SUPREME COURT OF INDIA

Commissioner of Income Tax

Versus

Hindustan Elector Graphities Ltd.,

(D.P. Wadhwa and Ruma Pal, JJ.)

Civil Appeal No. 2454 of 1998.

27.03.2000

JUDGMENT

D.P. Wadhwa, J. - The question of law which falls for consideration is :

Whether on the facts and in the circumstances of the case, Tribunal was justified in deleting the addition made by the Assessing Officer under Section 143(1)(a) in view of the clear cut provisions of Section 143(1)(a), 143(1A) and 234 ?

2. Respondent, the assessee, filed its return of income for the assessment year 1989-90. The return was filed on December 29, 1989. It was filed under Section 139 of the income Tax Act, 1961 (for short, the `Act').

3. Under Section 28 of the Act, income mentioned therein is chargeable to income tax under the head "profits and gains of business or profession". clause (iii)(b) in Section 28 was inserted by the Finance Act of 1990. finance Bill which ultimately become the Finance Act received assent of the President of India on May 31, 1990. clause (iii)(b) was given retrospective operation w.e.f. April 1, 1967. Clause (iii)(b) is as under :

"(iii)(b) - Cash assistance (by whatever named called received or receivable by any person against exports under any scheme or the government of India."

4. Before the insertion of clause (iii)(b), cash assistance received by any person against exports under any scheme of the Government would not be chargeable to income tax under the head "Profits and gains of business or profession". The assessee had received in the previous year relevant to the assessment year 1988-89 a sum of Rs. 1,31,41,030\- by way of cash assistance. Since clause (iii)(b) was inserted in Section 28, though having retrospective operation by the finance Act, 1990, the assessee did not include this income in its return which, as noted above, was filed on December 29, 1989. The assessee is a public limited company and for the assessment year 1989-90 last date of filing of return of income was December 31, 1989.

5. Deputy Commissioner Income Tax (Assessment) Special Range, Bhopal was the Assessing Officer. He by his order dated May 5, 1990 passed under Section 143(1)(a)[143(i)(a) where a return has been made under section 139, or in response

to a notice under sub-section (1) of section 142 -

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refunds due on the basis of such return, it shall be granted to the assessee;

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return shall be made;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, accounts or documents, is prima facie inadmissible, shall be disallowed:

Provided further that where adjustments are made under the first proviso, an intimation shall be sent to the assessee, notwithstanding that no tax or interest is found due from him after making the said adjustments;

Provided also that an intimation for any tax or interest due under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the income was first assessable.] of the Act added the aforesaid amount of Rs. 1,31,41,030\- representing the cash compensatory support and received by the assessee. The assessee had not offered this amount to tax. The Assessing Officer treated this as additional income under Section 143(1A)[143(1A)(a) - Where, in the case of any person, the total income as a result of the adjustments made under the first proviso to clause (a) of sub-section (1), exceeds the total income declared in the return by any amount, the Assessing Officer shall, -

(i) Further increase the amount of tax payable under sub-section (1) by an additional income-tax calculated at the rate of twenty per cent of the tax payable on such excess amount and specify the additional to be sent under sub-clause (i) of clause (a) of sub-section (1);

(ii) Where any refund is due under sub-section (1) reduce the amount of such refund by an amount equivalent to the additional income-tax calculated under sub-clause (i)] of the Act and levied the amount of tax at higher rate on this additional income and also charged interest under Section 234[234. Tax pad by deduction or advance payment :-

Tax paid or deemed to have been paid under the provisions of Chapter XVII-B or Chapter XVII-C in respect of any income provisional assessed under section 141A shall be deemed to have been paid towards the previousness.] of the Act.

6. The assessee filed an appeal against the order of the Assessing Officer before the Commissioner of Income Tax (Appeal), Bhopal who partly allowed the appeal on that part with which we are not concerned. The assessee then took the matter in appeal to the Income Tax Appellate Tribunal (Indore Bench), Indore (for short, the `Tribunal'). The Tribunal by its order dated August 11, 1982 allowed the appeal holding that no additional tax could be levied in respect of the amount of cash compensatory support and no interest under Section 234 could be charged on the said amount. Now, it was the Revenue which was agrived. At the instance of the Revenue, the Tribunal referred the question to the High Court of Madhya Pradesh under Section 256(1) of the Act for its opinion. High Court by its impugned judgment dated September 11, 1997 answered the question in affirmative, i.e. in favour of the assessee and against the Revenue. Against the judgment of the High Court, Revenue sought leave to appeal to this Court which was granted and that is how the matter is now before us.

7. We have to consider if the stand of the Revenue is valid or will it not lead to unjust result for the assessee. Revenue says under Section 143(1A), the Assessing Officer has no choice and he has to levy additional tax once he finds that the assessee has not shown the amount of the cash compensatory support in his return, whatever the reason be. Assessee contends it is something which is most improper and against the settled principles.

8. In ***Modern Fibotex India Ltd. and another v. Deputy Commissioner of Income - tax and others, 1995) 212 ITR 496 (Cal.)*** one of the two issues before the Court related to the validity of an intimation under Section 143(1)(a) of the Act. For the Assessment Year 1989-90 the assessee company received cash compensatory support from the Central Government amounting to about Rs. 8.00 lakhs. In its return of income the company claimed the amount received by it on account of cash compensatory support as not taxable. The Assessing Officer assessed the company applying the amended provision of Section 28 of the Act thus levying additional tax under Section 142(1A) of the Act. The company filed a writ petition in the High Court challenging the very constitutionality of Section 143(1)(a) read with Section 143(1A) and Section 4 and also the intimation sent by the Assessing Officer levying additional tax. High Court speaking through one of us (Ruma Pal, J.) noticed that Section 28 of the Act was amended with retrospective effect from April 1, 1967. It said :-

"an assessee cannot be imputed with clairvoyance. When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to the assesses' income ceased to be operative by reason of retrospective legislation."

High Court was further of the view that there was limitation on the power under Section 143(1)(a) and that the Assessing Officer must determine the questions of assessment thereunder by applying the law prevailing when the return was filed. One

has to see the nature of the obligation to which an assessee is subjected in filling his return and the object sought to be achieved by the introduction of Section 143(1A) and Section 143(1)(a) which direct levy of additional tax. The obligation is to file a correct return within the time specified, that is to say, a return, which is correct according to law in force, when it is required to be filed. It was not disputed that the return when filed by the assessee could not be termed out of hand as an incorrect return on the date of filing of the return. This is how the High Court dealt the matter :" ut is merely determing the scope of the power under section 143(1)(b). The assesses' return could have been taken up by the Assessing Officer under Section 143 prior to the amendment. In that event, no adjustment would have been made and no intimation would have been sent. An assessee's liability cannot be made to depend upon such a fortuitous circumstance."

High Court allow the writ petition to the extent that the impugned intimation and adjustment under Section 143(1)(a) were set aside and quashed.

9. In ***Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore, 1980 (124) ITR 15 (SC)*** the assessee did not include in its return of turnover the amount of freight included in the price of sugar in the bona fide belief that it was not liable to be included in the taxable turnover. The assessee was imposed with a penalty in view of Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and Section 9 of the Central Sales Tax, 1956 on the ground that it had furnished false return by not including the amount of freight in the taxable turnover disclosed in the returns. This Court said that it was difficult to see how the assessee could be said to have filed "false" return, when what the assessee did, namely, not including the amount of freight in the taxable turnover, was under bona fide belief that the amount of freight did not form part of the sale price and was not includable in the taxable turnover. A return cannot be said to be "false" unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. This Court said that Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 providing for imposition of penalty was a penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be involved for imposing penality. This Court further said that if the view canveased on behalf of the Revenue were accepted, the result would be that even if the assessee raised a bona fide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been intended by the Legislature, this Court as observed.

10. In ***Commissioner of Income-Tax v. Onkar Saran and Sons, (1992) 195 ITR 1 (SC)*** the assessee filed returns for the Assessment Years 1961-62 and 1962-63 disclosing incomes of Rs. 18,935 and Rs. 24,943 respectively. The assessments were

completed in the total income of Rs. 28,513\- and Rs. 28,463\- respectively. Income-tax Officer having come to know subsequently that the assessee had failed to disclose its profits from sale of certain lands, issued notices under Section 148 for both the years. The assessee, however, disclosed the same income as in the original returns. Income-Tax Officer made additions and after completing the re-assessments on March 6, 1969 initiated proceedings under Section 271(1)(c) and the Inspecting Assistant Commissioner imposed penalty on the assessee on the basis of the amended Section 271(1)(c) w.e.f. April 1, 1968. This Court said that even in a case where a return is filed in response to a notice under Section 148 involving an element of concealment, the law applicable would be the law as it stood at the time when the original return was filed for the Assessment Year in question and not the law as it stood on the date on which the return as filed in response to notice under Section 148.

11. Decision of the Calcutta High Court in ***Modern Fibotex India Ltd. and another, 212 ITR 496*** squarely covers the issue involved in the present appeal. Then we have to see the law on the date of filing of the return. The attract penal provisions there has been same element of lack of bonafides unless the law specifically provides otherwise.

12. The case before us does not represent even a bona fide mistake. In fact it is not a case where under some mistaken belief the assessee did not disclose the cash compensatory support received by it which he could offer to tax. It is true that income by way of cash compensatory support became taxable retrospectively with effect from April, 1967 but that was by amendment of Section 28 by the Finance Act of 1990 which amendment could not have been known before the Finance Act came in to force. Levy of additional tax bears all the characteristics of penalty. Additional tax was levied as the assessee did not in his return show the income by way of cash compensatory support. Assessing Officer on that account levied additional income tax. No additional tax would have been leviable on the cash compensatory support if the Finance Act, 1990 had not so provided even though retrospectively. Assessee could not have suffered additional tax but for the Finance Act, 1990. After he had filed his return of income, which was correct as per law on the date of filing of the return, it was thereafter that the cash compensatory support also came within the sway of Section 28. When additional tax has imprint of penalty Revenue cannot be heard saying that levy of additional tax is automatic under Section 143(1A) of the Act. If additional tax could be levied in such circumstances it will be punishing the assessee for no fault of his. That cannot ever be the legislative intent. It shocks the very conscious if in the circumstances Section 143(1A) could be invoked to levy the additional tax. following observations by the Constitution Bench of his Court in ***Pannalal Binjraj and another v. The Union of India and others, (1957) 31 ITR 565 (SC*** are apt :-

"A humane had considerate administration of the relevant provisions of the Income Tax Act would go a long way in allaying the apprehensions of the assesses and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with "an evil eye and unequal hand".

13. We uphold the view expressed by the Calcutta High Court. Keeping in view the

principles laid by this Court it has to be held that in the circumstances of the present case levy of additional tax taking into account the income by way of cash compensatory support is not warrant. The question is answered in affirmative i.e. in favour of the assessee and against the Revenue. The appeal is accordingly dismissed with costs.