In the High Court of Judicature at Madras

Dated: 03.08.2010

Coram:-

THE HON'BLE MR.JUSTICE F.M.IBRAHIM KALIFULLA
and
THE HON'BLE MR.JUSTICE M.M.SUNDRESH

Tax Case (Appeal) No.706 of 2010

Commissioner of Income Tax
Chennai. .. Appellant

vs.

M/s. Baer Shoes (India) Pvt. Ltd.
Flat 1B, No.13, First Floor
Bishop Lane, Pursawakkam
Chennai 600 007. .. Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, dated 11.12.2009 passed in I.T.A.No.2486/Mds/2007.

For Appellant : Mr.Arun Kurian Joseph
Standing Counsel for Income-tax

Judgment
(Judgment of the Court was delivered by M.M.SUNDRESH,J.)

The Revenue has come on appeal challenging the order of the Tribunal passed in ITA.No.2486 of 2007, by raising the following substantial question of law:

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the second reassessment proceedings were not validly initiated and thereby quashing the reassessment proceedings?"

2.1. Facts in brief:

For the assessment year 1999-2000, the assessee filed return showing 'nil' income by claiming deduction under Section 80HHC of the Income-tax Act, 1961. The assessee's return was initially processed under Section 143(1) of the

Act. The assessee was engaged in manufacturing, trading and exporting of leather goods.

2.2. The Assessing Officer reopened the assessment by invoking the provisions under Section 147 of the Act. The reopened assessment was completed on 18.03.2003. Accordingly, the deduction claimed by the assessee under Section 80HHC of the Act, was scaled down to Rs.73,42,876/-. In the said reassessment order, the loss from the export business was adjusted in accordance with the provisos to Section 80HHC(3)(c) of the Act. However, the Assessing Officer reopened the assessment, which was already reopened, by once again invoking the provisions of Section 147 of the Act. Accordingly, a notice under Section 148 of the Act, was issued to the assessee on 04.08.2005. The said proceedings have been initiated by the Assessing Officer on the ground that the assessee was wrongly allowed deduction under Section 80HHC of the Act, after netting the negative business profits with the export incentive. Thereafter, the Assessing Officer has passed an order rejecting the case of the assessee by disallowing the deduction under Section 80HHC.

2.3. Challenging the same, the assessee filed a further appeal to the Commissioner of Income-tax (Appeals). Since the said appeal was dismissed, the assessee preferred a further appeal to the Tribunal, which was allowed in favour of the assessee and hence, the present appeal by the Revenue.

3. Mr.Arun Kurian Joseph, learned standing counsel for the Revenue submitted that the proceedings have been initiated for the second time under Section 147 of the Act, only based upon the judgment of the Apex Court, wherein the Hon'ble Supreme Court was pleased to hold that the deduction under Section 80HHC could be allowed only if there was positive profits from export operations. The learned counsel also made reliance upon the decision rendered by this Court in ACIT vs. Apollo Hospitals Enterprises (300 ITR 167). The learned counsel therefore submitted that inasmuch as the order passed in the earlier reassessment proceedings having been done by taking into consideration of the negative business profits, the order passed by the Tribunal will have to be set aside. The learned counsel further submitted that as per the provision to Section 147, the order passed by the Assessing Officer is well within the period of limitation.

4. We are not able to countenance the said submission made by the learned standing counsel for the appellant. In the present case on hand, the assessee at the time of filing return for the assessment year 1999-2000 has disclosed all the materials before the Assessing Officer and claimed deduction under Section 80HHC. Even before the earlier proceedings initiated under Section 147, it is not the case of the Revenue that the assessee has not disclosed the materials. Therefore, on a consideration of the materials available on record, the Assessing Officer passed an order on the earlier two occasions. Thereafter, the Assessing Officer has sought to reopen the assessment once

again invoking the power under Section 147 of the Act, which, in our considered opinion, is not permissible in law on the facts of the case.

5. The judgment rendered by the Hon'ble Supreme Court is an expression of opinion on the interpretation of statute. The power under Section 147 will have to be invoked by the Assessing Officer in accordance with the said provision. In other words, merely because a judgment has been rendered, the same cannot be a ground for reopening the assessment under Section 147 of the Act. The Hon'ble Gujarat High Court in Austin Engineering Co. Ltd. vs. JCIT (312 ITR 70) has taken the view that in a case where the material facts were fully disclosed and the assessment was completed allowing deduction under Section 80HHC on export incentive, such an assessment cannot be reopened based upon a subsequent decision of the Supreme Court, since it merely would amount to a change of opinion. We are in respectful agreement with the judgment of the Gujarat High Court on the proposition of law laid down therein.

6. Regarding the other contentions, it is not in dispute that the first reassessment was done by the Assessing Officer under Section 147 of the Act on 18.03.2003. Thereafter, notice for reopening the assessment for the second time was issued to the assessee on 04.08.2005. The assessment in the present case on hand is for the assessment year 1999-2000. The four years period of limitation for invoking the power under Section 147 expired on 31.12.2004. As observed earlier, in the present case on hand, the assessee has disclosed all the material facts and he has also filed the return within the time. Therefore, the proceedings initiated by the Assessing Officer for the second time under Section 147 is barred by limitation. Therefore, we are of the considered opinion that even the proviso to Section 147 does not come into play on the facts of the case.

7. We also perused Explanation-1 to proviso to Section 147, which is extracted hereunder:

"Explanation 1:- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

8. In our considered view, the said explanation also does not apply to the present case on hand. A perusal of the said explanation would show that a mere production of accounts books and other evidence could have been discovered by the Assessing Officer would not amount to disclosure within the meaning of the provision. Therefore, the said Explanation-1 should be considered in the context of the provision, inasmuch as the same is applicable only for the production of the records and other evidence. Hence, we are of the opinion that the same will

not be applicable to the case of filing of a return with adequate particulars fully disclosing all the materials for the purpose of assessment.

9. Considering the above said factual and legal position, we are of the opinion that the question of law raised will have to be answered against the Revenue and accordingly, the same is answered against the Revenue. Consequently, this Tax Case Appeal stands dismissed.

ATR

To

1. The Secretary
   Central Board of Direct Taxes
   New Delhi.

2. Income Tax Appellate Tribunal
   Madras 'A' Bench
   Madras.

3. The Commissioner of Income Tax (Appeals)-III
   No.121, Mahatma Gandhi Road, Chennai 600034.

4. The Income Tax Officer
   Company Ward-I(1),
   Chennai 34