

IN THE HIGH COURT OF KERALA AT ERNAKULAM

ITA.No. 128 of 2010()

1. THE COMMISSIONER OF INCOME TAX, COCHIN.
... Petitioner

Vs

1. M/S.INDIA SEA FOODS, THOPPUMPADY, KOCHI.
... Respondent

For Petitioner :SRI.JOSE JOSEPH, SC, FOR INCOME TAX

For Respondent :SRI.ANIL D. NAIR

The Hon'ble MR. Justice C.N.RAMACHANDRAN NAIR
The Hon'ble MR. Justice B.P.RAY

Dated :17/01/2011

O R D E R

C.R.

C.N.RAMACHANDRAN NAIR &
BHABANI PRASAD RAY, JJ.

.....
I.T. Appeal No.128 of 2010
.....

Dated this the 17th day of January, 2011.

JUDGMENT

Ramachandran Nair, J.

We have heard Senior counsel Sri.P.K.R.Menon appearing for the appellant and Adv. Sri.Anil D. Nair appearing for the respondent. The question raised in the appeal filed by the Revenue is whether the Income Tax Officer can give up a rectification proceedings initiated under Section 154 and then proceed to make an income escaping

assessment under Section 147 of the Income Tax Act for the same assessment year. The return filed was processed under Section 143(1) and in the intimation sent, deduction claimed on export profit under Section 80HHC was allowed in terms of the claim. However, the Assessing Officer later noticed that excessive relief is granted while computing deduction under Section 80HHC in as much as while computing the eligible relief, deduction was not made of 90% of the items of income falling under Explanation (baa) to Section 80 HHC

(4C). Initially he proceeded to bring to tax the excessive relief granted by initiating rectification proceedings under Section 154. A notice in this regard was issued to the assessee under Section 154(3) of the Act on 28.3.2001. The assessee raised objection against maintainability of rectification proceedings in the reply filed to the notice. The Assessing Officer, therefore, did not proceed with rectification proceedings and the time for rectification of assessment expired on 30.4.2004. However, the Assessing Officer later on 23.3.2006 issued notice under Section 148 proposing to bring to tax the escaped income which happened on account of excess relief granted under Section 80HHC of the Act. In response to notice issued under Section 148, the assessee filed a letter stating that the original return filed may be treated as return filed pursuant to notice issued under Section 148 of the Act. Further, in the course of reassessment proceedings initiated under Section 147, the assessee raised various objections including maintainability of reopening under Section 147 by relying on decision of the Madras High Court in COMMISSIONER OF INCOME TAX VS. EID PARRY LTD. reported in(1995) 216 ITR 489. Besides this, the assessee raised a contention that reassessment cannot be made without a regular

assessment or in other words, an intimation issued under Section 143 (1) should not be subject to an income escaping assessment. The Assessing Officer overruled the objections and completed the income escaping assessment under Section 147 of the Act, against which the assessee filed the appeal. The C.I.T.(Appeals) allowed the appeal on both the grounds, against which Revenue filed appeal before the Tribunal. The Tribunal based on decision of the Supreme court in ASST. COMMISSIONER OF INCOME TAX VS. RAJESH JHAVERI STOCK BROKERS P. LTD. reported in (2007) 291 ITR 500 held that an intimation under Section 143(1)(a) itself is an assessment which could be revised through an income escaping assessment under Section 147 of the Act. The Tribunal accordingly upheld this ground raised by the Revenue and held in their favour. However, the Tribunal still dismissed the appeal by upholding the finding of CIT(Appeals) based on decision of the Madras High Court above stated that after initiation of rectification proceedings under Section 154, the Assessing Officer does not have jurisdiction to drop the same and proceed to make income escaping assessment under Section 147. It is against this order the appeal is filed before us.

2. As already stated, both the first appellate authority as well as the Tribunal declared the income escaping assessment as invalid only by virtue of the fact that prior to initiation of proceedings for reassessment, the Assessing Officer issued notice for rectification of assessment under Section 154 and it is after giving up the same that too, without issuing any express order, the assessment was reopened. Heavy reliance is placed on decision of the Madras High Court abovereferred. After going through the order of the Tribunal and that of the first appellate authority and after going through judgment of the Madras High Court, we are unable to uphold the findings of the first appellate authority or the order of the Tribunal on this issue. In our view, if an assessment happens to be an under-assessment or a mistaken order, the course open to the Assessing Officer is either to rectify the assessment if it is a mistake falling under Section 154 of the Act or to make income escaping assessment under Section 147. Both these provisions are self-contained provisions wherein conditions for invoking the powers and the procedure to be followed and the time limit within which orders are to be passed are mentioned. In this case the Assessing Officer first felt that the excessive relief granted in the

computation of relief under Section 80HHC is a mistake that could be rectified under Section 154 and following the mandatory requirement contained under Section 153(3) of the Act, notice was issued to the assessee. The assessee brought to the notice of the Assessing Officer that there is no apparent mistake in the proceedings issued and so much so, assessment cannot be rectified. The Assessing Officer apparently accepted the objection raised by the assessee and gave up the proceedings initiated under Section 154. But assessee was not informed that the proceedings initiated under Section 154 was dropped. However, after expiry of the period provided for rectification of assessment under Section 154, the Assessing Officer initiated proceedings under Section 147 for making income escaping assessment by issuing notice under Section 148 of the Act. Admittedly notice under Section 148 was issued within time and reassessment also was completed under Section 147 within the statutory period. The question to be considered is whether the initiation of proceedings under Section 154 and the dropping of the same without issuing an express order in that regard will affect the validity of re-assessment under Section 147.

3. On going through the decision of the Madras High Court, what

we notice is apparently an income escaping assessment was first completed under Section 147 and during pendency of the appeal before the first appellate authority, the officer initiated rectification proceedings under Section 154. The Madras High Court held that when recourse open to the Assessing Officer to bring to tax escaped income is either by rectification or by way of income escaping assessment, it is for the officer to choose between one of the two and proceed to pass one order. We do not think there can be any controversy because for the very same purpose, the Assessing Officer cannot issue two proceedings, one under Section 154 and the other under Section 147. However, we are unable to uphold the principle of constructive res judicata made applicable by the High Court in income tax proceedings in respect of proceedings one after another initiated by the Assessing Officer successively. The fact that the Assessing Officer initiated rectification proceedings under Section 154 does not mean that he should stick to the same only and proceed to issue orders as proposed. The very purpose of issuing a notice to the assessee is to give him opportunity to raise objection against the proceeding which includes the assessee's right to question the maintainability of the

rectification proceedings. If the assessee convinces the officer that rectification is not permissible, the Assessing Officer is absolutely free to give up the same and see whether there is any other recourse open to him to achieve the purpose i.e. to bring to tax escaped income. In this case even though the Assessing Officer did not issue any specific order dropping the proceeding initiated under Section 154 based on the objection filed by the assessee, the only inference possible after expiry of the time provided for completion of proceedings under Section 154 is that the Assessing Officer has given up the proposal. Further, when a notice is issued under Section 148 for making income escaping assessment, the Assessing Officer obviously made it clear that the proceedings under Section 154 is dropped and he proposes to proceed with reassessment under Section 147. In fact, even if the Assessing Officer had proceeded with the rectification proceedings under Section 154 which was not sustainable, it was open to the Commissioner of Income Tax to exercise his powers under Section 263, set aside the order issued under Section 154 and direct the Assessing Officer to consider income escaping assessment under Section 147 which the Assessing Officer is free to initiate. In this case the Assessing Officer

himself realised the mistake of initiating rectification proceedings and when he noticed that the correct recourse open to him under the Act is to make an income escaping assessment, he is entirely free to do it and in our view, there was nothing wrong in the Assessing Officer giving up rectification proceedings, though initiated by him based on reply filed by the assessee and then initiating an income escaping assessment by issuing notice under Section 148 within the statutory period. We, therefore, allow the appeal by vacating the orders of the Tribunal and that of the first appellate authority. Since there is no challenge on merits of the case i.e. with regard to withdrawal of excessive relief granted under Section 80HHC, the reassessment completed under Section 147 will stand restored.

C.N.RAMACHANDRAN NAIR
Judge

BHABANI PRASAD RAY
Judge

pms

