

(2004) 11 MP CK 0073

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1739 of 1997 , 17 November 2004

Arihant Builders, Developers and Investors (P) Ltd.

APPELLANT

Vs

ITAT

RESPONDENT

Date of Decision : 17-11-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 143, 255

Citation : (2005) 144 TAXMAN 121

Hon'ble Judges : S.K. Seth, J

Bench : Division Bench

Advocate : P.M. Choudhary, for the Petitioner and R.L. Jain and Ms. Veena Mandlik,, for the appearing parties;

Judgement

In this writ petition under article 226/227 of the Constitution of India, the petitioner is assailing by the order dated 22-8-1997 passed by the Indore Bench of Income Tax Appellate Tribunal in Appeal No. ITA/92/ IND./96. By the order impugned, Tribunal had refused to follow the earlier view taken by it. Facts relevant for the disposal of this case are as under:

2. The petitioner is engaged in the construction work. For the assessment year 1991-92, it had filed its return. The assessing officer framed the assessment u/s 143 and ordered the refund u/s 143(1)(a)(ii). Therefore, the assessee's officer issued a notice u/s 143(2). The assessee raised the contention that once an assessment is framed and refund is ordered, then no notice could be issued u/s 143(2). That contention is repelled by the assessing officer. The matter was taken in the appeal by the assessee in the CIT Appeals which too maintained the order of the assessing officer. Against the said order, petitioner preferred further appeal before the Tribunal, Indore Bench. By the order dated 19-7-1994, the Tribunal accepted the contention of the assessee and categorically held that once an assessment is framed and refund is ordered then, no notice could be issued u/s 143(2). It is pertinent to point out that against the said order, revenue sought

and the Tribunal made a reference to this court u/s 256(1). The reference was registered as M.C.C. No. 103 /1995. The M.C.C. came up for hearing on 23-8-1996. Since nobody appeared on behalf of the revenue, therefore, the Division Bench declined to enter upon the merits and dismissed the reference application in default of appearance.

3. For the assessment year 1992-93, the petitioner/assessee filed its return of income. After the summary scrutiny, the assessment was framed and like previous year and refund was ordered. It is undisputed that after the refund was ordered, the department issued notice u/s 143(2). Once again, the assessee raised the objection that notice u/s 143(2) was invalid and in support of his contention, assessee relied upon the decision of the Tribunal given in its appeal for the previous year as mentioned hereinabove. The assessing officer vide his assessment order dated 13-2-1995 framed the assessment ignoring the earlier order of the Tribunal on the ground that the view taken by the Tribunal was not acceptable to the department as a reference was made. The assessing officer thus framed the assessment u/s 143(3). Against the said order, an appeal was preferred by the assessee before the CIT (A), but in vain. It is also pertinent to point out that when the appeal was pending before the CIT (A), the Tribunal in another matter of Agrawal Warehousing and Leasing Ltd. (now Admanum Finance Ltd.) Vs. Commissioner of Income Tax, , took a contrary view. The CIT (A) while deciding the appeal preferred by the petitioner, preferred to follow the view taken by the Tribunal in Agrawal Warehousing & Leasing Ltd. instead of earlier view of the Tribunal which was taken in the earlier appeal preferred by the present petitioner. Against the order of the CIT (A), the petitioner once again preferred an appeal before the Tribunal. Thus apparently, two conflicting views on the point whether after the refund a notice u/s 143(2) could be issued or not was before the Tribunal. It was the duty of the Tribunal to take recourse to the provisions contained in section 255(4) to resolve the apparent conflict. Instead of doing so, by the order impugned, the Tribunal although criticized the assessing officer for not maintaining the judicial discipline by following the orders of the higher authorities, held that since in Agrawal Warehousing & Leasing Ltd. case, the Tribunal had taken a decision on the legal point, that legal point was binding on the CIT(A). It was also held by the Tribunal that earlier view taken by the Tribunal would have been binding had there been any dispute on the facts.

4. Shri P.M Choudhary, learned counsel appearing for petitioner, stated that curious and strange reasoning has been adopted by the Tribunal. It was also pointed out by Shri Choudhary that the view taken by the Tribunal in Agrawal Warehousing & Leasing Ltd. has not been approved by this court. When a reference at the instance of assessee was made by the Tribunal seeking the opinion of the court on the 5 questions, this court decided the Question Nos. 1, 2 & 3 in favour of the assessee, but in view of the answers to Question Nos. 1, 2 & 3, declined to answer Question Nos. 4 & 5. The decision of this court in Agrawal Warehousing and Leasing Ltd. (now Admanum Finance Ltd.) Vs. Commissioner of Income Tax, . The question No. 2 which was framed in Agrawal Warehousing &

Leasing Ltd."s case (supra) was as under:

"(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in not allowing the appeal on the preliminary issue regarding binding nature of orders of the Tribunal on lower authorities and instead dismissing the appeal on the basis of the grounds which were raised "without prejudice" to the grounds regarding preliminary issue?" (P 237)

5. That question was answered in favour of the assessee and against the revenue. It was further directed that the matter would go back to the Tribunal for doing the needful in the light of observations made by this Court. Learned counsel for the parties were unable to point out whether any Larger Bench has been constituted by the President to resolve the conflict or not. According to Shri Choudhary, unless and until the conflict is resolved, it was not proper on the part of the Tribunal to take the view which has been taken in the instant case. Shri Choudhary submitted that judicial discipline and propriety demands that the Tribunal should have followed its earlier view instead of following the later view. Shri R.L. Jain, learned counsel appearing for respondents submitted that under the scheme of the Act, the assessing officer has power to frame a regular assessment even though refund may have been ordered. It was also contended that the petitioner had an efficacious alternative remedy of reference and without resorting to that, writ petition deserves to be dismissed in limine. In support of this, Shri Jain has relied upon the decisions of Supreme Court - Commissioner of Income Tax Vs. Gujarat Electricity Board, - Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others, and Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, .

6. I have heard learned counsel for the parties at length. Perused the material available on the record. In the considered opinion of this court, there is no force in the submissions of Shri Jain that the writ petition should be dismissed on the ground of alternative remedy in view of the peculiar facts of the present case. In the present writ petition, a show-cause notice was issued to the respondents on 3-12-1997 on the ground that the Tribunal has committed grave and serious miscarriage of justice. The writ petition was admitted by this court on 5-3-1998 by a bi-party order. The objection which has been raised by Shri Jain was very much available to the respondents when the matter was admitted final hearing. From the order-sheet it appears that no such objection was ever raised at the time of admission. Now, the respondents cannot be permitted to turn around and submit that the petition should be dismissed in limine. Petitioner can not be now relegated to the alternative remedy. In this connection, it would be profitable to refer the decision in Standard Flour & Oil Mills v. State of M.P (1995) 28 VKN 42 wherein this court relying upon the decision of Supreme Court in L. Hirday Narain Vs. Income Tax Officer, Bareilly, repelled the similar kind of contention. Thus, I overrule the objection raised by Shri Jain, learned counsel for respondents.

7. So far as the order of the Tribunal is concerned, Shri Choudhary submitted that in view of the answer given by this court in Agrawal Warehousing & Leasing

Ltd."s case (supra), the appeal preferred by the Agrawal Warehousing & Leasing Ltd., has to be allowed by the Tribunal following the earlier view. But, no such document has been placed on record. As pointed out hereinabove, no order of the Larger Bench has also been placed on record to show as to ultimately what view has been availed by the Tribunal. One of the elementary principles of the judicial administration is that there should be consistency so that litigants are aware as to where they stand if the Courts and Tribunals are allowed to take view like the one in the present case, it would lead to anarchy and total chaos which would be against the judicial propriety and discipline. Thus, the order of the Tribunal suffers from legal infirmity which cannot be allowed to sustain. In view of the aforesaid, it would be in the fitness of things to set-aside the order impugned. Accordingly, the order passed by the learned Income Tax Appellate Tribunal in ITR No. 92/IND./96 relating to the assessment year 1992-93 in the appeal preferred by the petitioner, assessee is hereby set-aside and the learned Income Tax Appellate Tribunal is directed to decide the appeal afresh in accordance with law within a period of three months.

8. in view of the foregoing discussion, writ petition is allowed. However, there shall be no order as to costs.