Bombay High Court Export Credit Guarantee ... vs The Additional Commissioner Of ... on 11 January, 2013 Bench: Dr. D.Y. Chandrachud, A.A. Sayed VBC 1/13 wp502.12-10.1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.502 OF 2012

Export Credit Guarantee Corporation of India Ltd. ...Petitioner.
Vs.
The Additional Commissioner of Income Tax & Ors. ...Respondents.
....

Mr.F.V.Irani with Mr.R.Murlidharan, Mr.Atul K.Jasani and Mr.P.S.Tripathi for the Petitioner.
Mr.Vimal Gupta for Respondent No.1.
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CORAM : DR.D.Y.CHANDRACHUD AND

A.A.SAYED, JJ.

January 10/11, 2013. ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) : The Petitioner has sought to question the legality of a notice dated 24 March 2011 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961, seeking to reopen an assessment for Assessment Year 2006-07. There is incidentally a challenge to the order of the Assessing Officer disposing of the objections raised by the Petitioner to the reopening of the assessment. The Assessment Year to which the notice under Section 148 relates, is A.Y. 2006-07.

The reopening of the assessment has taken place within a period of four years of the end of the relevant assessment year. 2. For A.Y. 2006-07, the Petitioner filed a return of income on 28 November 2006 in which it offered income computed at Rs.385.25 crores to tax under Section 44 read with the First Schedule to the Act. An order of assessment was made on 17 November 2008 under Section 143(3) by which VBC 2/13 wp502.12-10.1 the total income was determined at Rs.386.08 crores after making certain disallowances. 3. A notice was issued on 24 March 2011 to the Petitioner seeking to reopen the assessment for A.Y. 2006-07. The reasons on the basis of which the assessment has been sought to be reopened are, summarised briefly as follows: (i) Paragraph 7.1 of Schedule 17 of the Notes forming part of the accounts shows that the assessee did not offer to tax an unapportioned claim recovery of Rs.27.24 crores representing the amount received from foreign countries as recoveries against claims paid and liability due to non- ascertainment of dues of other parties in respect of claims paid. The Assessing Officer has stated that as the assessee is a resident, all income relevant to the previous year was required to be brought to tax in accordance with Section 5(1) including the unapportioned recovery. However, in the assessment which was finalized under Section 143(3), the amount has not been brought to tax. There has been an under-assessment of income to the extent of Rs.2724.26 lakhs leading to short levy of tax; (ii) Paragraph 6.1 of Schedule 17 of the Notes to the accounts provides as follows: "Rs.2796.38 lakhs being the estimated amount of recovery expected out of the claims paid/payable by the Corporation, which has been recognized on individual assessment/estimate basis as per the accounting practice followed by the company in this regard. Pursuant to the change in accounting policy during the VBC 3/13 wp502.12-10.1 year, the provision for estimated recoveries in respect of claims paid and outstanding for recovery for a period exceeding 3 years as on the Balance Sheet date, the recoveries have been estimated at Rs.100.00 for each claim instead of individual assessment/estimates as hitherto followed. The change in the policy has the effect of existing provision for estimated recoveries being written off by about Rs.20 crores to the revenue account and reducing the profit of the year consequently." (emphasis supplied) In view of the above note, the change in the accounting policy resulted in a reduction in the income during the year under consideration by Rs.20 crores which, however, has remained to be added in the total income leading to short levy of tax; (iii) Paragraph 13 of Schedule 17 of the Notes to the accounts reads as follows: "Subsequent to the balance sheet date, approval has been received from the Ministry of Commerce for 1) revision of pay scales w.e.f. 1.8.2002 and consequently, on estimate amount of Rs.657 lakhs has been recognized as liability towards employees in the accounts." This liability was not crystallized before the balance-sheet date and is hence, not allowable as deduction in the previous year relevant to the assessment year under consideration. However, no disallowance has been made on this count resulting in under-assessment of total income by Rs.6.57 crores; (iv) The assessee has claimed and was allowed expenses of Rs.16.29 lakhs under the head of ISO Certification/Audit fees as revenue expenses. This is in the nature of capital expenses as the assessee has obtained a benefit of an enduring nature.

This amount was required to be VBC 4/13 wp502.12-10.1 disallowed and added back to the total income, but the omission to do so has resulted in an under-assessment of total income by Rs.16.29 lakhs leading to short levy of tax; (v) Annexure-J to the Tax Audit Report shows that the total prior period expenses incurred during the year is Rs.1.73 crores. After adjusting the prior period income of Rs.72.72 lakhs, an amount of Rs.1 crore was debited to the Profit and Loss Account. The expenditure of Rs.1.73 crores does not relate to the relevant previous year and should have, hence, been added to the total income. This has resulted into an escapement of income. In the circumstances, the Assessing Officer has stated that he has reason to believe that income to the extent of Rs.54.66 crores escaped assessment resulting in a short levy of tax. 4. The assessee by a letter dated 18 November 2011 objected to the notice proposing to reopen the assessment for A.Y. 2006-07. The Assessing Officer by his order dated 22 November 2011 disposed of the objections. 5. Counsel appearing on behalf of the Assessee submitted that (i) There was complete disclosure on the part of the assessee of material facts during the course of the assessment and there is an absence of fresh or tangible material on the basis of which the assessment can be reopened. The fact that the Assessing Officer has relied upon the Notes forming part of the accounts in Schedule 17 is itself indicative of the fact that there was no VBC 5/13 wp502.12-10.1 failure on the part of the assessee to disclose material facts; (ii) Under Section 44 of the Income Tax Act, 1961, read with Rule 5(a) of the Rules contained in the First Schedule, the Assessing Officer has no jurisdiction to make an income addition. Grounds (i), (ii) and (v) of the reasons disclosed to the assessee would indicate that the Assessing Officer is proposing to make an income addition which is contrary to the statutory provision; (iii) As regards Ground (i) in respect of an earlier year, the CIT(A) held in favour of the assessee and the Committee on Disputes had not permitted the Commissioner to carry the matter further, which has been accepted by the Revenue; (iv) Even on merits also, there is no reason to believe that income has escaped assessment. In view of the judgment of the Supreme Court in CIT vs. Hindustan Housing and Land Development Trust Ltd.,1 there must be an absolute right on the part of the assessee to receive an amount for income to accrue. In the present case, claims which have been received by the assessee are required to be disbursed to various persons and pending the disbursal, the amount was held in suspense. Income had hence not accrued; (v) As regards Ground (ii), the mere making of a claim does not amount to income in view of the judgment of the Supreme Court in Godhra Electricity Co. Ltd. vs. CIT;2 (vi) As regards Ground (iii), the objection of the assessee is that the Union Government approved the revision of pay scales of the employees of the LIC and a circular was issued on 8 September 2005. The pay scales of the Officers and employees of the assessee were due for revision with effect from 1 August 2002. The Government of India approved the revision of pay scales on 24 August 2006. Following the principles laid 1 (1986) 161 ITR 524 2 (1997) 225 ITR 746 VBC 6/13 wp502.12-10.1 down in accounting standard A : 4, the approval of the Government which was an event occurring after the balance-sheet date (31 March 2006) required an adjustment by debiting the Profit and Loss Account.

Since the revision was approved by the Government before the finalization of accounts for the year ending 31 March 2006, the liability has definitely arisen; (vii) As regards Ground (iv), an ISO certification does not constitute an expenditure of a capital nature; and (viii) As regards Ground (v), similar to credit amounting to Rs.1.73 crores, the expenses of Rs.72.72 lakhs had also been incurred by the assessee. That expenditure, though it related to an earlier period, had crystallized in the previous year ending on 31 March 2006 and hence, only the net amount of Rs.1 crore was correctly added back while filing the return of income for Assessment Year 2006-07. 6. On the other hand Counsel appearing on behalf of the Revenue urges that (i) The assessment is sought to be reopened within a period of four years. Hence, in view of the judgment of the Supreme Court in Commissioner of Income Tax vs. Kelvinator India Ltd.,3 the Assessing Officer is acting within jurisdiction when he proposes to reopen the assessment on the basis of tangible material; (ii) In the present case, during the course of the assessment proceedings, no query was raised by the Assessing Officer in respect of any of the five points with reference to which the assessment is sought to be reopened. None of those issues has been referred to in the order of Assessing Officer. Hence, this is not a case where the Assessing Officer has sought to review his earlier findings, nor is this a 3 (2010) 320 ITR 561 VBC 7/13 wp502.12-10.1 case of a change of opinion. The notice proposing to reopen the assessment has been issued within a period of four years and is justified having regard to the fact that there was a complete failure on the part of the Assessing Officer to apply his mind to the five points on which the assessment is sought to be reopened, when he passed the original order of assessment; (iii) By way of illustration, it may be noted that the assessee has admitted in paragraph 6.1 of the Notes forming part of the accounts in Schedule 17 that profit had, as a result of a change in the accounting policy, been reduced in view of the existing provision of estimated recovery being written off by Rs.20 crores. Yet, no query was raised by the Assessing Officer in the proceedings under Section 143(3); (iv) In the circumstances, for this Court to preempt any enquiry whatsoever would go against the object and purpose of Section 147 and would be impermissible; (v) In respect of each of the grounds for reopening, the Petitioner has sought to make submissions on merits, but this is not the appropriate stage where that can be determined. At this stage, the only issue before the Court is whether the Assessing Officer has reason to believe that income has escaped assessment and not whether it can be conclusively held that the original order of assessment is incorrect. 7. The assessment for Assessment Year 2006-07 is admittedly sought to be reopened within a period of four years from the end of the relevant Assessment Year. Where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the proviso to Section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts VBC 8/13 wp502.12-10.1 necessary for his assessment for that year. This stipulation does not govern a notice for reopening within a period of four years. Where the assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the governing test has been formulated in the judgment of the Supreme

Court in Commissioner of Income Tax vs. Kelvinator of India Ltd. (supra). The principle which has been enunciated by the Supreme Court is as follows : "Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words"reason to believe" falling which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre- condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an inbuilt test to check abuse of power by the AO. Hence, after 1 st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO". The Assessing Officer even within a period of four years cannot reopen an assessment merely on the basis of a change of opinion. The Assessing Officer has no power to review an assessment which has been concluded. VBC 9/13 wp502.12-10.1 But where he has tangible material to come to the conclusion that there is an escapement of income from assessment, the power to reopen can be exercised. The expression"reason to believe" in Section 147 has been construed in the judgment of the Supreme Court in Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers P. Ltd.,4 to mean a cause or justification. However, at the stage when the Assessing Officer reopens an assessment, it is not necessary that the material before the Court should conclusively prove or establish that income has escaped assessment. A reason to believe at the stage of reopening is all that is relevant. This aspect must be emphasized because it clearly emerges from the judgment of Rajesh Jhaveri Stock Brokers: "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 ... 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 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." 8. To hold that the Assessing Officer must be deemed to have accepted what he has plainly overlooked or ignored in the assessment order 4 (2007) 291 ITR 500 VBC 10/13 wp502.12-10.1 would be to stretch the interpretation of Section 147 to a point where the provision would cease to have meaning and content. Such an exercise of excision by judicial interpretation is impermissible. When an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of Section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within jurisdiction. 9. We have considered it appropriate to emphasise this aspect because much of the submission on behalf of the Petitioner in these proceedings has focused on the merits of the assessment. At this stage, the test to be applied is whether there was reason to believe that income had escaped assessment and whether the Assessing Officer has tangible material before him for the formation of that belief. A reason to believe is what is relevant not an established fact of the escapement of income. 10. The salient aspect of the case that merits emphasis is that the order of assessment that was passed by the Assessing Officer under Section 143(3) is completely silent in respect of each one of the five points on the VBC 11/13 wp502.12-10.1 basis of which the assessment is sought to be reopened. There is merit in the contention which has been urged on behalf of the Revenue that no query had been raised during the course of the assessment and the assessment order would ex-facie disclose that the Assessing Officer has not applied his mind at all to any of the points on the basis of which the assessment is now sought to be reopened. That there exists tangible material for the Assessing Officer to reopen the assessment in the present case is evident from the record. For instance, as we have noted earlier, in respect of one of the grounds, Ground (ii), the reasons which have been disclosed to the assessee would indicate that reliance has been placed on paragraph 6.1 of the Notes forming part of the accounts in Schedule 17. Paragraph 6.1 posits that an amount of Rs.27.96 crores is the estimated amount of recovery expected out of the claims paid or payable by the assessee which had been recognized on an individual assessment/estimate basis on the basis of the accounting practice followed by the assessee. During the year in question, there was a change in accounting policy as a result of which the provision for estimated recovery in respect of claims paid and outstanding for recovery for a period of three years or more as on the balance-sheet date has been estimated at Rs.100/- for each claim in substitution of the individual assessment/estimate

made earlier. The assessee has stated that the change in policy has the effect of the existing provision for estimated recovery being written off by about Rs.20 crores to the revenue account and reducing the profit of the accounting year consequently. Evidently the Assessing Officer had not considered paragraph 6.1 of the Notes forming part of the accounts. At this stage, it would be necessary for the Court to record that we have not been called upon to decide VBC 12/13 wp502.12-10.1 as to whether any addition to the income would have to be made on that ground since that is a matter which has to be decided after the assessment is reopened. All that is relevant at this stage is whether there is reason to believe on the part of the Assessing Officer that income had escaped assessment. The answer is in the affirmative. It would not be appropriate for this Court to preempt an enquiry whatsoever by the Assessing Officer, once a tangible basis has been disclosed for reopening the assessment. Similarly, in respect of the revision of pay scales, the Assessing Officer has sought to reopen the assessment on the ground that the liability had not crystallized before the balance-sheet date. Here again, it is apparent that there has been no application of mind to the relevant facts by the Assessing Officer during the course of the assessment proceedings. As regards the first ground, on the basis of which the assessment is sought to be reopened, it has been sought to be urged that under Section 44 read with Rule 5(a), it would not be open to the Assessing Officer to make an income addition. Moreover, it has been urged that in the past, the same practice had been accepted by the Revenue. These are matters which on merits will be considered by the Assessing Officer and it would be inappropriate for this Court to express any opinion on the merits of issue. Moreover, once the Court has come to the conclusion that even a single ground on the basis of which the assessment is sought to be reopened is valid and within jurisdiction, the notice for reopening of the assessment would have to be upheld. Consequently, we clarify that though submissions have been urged on the merits of each of the grounds, we keep all rights and contentions of the parties open to be urged before the Assessing Officer, once the assessment is reopened in exercise of the power VBC 13/13 wp502.12-10.1 conferred by Section 147. The Assessing Officer has acted within jurisdiction in reopening the assessment. 11. For these reasons, no case for interference under Article 226 of the Constitution is made out. We accordingly dismiss the Petition. There shall be no order as to costs. (Dr.D.Y.Chandrachud, J.)

ig (A.A.Sayed, J.)