BOMBEY HIGH COURT

Commissioner of Income Tax Bombay

Vs.

Indian Rare Earth Limited Bombay

I.T.R. No. 68 of 1975

(C. Mookerjee, C.J. S.P. Bharucha and T.D. Sugla, JJ.)

22.09.1989

JUDGMENT

T.D. Sugla, J.

1. In this reference under section 256(1) of the Income-tax Act, 1961, the Income-tax Appellate Tribunal has referred to this court the following two questions of law at the instance of the Department :

> "(1) Whether, on the facts and in the circumstances of the case, the assessment of the assessee for the assessment year 1962-63 having been validly reopened under section 147 of the Income-tax Act, 1961, the Income-tax Officer could set off the unabsorbed depreciation of past years in such reassessment when the omission of effect the set off in the original assessment was not due to any omission or failure on the part of the assessee to disclose fully and truly all material facts relating to that unabsorbed depreciation ?
> (2) Whether, on the facts and in the circumstances of the case, it was open to the Income-tax Officer in the reassessment proceedings under section 147(a) of the Income-tax Act, 1961, to recompute the assessable income of the assessee at 'nil' and thereby disentitle it to the income-tax rebate when, in the original assessment, the assessable income had been computed at Rs. 1,24,929 and on that basis it has been held entitled to the income-tax rebate under section 2(5)(i) of the Finance (No. 2) Act, 1962, and such assessment had became final as both the assessee and the Income-tax Department had taken no further proceedings from the Tribunal's order to that effect ?"

2. When the reference came up before a Division Bench of this court to which one of us (justice Bharucha) was a party, it was submitted that in view of the Supreme Court decisions in *CST v. H. M. Esufali H. M. Abdulali*[1] and *Deputy Commissioner of Commercial Taxes v. H. R. Sri Ramulu*[2] and the Full Bench decision of the Andhra Pradesh High Court in *Commissioner of Wealth Tax v.*

Subakaran Gangabhishan[3] the decision of this court in *New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. v. Commissioner of Income Tax*[4] required reconsideration. Being prima facie of the view that the said decision

[1][1973] 90 ITR 271 [3][1980] 121 ITR 69
[2][1977] 39 STC 177 [4][1977] 107 ITR 760 (Bom)

required reconsideration, the Bench referred the matter to the Hon'ble Chief Justice for constitution a Full Bench. This is how this reference has come up before this Full Bench for adjudication.

3. Sri Dalvi, hitherto learned counsel for the respondent-assessee, sought discharge on the ground that despite intimation sent by him to the assessee, he had received no instructions. However, having regard to the importance of the questions raised, the court considered it appropriate to request Shri Dalvi to assist the court in the capacity of amicus curiae. Shri Dalvi, it may be stated in fairness to him, gladly agreed to assist the court.

4. The assessee is a company. The assessment involved is the assessment year 1962-63. The assessment was originally completed computing the total income at Rs. 5,68,797 (comprising business income at Rs. 4,43,868 and income from property and other sources at Rs. 1,24,929). Holding that unabsorbed depreciation was to be set off against business income the totals taxable income was computed at Rs. 1,24,929. An appeal was filed by the assessee. It was, inter alia, contended that its claim for deduction in respect of Rs. 1,20,398, being provision for gratuity to staff, was wrongly disallowed and that the assessee was entitled to relief under section 2(5)(i) of the Finance (No. 2) Act, 1962, in respect of profits made on export of goods out of India. The Appellate Assistant Commissioner confirmed the disallowance as regards the claim in respect of provision for gratuity, but held that the assessee was entitled to relief in respect of export profits provided under section 2(5)(i) of Finance (No. 2) Act, 1962. Accordingly, he directed the Income-tax Officer to compute that relief in accordance with the Rules framed under the Act. Against the order of the Appellate Assistant Commissioner, the Department filed an appeal on the ground that the Appellate Assistant Commissioner's direction to the Income-tax Officer to compute the relief on account of export profits was not justified. The assessee filed cross objections contending that the disallowance of its claim in respect of provision for gratuity to the staff should not have been maintained. The Tribunal dismissed the Department's appeal as well as the assessee's cross-objections.

5. Subsequently, it came to the notice of the Income-tax Officer that excessive depreciation was claimed by and allowed to the assessee during the original assessment proceedings inasmuch as terminal adjustment had not been made in regard to initial depreciation allowed in the earlier years. The Income-tax Officer reopened the assessment proceedings under section 147(a) of the Income-tax Act, 1961, and issued and served a notice under section 148 on the assessee. In response thereto, the assessee filed a revised depreciation statement and the reassessment was

completed by reducing the assessee's claim for depreciation and development rebated to the extent of Rs. 70,282 and Rs. 14,648, respectively. The total income was this computed at Rs. 6,53,727 (Rs. 5,28,798 as business income and Rs. 1,24,929 as income from property and other sources) as against Rs. 5,68,797 in the original assessment. The Income-tax Officer, however, took the view that unabsorbed depreciation of the earlier years was to be set off not only against business income but also against other income. Accordingly, as against computing the assessee's taxable income computed at Rs. 1,24,929 originally, the taxable income on reassessment was computed at nil. As a natural corollary, the assessee was not entitled to relief under section 2(5)(i) of the Finance (No. 2) Act, 1962.

6. The first contention that the original assessment having become final as a result of the order of the Tribunal in appeal, the reopening of the assessment under section 147(a) was not valid was rejected by the Appellate Assistant Commissioner for obvious reasons. The next contention that the Tribunal had, in an appeal arising out of the original assessment, held that the assessee was entitled to relief under section 2(5)(i) of the Finance (No. 2) Act, 1962, on its export profits was also rejected by the Appellate Assistant Commissioner who held that the context in which the Tribunal had granted relief to the assessee had materially changed inasmuch as, as a result of reassessment, the net taxable/total income had been computed at "nil" and no relief under section 2(5)(i) could be allowed in respect of export profits when the total income was "nil". The Tribunal accepted the assessee's contention and held that the subject-matter of reassessment under section 147 was to tax the escaped income and not to recompute the income. It might be able that the Income-tax Officer had not set off unabsorbed depreciation against the assessee's income other than business income in the original assessment due to ignorance or mistake of law. Since that was not the subject-matter of reassessment, the Tribunal further held that the Income-tax Officer was not justified in tinkering with that part of the assessment while making a reassessment.

7. The submission on behalf of the Department before us was that, in view of the Supreme Court decisions in *CST v. H. M. Esufali H. M. Abdulali*[5] *Deputy Commissioner of Commercial Taxes v. H. R. Sri Ramulu*[6] and *Income Tax Officer v. Mewalal Dwarka Prasad*[7] the settled law as regards reassessment under section 147 is thus : what is true of an assessment must also be true of a reassessment because a reassessment is nothing but a fresh assessment. Once valid proceedings under section 147 were started, the Income-tax Officer had not only the jurisdiction but it was his duty to complete the whole assessment be novo, i.e., to levy tax on the entire income. Shri Dalvi, on the other hand, submitted that the observations in the above Supreme Court decisions required to be considered in the context of facts in those cases. So considered, it would appear that on a valid reopening of a case under section 147(a) or section 147(b), the jurisdiction of the Income-tax Officer was to included all escaped income falling under either or both of this sub-sections and not confined to the escaped income falling under the sub-section under which the proceedings were reopened. He pointed out that the scope of a reassessment was to rope in escaped income and if it was taken to be as wide as proposed by Shri Jetley, a number of

anomalous situations would arise, such as that the total income computed in the reassessment might fall below the taxable income computed in the assessment; while the Income-tax Officer might only include escaped income and start with the total income computed in the original assessment, the original assessment having been treated as non est, appeal, revision, reference arising out of the original assessment might abate and a starting situation might arise; and the assessee might claim dedications for the first time in the reassessment and might also claim such deductions as were rejected in the original proceedings and the rejections had become final.

8. In order to appreciate the rival contentions, it is desirable to refer to this court's judgment in *New Kaiser-I-Hind Spinning and Weaving Co. Ltd. v. Commissioner of Income Tax*[8] It observed (at page 772) :

[5][1973] 90 ITR 271 [7][1989] 176 ITR 529
[6][1977] 39 STC 177 [8][1977] 107 ITR 760

> "...A careful perusal of the judgment of the Supreme Court in *V. Jaganmohan Rao's case*[9] shows that the court was not concerned in that case with the question as to whether the reassessment could be made under section 34(1)(a) or section 34(1)(b), but the observations quoted above were made by the Supreme Court only in reference to and in the context of the contention that was advanced before it (at the top of page 380) that only 2/3rd of the income of the mill could be said to have escaped assessment. In fact, though the Supreme Court has in its judgment referred to section 34(1)(b), at the time material for the assessment in the said case, clauses (a) and (b) were not to be found as separate clauses in section 34 as it then stood. It is in reference to the said contention that the Supreme Court said that the entire income that had escaped assessment was liable to be reopened in the proceedings initiated in the said case under section 34(1)(b). It is also clear from the passage from the judgment of the Supreme Court quoted above that, when reassessment proceedings are initiated, it is not the entire original assessment that is set aside, but it is only the 'under-assessment' that is set aside, and the Income-tax Officer was under a duty to levy tax on the entire income that had escaped assessment, and not on the entire income of the assessee as such."

It is true that this judgment has not been directly disapproved or over-ruled by the Supreme Court in either of the three cases relied upon by Shri Jetley for the Department. However, the Supreme Court in *Income Tax Officer v. Mewalal Dwarka Prasad*[10] in terms, approved the Andhra Pradesh High Court decision in *Pulavarthi Viswanadham v. Commissioner of Income Tax*[11] which was not followed by this court. It can, therefore, be taken that the view taken by this court has not been approved by the Supreme Court. In this context, it may be desirable to refer to the observations from the aforesaid Andhra Pradesh High Court decision quoted with approval by the Supreme Court in its decision in Mewalal's case [1989] 176 ITR 529, 532. The observations are :

> "What emerges from sub-section (2) of section 22 is that when once an assessee is required to submit a return of his income, he is obliged to disclose the totality of his

income. The question that falls to be decided on the language of these two sections is whether after notice is issued under section 34(1)(a), the assessment should be limited to items which escaped assessment by reason of the failure on the part of the assessee to disclose all his income, profits or gains which are subject to tax. The contention of learned counsel for the assessee is that having regard to the terms of clause (b), it was not within the powers of the Income-tax Officer to bring charge such of the items as have escaped from being taxed without any remissness on his part. It is only items that escaped assessment due to omission or failure of the assessee that come within the ranger and sweep of section 34, continues learned counsel for the assessee. We do not think that we can accede to this proposition. When once the assessment is reopened, no distinction could be made between items falling under clause (a) and those coming within the pale of clause (b). As pointed out by a Division Bench of this court in R.C. No. 12 of 1969 *Parimisetti Seetharamamma v. Commissioner of Income Tax*[12] to which one of us was a party (p. 460) :

...When once an assessment is reopened under section 34, the Income-tax Officer

[9][1970] 75 ITR 373 [11][1963] 50 ITR 463

[10][1989] 176 ITR 529 [12][1963] 50 ITR 450

process do novo under the relevant sections of the Income-tax Act, i.e., he issues notice under section 22(2) and proceeds to assess the assessee. He has to follow the same procedure as in the case of the first assessment as is clear from the clause in section 34 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. The proceedings under section 34 must be deemed to related to proceedings which, commence with publication of notice under section 22(1)'."

A Full Bench of the Andhra Pradesh High Court against considered the scope of a reassessment in *Commissioner of Wealth Tax v. Subakaran Gangabhishan*[13] After the extensive consideration of a number of available judicial decisions, the Full Bench dissented from the view taken by the court in New Kaiser-I-Hind Spg. and Wvg. Co.'s case [1977] 107 ITR 760 and confirmed the view taken by its Division Benches earlier in *Parimisetti Seetharamamma v. Commissioner of Income Tax*[14] and *Pulavarthi Viswanadham v. Commissioner of Income Tax*[15] The Supreme Court, as already stated, has, in its latest decision in *Income Tax Officer v. Mewalal Dwarka Prasad*[16] approved the Andhra Pradesh High Court's decision in *Pulavarthi Viswanadham v. Commissioner of Income Tax*[17] Further, in that decision, the Supreme Court has reiterated the following observation for its decision in *V. Jaganmohan Rao v. Commissioner of Income Tax/CEPT while approving the Andhra Pradesh High Court's decision*[18] (at paged 533 of 176 ITR) :

"This argument is not of much avail to the appellant because once proceedings under section 34 are taken to be validly initiated with regard to two-thirds share of the income, the jurisdiction of the Income-tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once the Income-tax Officer decides to reopen the

assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under section 22(2) and may proceed to assess or reassess such income, profits or gains. It is, therefore, manifest that once an assessment is reopened by issuing a notice under sub-section (2) of section 22 the previous under assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under section 34(1)(b) the Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year."

In the circumstances, it appears clear to us that once valid proceedings under section 147 are started, the Income-tax Officer has only the jurisdiction but it is his duty to complete the whole assessment de novo. What is true of an assessment must also be true of a reassessment because a reassessment is nothing but a fresh assessment.

9. The Supreme Court, in *Income Tax Officer v. Mewalal Dwarka Prasad*[19] having approved the categorical observations of the Andhra Pradesh High Court in *Pulavarthi Viswanadham v. Commissioner of Income Tax*[20] it is not now open to this court to examine the scope of a reassessment under section 147 in

[13][1980] 121 ITR 69 [15][1963] 50 ITR 463 [17][1963] 50 ITR 463
[14][1963] 50 ITR 450 [16][1989] 176 ITR 529 [18][1963] 50 ITR 463
[19][1989] 176 ITR 529 [20][1963] 50 ITR 463

the light of Shri Dalvi's argument about possible anomalies.

10. Having regard to the above discussion, both the questions of law are answered in the affirmative and in favour of the Revenue. No order as to costs.
Order accordingly.