Gujarat High Court

Shree Bansidhar Spinning And ... vs Income-Tax Officer, Companies ... on 11 January, 1980

Equivalent citations: (1980) 16 CTR Guj 16, 1980 125 ITR 537 Guj

JUDGMENT DIVAN C.J. - The petitioner herein challenges the notices issued under s. 148 of the I.T. Act, seeking to reopen the assessment for the assessment years 1965-66 to 1970-71. The relevant previous years for these assessment years are the calendar years 1964 to 1969, calendar year being the accounting year of the petitioner-company. The petitioner before us is a private limited company and carried on business of manufacturing textiles. The petitioner-company was registered on October 1, 1963, and came into being on that day. On October 3, 1963, the Petitioner-company purchased textile mills located at Ahmedabad for the aggregate sum of Rs.40,00,000 from Deepak Textile Industries Private Ltd. of Rajkot. The sale deed was executed in respect of lands, plant and part of machinery which was to be treated as immovable property because of the nature of that machinery and these immovable properties were taken to have been sold at the aggregate sum of Rs.4,00,000 by the vendor to the petitioner-company and the balance amount of Rs. 36,00,000 was treated as towards the rest of the machinery, furniture, etc., which were all treated as movables in which property passed on mere delivery of possession. There was no itemisation of the machinery in the sale deed but at the time of sale, the vendor furnished a list of the different machineries in this textile mill and the value allocated to the different items was shown in the list. In this list, there was one item showing as follows: "Electrification complete with transformers, switch gears, switches, starters and electric motors" and for all these items concerning electrical machinery a sum of Rs. 7,00,000 was shown in the list. The accounting year of the petitioner-company being the calendar year, for the period October 3, 1963, to December 31, 1963, income-tax return was filed for assessment year 1964-65 and along with the return filed, details were given regarding the machinery and also regarding the basis on which depreciation was being claimed by the petitioner-company. The petitioner-company claimed depreciation on the entire textile machinery worth Rs.36,00,000 less the amount of Rs.10,000 and the depreciation was claimed on the footing that the entire machinery worth Rs. 36,00,000 was textile machinery and the additional depreciation allowance permissible in the case of textile machinery was claimed by the petitioner-company. The petitioner-company also claimed extra shift allowance in respect of different shifts actually worked by the company. The ITO in the original assessment orders passed in 1964 and 1965 and also in each of the six successive years from the assessment year 1965-66 to 1970-71, accepted the figure furnished by the petitioner-company and passed order accordingly. In respect of the assessment year 1971-72, the ITO raised an objection regarding the claim of the petitioner-company to extra shift allowance because, according to the ITO, the extra shift allowance was not permissible on the entire amount of Rs. 7,00,000 which was for the electrification complete with transformers, switch gears, switches, starters and electric motors but was only climbable in respect of the lesser amount which was the cost of the electric motors only. According to the ITO, the electric motors were worth Rs. 2,49,100 and under the rules pertaining to the extra shift allowance, the extra shift allowance could be allowed only in relation to the cost of electric motors and not the cost of the entire electrification. Therefore, the extra shift allowance was not allowed in respect of the entire amount of Rs. 7,00,000 but was allowed only in respect of Rs. 2,49,100. Thereafter, on March 28, 1974, notices under s. 148 were issued in respect of each of the six years which are under consideration before us in the present proceedings. It was clearly indicated that these notices were issued under s. 147(a) of the Act. In the courts of the correspondence which ensued, a letter was addressed by the

ITO, the first respondent herein, on January 27, 1976, and in that letter the grounds for the notices for reopening the assessment for these six years under consideration were stated and the grounds as set out in that letter were two. It was pointed out by the first respondent that the assessment had been reopened under s. 147(a) of the Act on the ground that particulars regarding the claim of depreciation and extra shift allowance were not accurately furnished by the petitioner-company. The value of the total machinery of Rs. 35,90,000 included cost of electrical machinery shown in the list of plant and machinery as "Electrification complete with transformers switch gears, switches, starters and electric motors".

As per the Rules, extra shift allowance could not be allowed on the above electrical machinery except the electric motors which formed part of the textile machinery and, in the absence of any details regarding the cost of electric motors, the ITO proposed to estimate the same at Rs. 2,49,100 and also proposed to withdraw the extra shift allowance given of the petitioner-company on the balance of cost of electrical machinery of Rs.5,00,000. The second ground on which the reopening of the assessment was sought was that the petitioner-company had deducted the sale price of machineries from the written down value of machineries in two assessment years. In the assessment year 1966-67, the sale price of Rs. 1,32,135 was sought to be deducted and for the assessment year 1967-68, the sale price of Rs. 1,30,644 was sought to be deducted. The sale prices had been deducted from the written down value on the ground that separate prises for the items sold were not available. However, scrutiny revealed that the petitioner had sold seven Bowl Calendar Machines for Rs. 90,000. In the assessment year 1966-67, the cost of which was Rs. 70,000. In the same way, the petitioner-company had sold in the assessment year 1967-68, Singeing Machine for Rs. 1,12,200, the cost which was Rs. 84,000. Thus, there arose a capital gain as well as profit under s. 41(2) in the assessment years 1966-67 and 1967-68. The petitioner was, therefore, called upon to show cause why profit under s. 41(2) and capital gain should not be taxed in the assessment years 1966-67 and 1967-68 as mentioned in that letter. The ITO also stated that the written down value of the remaining machinery would increase for which the correct written down value would be taken while passing the assessment orders for the assessment years 1968-69 and onwards. Thus, as shown by this letter of January 27, 1976, proceedings were sought to be reopened on two grounds, one on the ground that extra shift allowance had been claimed and allowed in respect of all electrical machinery of Rs. 7,00,000, though in accordance with the Rules in that behalf it was permissible only in respect of electric motors valued at Rs. 2,49,100. The second ground on which the assessments were sought to be reopened, at least from assessment year 1968-69 onwards, were on the ground of sale price of the machinery having been shown and yet income under s. 41(b) , being balancing charge, being allowed and escaping assessment because cost price of this machinery was not disclosed in the relevant return. Consequently, not only deemed income by way of balancing charge under s. 41(2) had escaped assessment but also capital gains had escaped assessment and in the light of these factors the written down value for the assessment years 1968-69 onwards was required to be increased in the light of what was ordered in respect of assessment years 1966-67 and 1967-68.

In the petition the main ground of challenge is that all primary facts which the petitioner-company was required to disclose were in fact disclosed by the petitioner-company. Nothing was kept back and if because of some audit objection or audit note the ITO thought that he had made a mistake or that he had allowed extra shift allowance in a large amount by way of that allowance, then, the fault

was of the ITO who passed the original assessment order and it was not because of any omission or failure on the part of the petitioner-company that extra shift allowance came to be granted in a larger amount.

Under s. 147(a) , if the ITO has reason to believe that, by reason of the omission or failure on the part of the assessee to make a return under s. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for the assessment for that year, he may, subject to the provisions of ss. 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. All that we are required to find out as a condition precedent for the exercise of power under s. 147(a) in the instant case in whether there was any failure or omission on the part of the petitioner-company to disclose fully and truly all material facts necessary for the assessment for the assessment years for which the assessment is sought to be reopened.

In the affidavit-in-reply filed by the first respondent it has been clearly stated in para. 6(d) that the petitioner-company claimed depreciation allowance including extra shift allowance on the written down value and submitted the statement showing the amount of depreciation claimed. The original orders of assessment for the relevant assessment years were made allowing the depreciation as claimed. But, according to the first respondent, the filing of the statement was not sufficient. The pointed attention of the ITO may not have been drawn and hence the claim was allowed. It was not shown that the depreciation statement was fully checked by the ITO concerned and after applying his mind the claim was allowed. In para. 6(e) of the affidavit-in-reply it has been stated that it was true that during the proceedings for the assessment year 1971-72, the ITO received an objection from the audit section of the I.T. department in respect of the extra shift allowance granted to the petitioner-company for the relevant assessment years. It was also true that for the assessment year 1971-72, the claim of the petitioner for extra shift allowance on the amount of Rs. 5,00,000 was disallowed. In para. 6(h) of the affidavit-in-reply it has been stated that in answer to a demand from the chartered accountant of the petitioner for being furnished with the reasons which formed the basis of the impugned notice, the petitioner was informed that the assessments were reopened under s. 147(a) of the Act, on the ground that particulars regarding the claim of depreciation (extra shift allowance) were not accurately furnished by the petitioner. It has been pointed out under para. 6(1) that capital gain as well as profit under s. 41(2) had escaped assessment so far as assessment years 1966-67 and 1967-68 were concerned and in that paragraph what has been stated in the letter of January 27 is reiterated. According to para. 6(1) of the affidavit-in-reply, it was submitted that the action of initiation of reassessment under s. 147(a) was perfectly legal, valid and binding on the petitioner. According to the first respondent, no doubt the attention of the ITO was drawn by an audit objection and that the reassessment was not pressed under s. 147(b) of the Act and it was contended that though there were different provisions for reopening the assessment under ss. 147(a) and 147(b) , the scope was not mutually exclusive and it was contended that the revenue would be entitled to invoke either or both of the said provisions subject to the conditions laid down therein being satisfied. According to the first-respondent, per para. 6(1), the petitioner did not disclose true and full particulars of depreciation and though the statement was filed, the attention of the ITO was not drawn to the fact that electrical machinery was not eligible for depreciation except for electric motors. In para. 6(m) of the affidavit-in-reply it was contended that if the attention of the ITO was

not drawn to the fact that electrical machinery did not qualify for allowance of depreciation (extra shift allowance), the action under s. 147(a) could be validly taken.

Thus, the affidavit-in-reply makes it clear that the proceedings were initiated after an audit objection by the audit section of the I.T. department and consequently the proceedings were sought to be taken under s. 147(a) because the pointed attention of the ITO was not drawn at the time of the original assessment to the fact that part of the electrical machinery only was confined to electrical motors and that the entire amount of Rs. 7,00,000 did not pertain to electric motors. It is to be borne in mind that in the original assessment orders for the relevant years, the ITO had noted that depreciation as per the statement was checked and that it was after going through the accounts and statements furnished by the assessee that the total income of the assessee was assessed and that shows that depreciation was checked and the same statement is to be found in the original assessment orders for each of the six orders under consideration before us. Hence, it is obvious that depreciation was being checked from the statements furnished by the assessee along with the return for each of the assessment years under consideration.

We may point out that in Ahmedabad Cotton Mfg. Co. Ltd. v. Union of India [1974] 95 ITR 639 (Guj), the question of obligation of the ITO in connection with depreciation allowance was considered and relying on the observations of the Supreme Court in Maharana Mills (P.) Ltd. v. ITO [1959] 36 ITR 350, the observations being at page 357, it was held that the method enjoined for the purpose of ascertaining the written down value while granting depreciation allowance was that the ITO should take into consideration the actual cost determining it for himself, if necessary, taking into consideration the allowance granted in the past and then make his own computation as to the written down value for the assessment year with which he was concerned. Hence, it was obvious that if the ITO who passed the assessment order as in the case of the petitioner-company in that case at the time of the original assessments for the assessment years 1962-63 and 1963-64, had followed that method which was enjoined upon him and had taken into consideration the actual cost determining it for himself if necessary and had taken also into consideration the allowances granted in the past (inclusive of the initial allowance) and then had made his own computation as to the written down value for the assessment year with which he was concerned, it was obvious that no excess depreciation allowance would have been granted by him. Thus, even if the assessee furnishes his statement regarding depreciation, it is for the ITO concerned and that duty is enjoined upon him under the provisions of the Act, to work out the correct figure of depreciation for himself starting from the actual cost and, if necessary, work out the actual cost for himself and then working out the depreciation allowance granted in the past and then arrive at the computation for the depreciation allowance for the particular assessment year with which he was dealing at the moment. If he has not done so, then, he has to thank himself. If all the figures which would enable the ITO to arrive at the correct amount of depreciation have been furnished by the assessee, the rest has to be done by the ITO himself and to say that the pointed attention of the ITO at the time of the original assessment was not drawn to this or that particular feature is no ground for reopening the assessment. In Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC), the Supreme Court held that when an ITO relies upon his own records for determining the amount of depreciation allowance to the assessee and makes a mistake in doing so, responsibility for that mistake cannot be ascribed to an omission or failure on the part of the assessee and it was further held that where for certain items

the ITO lost sight of the fact that the aggregate of the depreciation, including the initial depreciation allowed under the different heads, could not exceed the original cost to the assessee of those items of capital assets, the assessee could not be held responsible for the remissness on the part of the ITO in no applying the law contained in prov. (c) to s. 10(2)(vi) of the Indian I. T. Act, 1922, and it could not be said that excess depreciation, allowed because of the mistake in calculation of the depreciation, was allowed and income escaped assessment because of the assessees omission or failure to disclose fully and truly all material facts and no action can be taken for reopening the assessment under s. 147(a) of the I.T. Act, 1961, on the basis of the detection of that mistake alone after the expiry of four years from the end of the assessment year. At page 7 of the report, Khanna J., speaking for the Supreme Court, observed :

"Clause (a) of section 147 of the Act of 1961 corresponds to clause (a) of sub-section (1) of section 34 of the Act 1922. The language of clause (a) of section 147 read with sections 148 and 149 of the Act of 1961 as also the corresponding provisions of the Act of 1922 makes it plain that the two conditions have to be satisfied before the Income-tax Officer acquires jurisdiction to issue notice under section 148 in respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year, viz., (i) the Income-tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and (ii) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee (a) to make a return under section 139 for the assessment year to the Income-tax Officer, or (b) to disclose fully and truly material facts necessary for his assessment for that year. Both these conditions must co-exist to confer jurisdiction on the Income-tax Officer. It is also imperative for the Income-tax Officer to record his reasons before initiating proceedings as required by section 148 (2). Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice. The duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax Officer with regard to the inference which he should draw from the primary facts."

and it was point out from the decision in Calcutta Discount Co.s case [1961] 41 ITR 191 (SC), that once all the primary facts were before the assessing authority, he required no further assistance by way of disclosure. It was for him to decide what inferences or facts could be reasonably drawn and what legal inferences have ultimately to be drawn. It was not for somebody else-far less the assessee-to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often different as regards what inference should be drawn from given facts, it would be meaningless to demand that the assessee must disclose what inferences-whether of facts or law he should draw from the primary facts. At page 10, Khanna J. further observed :

"It has been said that the taxes are the price that we pay for civilization. It so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that laps of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as the income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment."

In Gemini Leather Stores v. ITO [1975] 100 ITR 1, the Supreme Court has dealt with the problem of s. 147(a) and there the fact as were that in the proceedings for the original assessment of the appellant-firm, though the appellant did not disclose certain transactions evidenced by certain drafts, the officer himself discovered the facts relating thereto but by oversight did not bring the amounts represented by the drafts to tax as the income of the appellant. Subsequently, the ITO issued a notice under s. 147(a) of the I.T. Act, 1961, with a view to assess the amounts as the appellants income from undisclosed sources. On a writ petition filed by the appellant, the High Court held that the ITO did not apply his mind to the question whether the amounts could be treated as part of the total income of the appellant and as the appellant did not disclose the source of those amounts which were not recorded in the account books, all the conditions for invoking the jurisdiction under s. 147(a) were present. Reversing the decision of the High Court, the Supreme Court held that after discovery of the primary facts relating to the transactions evidenced by the drafts it was for the officer to make the necessary inquiries and draw proper inferences as to whether the amounts represented by the drafts could be treated as part of the total income of the appellant. That the officer did not do. It was plainly a case of oversight and it could not be said that income chargeable to tax had escaped assessment by reason of the omission or failure on the part of the appellant to disclose fully and truly all material facts. He could not, therefore, take recourse to s. 147(a) to remedy the error resulting from his own oversight. In view of these two decisions of the Supreme Court in Gemini Leather Stores case [1975] 100 ITR 1 (SC) and the other in Parashuram Pottery Works case [1977] 106 ITR 1 (SC), it is clear that even if the extra shift allowance as part of depreciation allowance was wrongly allowed in the assessment years under consideration such extra shift allowance resulted from the omission on the part of the ITO himself to check correctly and interpret correctly the legal provisions and work out the correct figure of extra shift allowance permissible on the facts of this particular case. If any large amount had been allowed in the past, it was because of the mistake on the part of the ITO concerned, when he passed the original assessment orders. As the original assessment orders go to show, during each year it appears that the statement was checked and the amounts were discussed and the statements of account were scrutinised and thereafter the ITO passed orders of assessment. Under these circumstances, it was not for the assessee to draw what is called "pointed attention" of the ITO to the fact that extra shift allowance was being claimed on all electrical machinery and not merely electric motors. In any event, we are not concerned in the present proceedings with the merits or otherwise of the

contentions as to whether the extra shift allowance could be claimed on the entire amount of Rs. 7,00,000 or only on the amount of Rs. 2,49,100, that being the value of electric motors used as part of textile machinery but ultimately, even if any mistake was committed it was because of an error on the part of the ITO in drawing the correct inference from the facts and law on the primary facts placed before him by the assessee and it cannot be said that there was an omission or failure on the part of the assessee to place primary facts or to disclose primary facts before the ITO. Under these circumstances, it is obvious that on the ground of extra shift allowance which was part of depreciation allowance allowed in the assessment years under consideration, it was not open to the ITO to seek to reopen the earlier assessment orders on the ground that there was an omission or failure on the part of the assessee to disclose truly and fully all material facts relating to those relevant assessment years.

As regards the item of balancing charge and capital gains flowing from the sales which were effected in the previous years relevant to the assessment years 1966-67 and 1967-68, it must be pointed out that the entire concept of balancing charge under s. 41 (2) turns upon the concept of depreciation allowance. It is because of the depreciation allowance granted in the previous years and the written down value being taken into consideration in the light of those earlier depreciation allowance that when the buildings, plant and machinery are sold on which depreciation was allowed in the past, the difference between the original cost and the written down value is treated as income under s. 41(2) by way of balancing charge. De hors or apart from the depreciation allowance, the concept of s. 41(2) does not exist and if any mistake occurred in depreciation allowance even in respect of these machineries which were sold, it cannot be said that the original cost of the seven Bowl Calender Machines which were sold in assessment year 1966-67 was Rs. 70,000 and the original cost of the Singeing Machine which was sold in the previous year 1967-68 was Rs. 84,000. In these facts were available on the record of the ITO at the time when he issued the notices on January 27, 1976, it was an omission on his part at the time when he passed the original assessment orders for 1966-67 and 1967-68, not to have ascertained from his own record what the cost was in respect of these pieces of machinery which were sold and not to have worked out the correct written down value and not to have worked out the correct balancing charge and also capital gains in respect of the seven Bowl Calender machines and the Singeing Machine in question. As pointed out earlier in the course of this judgment from the case of Ahmedabad Cotton Manufacturing Co. [1974] 95 ITR 639 (Guj), it is enjoined upon the ITO to work out the written down value for himself from his own record by consulting his own record if necessary and he cannot say that because he committed a mistake in the past in working out the correct written down value and on that basis the balancing charge under s. 41(2) , he can reopen the assessment under s. 147(a). In view of the decision of the Supreme Court in Parashuram Potterys case [1977] 106 ITR 1 (SC) and the decision of this court in Ahmedabad Cotton Manufacturing Co.s case [1974] 95 ITR 639 (Guj), it is obvious that even on the ground of s. 41(2) and on the ground of capital gain, it is not permissible for the ITO to reopen the assessment because in the past he accepted the statement of the petitioner-company at the time of the relevant assessment that the cost of the respective pieces of machinery which were sold in the relevant years was not available. We find from the copies which have been annexed to the orders that in the statement of account which were furnished along with the return for the relevant years when the machineries were sold, that it was clearly stated "cost not ascertained" and that statement was accepted even after checking up by the ITO concerned when he passed the original orders of

assessment. If the ITO was remiss in not ascertaining the correct cost though it was available from his own record and could have been available from his record because he had to work out the cost for the purposes of depreciation allowance in the manner enjoined upon him by the I.T. Act, the assessee cannot be sought to be held liable on the ground of failure on his part to disclose fully or truly all the relevant facts.

On neither ground, therefore, on which reliance was placed in the letter of January 27, 1976, as grounds for reopening the assessment for the six years under consideration, was it open to the ITO to resort to the provisions of s. 147(a) and issue notices under s. 148. Since the condition precedent for the exercise of jurisdiction for reopening the assessment was not satisfied in respect of any of the years for which the notice were issued, this special civil application must be allowed and each of these notices, annex."E", collectively to the petition, must be quashed and set aside. This special civil application is allowed accordingly. Notices, annex."E", are quashed and set asides. Rule is made absolute accordingly. The respondents will pay the costs of this petition to the petitioner.