the Assessing Officer to reopen the assessment.

11. It is undoubtedly true that proviso to section 143(2) of the Act prescribes a time limit within which such notice could be issued. It is equally well settled that such notice is mandatory and in absence of notice under section 143(2) of the Act within the time permitted, scrutiny assessment under section 143(3) cannot be framed. However, merely because no such notice was issued, to contend that the assessment cannot be reopened, is not backed by any statutory provisions. Counsel for the petitioner did not even stretch his contention to that extent. The case of the petitioner as we understand is that in guise of reopening of an assessment, the Assessing Officer cannot try to scrutinize the return. This aspect substantially overlaps with the later contention of the petitioner that the reasons recorded by the Assessing Officer were not germane and were not sufficient to permit reopening.

12. We must recall that the return filed by the petitioner was not taken in scrutiny. No assessment, thus, took place. The Assessing Officer without any assessment, merely issued an intimation under section 143(1) of the Act accepting such return. In that view of the matter, it cannot be stated that the Assessing Officer formed any opinion with respect to any of the aspects arising in such return. In such a case, scope for reopening such assessment under section 147 of the Act as compared to an assessment which was previously framed under section 143(3) of the Act, whether beyond or within four years from the end of the relevant assessment year, is substantially wider. The Apex Court in case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***, (supra) noticed such distinction and noted that the scheme of sections 143(1) and 143(3) of the Act is entirely different. It was noticed that after 1.4.1989, the provisions contained in section 143 underwent substantial changes. It was noticed that the intimation under section 143(1) of the Act is given without prejudice to the provisions of section 143(3) of the Act and though technically the intimation would be deemed to be demand notice under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2)(a) of the Act. The Apex Court observed that the word "intimation" as substituted for assessment carried different concepts. It was observed that while making an assessment, the Assessing Officer is free to make any addition after granting an opportunity to the assessee. The Apex Court observed that, *"It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the*

acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise.".

13. Despite such difference in the scheme between a return which is accepted under section 143(1) of the Act as compared to a return of which scrutiny assessment under section 143(3) of the Act is framed, the basic requirement of section 147 of the Act that the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment is not done away with. Section 147 of the Act permits the Assessing Officer to assess, re-assess the income or re-compute the loss or depreciation if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. This power to reopen assessment is available in either case, namely, while a return has been either accepted under section 143(1) of the Act or a scrutiny assessment has been framed under section 143(3) of the Act. A common requirement in both of cases is that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.

14. The term "reason to believe" has come up for consideration in various decisions before this Court as well as the Apex Court. It is not necessary to trace long line of decisions on the point. We may, however, refer to two of the recent decisions. In case of ***Commissioner of Income Tax v. (1) Kelvinator of India Ltd. & (2) Eicher Ltd.***, reported in (2010) 320 ITR 561 (SC), in the context of amended provision of section 147 with effect from 1.4.1989, the Court stressed on the expression "reason to believe", observing that the Court has to give a schematic interpretation to such words, failing which section 147 would give arbitrary powers to the Assessing Officer to reopen the assessments on the basis of mere change of opinion. On that basis, the Apex Court concluded that even in the case of assessment which is sought to be reopened within a period of four years from the end of relevant assessment year, the concept of change of opinion is not given a go-bye. It was observed that, "*Hence, after 1.4.1989, the Assessing Officer has power to reopen, provided that there is tangible material to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.*". The Apex Court noticed that previously, the parliament had introduced the expression "opinion" under section 147 of the Act, however, on receipt of representations from various quarters, the same was substituted as was originally used to "reason to believe".

15. In case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***, (supra), the Apex Court observed that phrase "reason to believe" mean cause or justification. If the Assessing Officer has cause or justification to know or subjective satisfaction that income had escaped assessment, it can be stated to have reason to believe that income chargeable to tax had escaped assessment. It was observed as under :

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)]."

16. It would, thus, emerge that even in case of reopening of an assessment which was previously accepted under section 143(1) of the Act without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. However, as held by the Apex Court in the case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***, (supra) and several other decisions, such reason to believe need not necessarily be a firm final decision of the Assessing Officer.

17. If we accept such proposition, the petitioner's apprehension that the Assessing Officer would arbitrarily exercise powers under section 147 of the Act to circumvent the scrutiny proceedings which could not be framed in view of notice under section 143(2) having become time barred, would be taken care of. To reiterate, even for reopening of an assessment which was accepted previously under section 143(1) of the Act without scrutiny, the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment.

18. Reverting to the facts of the present case, we notice that in two out of four reasons recorded by the Assessing Officer for reopening the assessment, he stated that he need to verify the claims. In the second ground, he had recorded that admissibility of the bad debts written off required to be verified. In the fourth ground also, he had recorded that

admissibility of royalty claim was required to be verified. We are in agreement with the contention of the counsel for the petitioner that for mere verification of the claim, power for reopening of assessment could not be exercised. The Assessing Officer in guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment.

19. With respect to other two grounds, however, we find that the Assessing Officer had some material at his command to form a belief that income chargeable to tax had escaped assessment. Ground No.1 pertained to the claim of deduction under section 80HHC of the Act and the Assessing Officer was of the opinion that the Central as well as the State Sales Tax and other income in the net profit would not qualify for deduction under section 80HHC of the Act. It may be that he referred to the decisions of the Apex Court in the case of Sterling Foods Ltd., however, mere wrong reference to a judgement would not invalidate the ground if otherwise was valid in law. Equally, in the third ground, the Assessing Officer noted that the assessee had debited warranty expenses of Rs.1,43,48,347/- to the P & L Account, out of which an amount of Rs.1,05,48,633/- was incurred during the financial year under consideration. He was, therefore, of the opinion that remaining amount of Rs.37,99,714/- is not allowable expenditure. We are of the opinion that such reason also would permit the Assessing Officer to reopen the assessment. The Assessing Officer has found that a claim not arising during the year under consideration was made. He desires to disallow such a claim. It cannot be stated that the ground was not germane. The counsel for the petitioner, however, vehemently contended that the petitioner's claim in this respect has been accepted by this Court. He drew our attention to an order dated 27.12.2011 passed in Tax Appeal No.2087 of 2010, wherein this Court had rejected the revenue's appeal in which one of the issues was with respect to such warranty expenditure. Counsel for the revenue, however, pointed out that the Department has not accepted this decision of the High Court.

20. In view of the above discussion, we do not find that the notice for reopening is invalid or lacks jurisdiction. The petition is, accordingly, dismissed. Rule is discharged. Interim relief granted earlier stands vacated.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]