(2009) 03 CAL CK 0052

In the Calcutta High Court

Case No : G.A. No. 507 of 2009 with W.P. No. 453 of 2007

Anand Kumar Arya and Another APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 12-03-2009

Acts Referred:
Income Tax Act, 1961 — Section 127, 127(1), 127(2), 127(3)

Citation : (2009) 314 ITR 324

Hon'ble Judges : Soumitra Pal, J

Bench : Single Bench

Advocate : Sakya Sen and P. Saha, for the Appellant;I.P. Mukherjee and F. Ghaffer, for the Respondent

Judgement

Soumitra Pal, J.—This writ application was filed by Anand Kumar Arya and Sudarshan Kumar Arya, stated to be working as partners of M/s. Economic Transport Organization (in short "ETO") a registered partnership firm, challenging an order dated January 19, 2007, passed u/s 127 of the Income Tax Act, 1961 (in short, "the Act"), by the Commissioner of Income Tax, Kolkata, XIII, Kolkata, respondent No. 1.

2. The writ petition was moved on May 3, 2007, when an interim order was passed restraining the respondents from transferring the file. Subsequently, directions were issued for filing of affidavits. Affidavits have since been exchanged and are on record. It may be noted that during the pendency of the writ petition, on June 27, 2007, the interim order lapsed.

3. Mr. Sen, learned advocate appearing on behalf of the petitioner, reiterating the statements in the writ petition has submitted that the transfer has been sought to be effected without issuing any notice and without giving an opportunity of hearing as postulated u/s 127 of the Act. Though representations objecting to such transfer were furnished on February 1, 2007, and on April 9, 2007, those were not considered. Since the order of transfer is vague as it merely states that it is for administrative convenience, the impugned order is bad. Moreover, since it

appears from annexure A to the application being G. A. No. 507 of 2009 that the ETO is still assessed at Kolkata, the entire action of transfer of the files of the petitioners who are the partners of ETO is bad in law. With regard to the allegation in paragraph 2(c) of the affidavit-in-opposition, it has been submitted with reference to paragraph 4 of the affidavit-in-reply that since the residence of Sudarshan Kumar Arya, petitioner No. 2, was not searched, the allegation is incorrect. Reliance has been placed on the judgment in W.P. No. 1657 of 2006, Kumar Kumar and Brothers and Another Vs. Union of India (UOI), in support of his submission.

4. Mr. Mukherjee, learned advocate appearing on behalf of the respondents, supporting the order dated January 19, 2007, has submitted that a search was conducted in one of the organisations in Mumbai. After search, in exercise of the powers conferred by the notification issued by the Central Board of Direct Taxes, New Delhi, regarding centralisation of search cases, appearing at page 31 of the affidavit-in-opposition, the files of the petitioners were transferred. By the said notification an exception has been carved out and since centralisation has been made in Central charge and respondent No. 1 was under an obligation, since no useful purpose would have been served by giving an opportunity of hearing, compliance with the formalities u/s 127 of the Act was dispensed with. The submission is since files have been transferred to Mumbai, the petitioners are at liberty to apply before the authorities at Mumbai for retransfer of the files from Mumbai to Kolkata. The submission has been made that since interim order lapsed and transfer has already been effected, no order may be passed. In this regard, reliance has been placed on paragraphs 7, 8, 9 and 10 of the judgment of the hon''ble apex court in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, in support of his submissions.

5. In order to appreciate the issue, it is appropriate to refer to the relevant portion of the impugned order dated January 19, 2007, which is as under:

In exercise of the power conferred upon me by Sub-section (2)(a) of Section 127 read with Sub-section (3) of Section 127 of the Income Tax Act, 1961, and of all other power enabling me on this behalf, I, the Commissioner of Income Tax, Kolkata-XIII, Kolkata, hereby transfer the case(s) particulars of which are mentioned in columns 2 and 3 of the schedule herein below from the Assessing Officer mentioned in column 4 to the Assessing Officer mentioned in column 5 thereof. This order has been passed for administrative convenience.

Schedule
-- Sl. Name and address P.A. No. From To No. of the assessee -- 1 2 3 4 5 -- 1. Anand Kumar Arya ADKPA8359 ITO, ACIT, 11 Ward-37(3) Central Circle 17, Kolkata Mumbai 2. ... ...

3. Sudarshan Kumar ADLPA4430 ITO, ACIT, Arya A Ward-37(4) Central Circle 17, Kolkata Mumbai 4. ... ... 5. ... ... ---

This order will take immediate effect.

Commissioner of Income Tax, Kolkata-XIII, Kolkata.

(emphasis supplied)

6. I find that the order of transfer of the files of the petitioners was passed for "administrative convenience". Admittedly, prior to the order of transfer no notice to show cause was issued. No opportunity of hearing was granted. Section 127(1) of the Act postulates that a "reasonable opportunity" of hearing is to be granted to the assessee "wherever it is possible to do so" and reasons for such transfer should be recorded. Significantly, there is no such requirement in Section 127(3) in the case of intra city transfer. In the instant case, since no opportunity of hearing was granted to the petitioners, the order of transfer transferring the files from Kolkata to Mumbai, an intra city transfer, does not satisfy the parameters under the said section. The facts, in the instant case, are similar to the facts in Kumar Kumar and Brothers and Another Vs. Union of India (UOI), wherein prior to transfer of the case from Kolkata to Mumbai no hearing was granted. Moreover, there is nothing on record to show why there was denial of such opportunity. So far as recording of reasons is concerned, I find the order of transfer has been passed for "administrative convenience". In my view, merely stating that the transfer is for "administrative convenience" does not fulfil the criteria of recording of reason. Since law and not a notification should prevail, the submission of the respondents that the transfer was in accordance with the Notification dated August 14, 2002, issued by the Central Board of Direct Taxes cannot be supported as transfer has to be on the basis of Section 127. Further, the argument of the respondents that the transfers were for "effective and co-ordinated investigation", evident from the letter dated April 7, 2006, issued by the Deputy Director of Income Tax (Inv.) Unit-VII (2), Mumbai, (pages 26 - 28 of the affidavit-in-opposition), has been set at naught by the order dated March 13, 2008, issued by the Chairman, Income Tax Settlement Commission (page 20 of the application being G. A. No. 507 of 2009) directing transfer of the files of the petitioners from Additional Bench Mumbai to Additional Bench Kolkata. Besides, since it is evident from pages 14,15 and 16 of the said application, ETO of which the petitioners are the partners, is still assessed at Kolkata, the argument that the transfer is for centralisation is without merit.

7. So far as the judgment in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, , relied on by the respondent is concerned, I find that it has been held that "each case will have to be considered on its own facts." In the instant case, since the petitioners, after being served with the impugned order dated January 19, 2007, had furnished two representations dated February 1, 2007, and April 9, 2007, and had filed this writ petition on April 9, 2007, in my

view, there was no delay on their part in moving the writ petition. Regarding the inconvenience to the respondents in retransferring the files as I find that the entire exercise of transfer of the files was not in accordance with the provisions contained in Section 127 of the Act, the argument is without merit.

8. It is to be noted that the respondents have tried to justify the order of transfer by supplementing reasons in their affidavit-in-opposition. In my view, the validity of an order has to be judged from the order itself. If the affidavit filed by the respondents justifying the reasons for such transfer is accepted, then the order of transfer which is not within the parameters of Section 127 may get validated by the additional grounds later brought by way of affidavit which, in my view, cannot be done. Therefore, the writ petition is allowed. Hence, the order of transfer dated January 19, 2007, is set aside and quashed. Consequential proceedings are also quashed. The application is also disposed of accordingly. Respondent Nos. 1, 2, 3, 4 and 5 are directed to transfer the files of the petitioners from Mumbai to Kolkata forthwith.

9. No order as to costs.

10. Learned advocates for the parties are permitted to take down the gist of this order for communication and the respondents shall act on the basis of such communication.

11. Urgent photostat certified copy of this order, if applied for, be furnished to the appearing parties on priority basis.