SUPREME COURT OF INDIA

Assistant Commissioner of Income Tax

Vs

Rajesh Jhaveri Stock Brokers Private Limited

Appeal (Civil) 2830 of 2007 (Arising Out of S.L.P. (C) No.24482 of 2005)

(Arijit Pasayat and D. K. Jain, JJ)

23.05.2007

JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal filed by the revenue is to the correctness of the decision rendered by a Division Bench of the Gujarat High Court allowing the Special Civil Application filed by the appellant.

3. Background facts in a nutshell are as follows:

4. The respondent-a Private Limited Company filed its return of income for Assessment year 2001-02 on 30th October, 2001 declaring total loss of Rs.2, 70, 85, 105/-. The said return was processed under Section 143(1) of the Income Tax Act, 1961 (in short the Act) accepting the loss returned by the respondent. Notice under Section 148 of the Act was issued on the ground that claim of bad debts as expenditure was not acceptable. On 12th May, 2004 a return of income declaring the loss at the same figure, as declared in the original return, was filed by the respondent under protest. Copy of the reasons recorded was furnished by the appellant on the respondents request some time in

November, 2004. The respondent raised various objections, both on jurisdiction and merits of the subject matter recorded in the reasons. On 4th February, 2005 the appellant disposed of the objections holding that the initiation of reassessment proceedings was valid and he had jurisdiction to undertake such an exercise. It is in the aforesaid backdrop of facts that the impugned notice under Section 148 of the Act dated 12th May, 2004 was challenged by the respondent.

5. The High Court allowed the writ petition following the decision of the High Court in Adani Exports v. Deputy Commissioner of Income Tax (Assessment) Â 1998 Indlaw GUJ 182.

6. In support of the appeal learned counsel for the appellant submitted that the factual position involved in Adani Exports case (supra) was entirely different. That was a case relating to Section 143 (3) of the Act and the present case relates to Section 143(1) of the Act. It is pointed out that return was filed by the respondent for the concerned assessment year i.e. 2001-2002 on 30.10.2001. The return was processed under Section 143 (1) of the Act on 26.11. 2001. The revenue audit raised an objection relating to a debit of Rs.1285.72 lakh as bad debt out of total expenditure of Rs.1307.64. Since the conditions stipulated under Section 36(1)(vii) read with Section 36(2) of the Act were not fulfilled, the assessing officer reopened the assessment by issuing a notice in terms of Section 148 of the Act on the ground that it has reason to believe that the income assessable to tax had escaped assessment within the meaning of Section 147 of the Act. The respondent asked for the reason for re-opening the assessment. On 31.5.2004 a return of income declaring the loss of the original return was filed by the respondent under protest and raised various objections relating to jurisdiction and merits of the subject matter. The same was disposed of by the assessing officer holding the initiation of re-assessment proceedings was valid and the assessing officer had jurisdiction to undertake the exercise. Thereafter a writ petition was filed as noted above. The High Court relying on the decision in Adani Exports case (supra), which had no application, allowed the writ petition.

7. According to the learned counsel for the appellant the distinction between the position as under Section 143(1) of the Act vis-a-vis under Section 143(3) of the Act has been completely lost sight of by the High Court. Adani's case (supra) related to a case under Section 143(3) of the Act.

8. Learned counsel for the respondent on the other hand supported the order.

9. In order to consider the rival submissions, it is necessary to take note of Section 143(1) (as it stood before and after amendment with effect from June 1, 1999), 147 and 148. The provisions read as follows:

After amendment:

143. Assessment- (1) 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, any tax paid on self-assessment 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 refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee:

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this sub-section where either no sum if payable by the assessee or no refund is due to him:

Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of the assessment year in which the income was first assessable

Before amendment:

10. Section 143(1) as it stood at the point of time when the intimation was given under the said provision, so far as relevant, read as follows:

143. (1)(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 refund is 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, if prima facie admissible but which is not claimed in the return, shall be allowed;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disal1owed:

Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him:

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in h the income was first assessable.

147. Income escaping assessment.If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub- section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

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.

Explanation 2. - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) Where a return of income has been furnished by the assessee but no assessment has been made

and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) Where an assessment has been made, but

(i) Income chargeable to tax has been under-assessed ; or

(ii) Such income has been assessed at too low rate ; or

(iii) Such income has been made the subject of excessive relief under this Act ; or

(v) Excessive loss or depreciation allowance or any other allow- ance under this Act has been computed.

148. Issue of notice where income has escaped assessment. (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

11. It is to be noted that substantial changes have been made to section 143(1) with effect from June 1, 1999. Up to March 31, 1989, after a return of income was filed the Assessing Officer could make an assessment under section 143(1) without requiring the presence of the assessee or the production by him of any evidence in support of the return. Where the assessee objected to such an assessment or where the officer was of the opinion that the assessment was incorrect or incomplete or the officer did not complete the assessment under section 143(1), but wanted to make an inquiry, a notice under section 143(2) was required to be issued to the assessee requiring him to produce evidence in support of his return. After considering the material and evidence produced and after making necessary inquiries, the officer had power to make assessment under section 143(3). With effect from April 1, 1989, the provisions underwent substantial and material changes. A new scheme was introduced and the new substituted section 143(1) prior to the subsequent substitution with effect from June 1, 1999, in clause (a), a provision was made that where a return was filed under section 139 or in response to a notice under section 142(1), and any tax or refund was found due on the basis of such return after adjustment of tax deducted at source, any advance tax or any amount paid otherwise by way of tax or interest, an intimation was to be sent without prejudice to the provisions of section 143(2) to the assessee specifying the sum so payable and such intimation was deemed to be a notice of demand issued under section 156. The first proviso to section 143(1)(a) allowed the Department to make certain adjustments in the income or loss declared in the

return. They were as follows:

(a) an arithmetical error in the return, accounts and documents accompanying it were to be rectified;

(b) any loss carried forward, deduction, allowance or relief which on the basis of the information available in such return, accounts or documents, was prima facie admissible, but which was not claimed in the return was to be allowed;

(c) any loss carried forward, relief claimed in the return which on the basis of the information as available in such returns accounts or documents were prima facie inadmissible was to be disallowed.

12. What were permissible under the first proviso to section 143(1)(a) to be adjusted were, (i) only apparent arithmetical errors in the return, accounts or documents accompanying the return, (ii) loss carried forward, deduction allowance or relief, which was prima facie admissible on the basis of information available in the return but not claimed in the return and similarly (iii) those claims which were on the basis of the information available in the return, prima facie inadmissible, were to be rectified/allowed/disallowed. What was permissible was correction of errors apparent on the basis of the documents accompanying the return. The Assessing Officer had no authority to make adjustments or adjudicate upon any debatable issues. In other words, the Assessing Officer had no power to go behind the return, accounts or documents, either in allowing or in disallowing deductions, allowance or relief.

13. One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989 to March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998 and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word 'intimation' as substituted for 'assessment' that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No.2) Act, 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the

Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994, to May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions 'intimation' and 'assessment order' have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(l)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in Apogee International Limited v. Union of India Â 1996 Indlaw DEL 195. 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.

14. Additionally, section 148 as presently stands is differently couched in language from what was earlier the position. Prior to the substitution by the Direct Tax Laws (Amendment) Act, 1987, the provision read as follows:

148. Issue of notice where income has escaped assessment. (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub- section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

15. Section 147 prior to its substitution by the Direct Tax Laws (Amendment) Act, 1987, stood as follows:

147. Income escaping assessment.If (a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :

(a) Where income chargeable to tax has been underassessed ; or

(b) where such income has been assessed at too low rate ; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian Income Tax Act, 1922 (11 of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2. 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 this section.

16. 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 Â , 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. Â (SC)] ; Raymond Woollen Mills Ltd. v. ITO [Â 7 (SC)].

17. 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 (i) 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.

18. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

19. Inevitable conclusion is that High Court has wrongly applied Adani's case (supra) which has no application to the case on the facts in view of the conceptual difference between Section 143(1) and Section 143(3) of the Act.

20. Learned counsel for the respondent submitted that other points are available to be raised. Since no other point was urged before the High Court, we find no reason to examine if any other point was available. The appeal is allowed without any orders as to costs.