

(2012) 07 DEL CK 0251

In the Delhi High Court

Case No : ITA No. 331, 332, 333 and 334 of 2012, CM Application 8948, 8949, 8950, 8951 of 2012

Ashian Needles Pvt. Ltd.

APPELLANT

Vs

CIT

RESPONDENT

Date of Decision : 06-07-2012

Acts Referred:

Constitution of India, 1950 — Article 142

Income Tax Act, 1961 — Section 143(3), 147, 253, 253(2), 253(4)

Citation : (2012) 6 AD 416

Hon'ble Judges : S. Ravindra Bhat, J; R.V. Easwar, J

Bench : Division Bench

Advocate : M.P. Rastogi and Mr. K.N. Ahuja, for the Appellant; Sanjeev Rajpal, for the Respondent

Judgement

Mr. Justice S. Ravindra Bhat

CM APPL.8948/2012 (Exemption) IN ITA No. 331/2012 CM

APPL.8949/2012 (Exemption) IN ITA No. 332/2012 CM

APPL.8950/2012 (Exemption) IN ITA No. 333/2012 CM

APPL.8951/2012 (Exemption) IN ITA No. 334/2012

For the reasons mentioned in the applications, the same are allowed subject to just exceptions.

ITA Nos.331/2012, 332/2012, 333/2012 & 334/2012

1. Issue Notice. Mr. Sanjeev Rajpal, Advocate accepts notices on behalf of respondents in all the four appeals. With consent of counsel, the matters were taken up for hearing.

The following substantial question of law arises for determination: (i) Whether the Tribunal committed an error of law in holding that the Appellant's cross-

objections under Section-253 (4) of the Income Tax Act was barred.

The facts necessary for deciding the Appeals are that: - The Income Tax authorities made re-assessments on 28.12.2007. The order was carried in Appeal. The Appellant had objected to the assumption of jurisdiction under Section-147 of the Act by the A.O. and also objected to the addition of certain amounts on merits. The Commissioner of Appeals by order dated 30.04.2009 upheld the order on jurisdiction even while accepting the assessee's appeal on merits. The Revenue appears to have carried the matter in appeal to the ITAT. The assessee did not file any appeal or cross-objections. There is some dispute whether the notice of appeals was in fact received by the appellant. However, the ITAT decided the appeals by its order dated 06.11.2009. Paragraph-4 of the said order noticed that no-one was present on behalf of the assessee in spite of service of notice of hearing. The Tribunal by that order directed remand to the A.O. on the question of consideration of additional evidence relied upon by the appellant. The matter was carried in appeal by the assessee to this Court under Section-260A being ITA Nos.876, 877, 878 and 880/2010. This Court by its order dated 13.07.2010 disposed of the said four appeals. The Court expressly kept open and did not go into the question whether notice of appeals before the ITAT had in fact been served upon the assessee as is evident from the following observations: -

Be it noted, learned counsel appearing for the assessee tried to impress upon us that the notices were not served and, therefore, the order should be deemed to be an ex parte order. As advised at present, we are not inclined to delve into the said issue as we are of the considered opinion that the matter has to be remanded to the tribunal on the other issue

2. This Court's order was a restricted one. In that, the Tribunal was directed to adjudicate the matter afresh on the applicability of Rule-46 (A) and whether in obtaining the factual matrix, the only option was to remand the matter to the Assessing Officer.

3. In the above background, on 18.03.2011, the appellant filed its cross-objection before the ITAT under Section-253 (4) of the Act. It was contended that the ITAT had not issued notice and that the appellant became aware of the pendency of the remitted appeals only upon noticing them in the cause list. The Revenue objected to the cross-objection. By the impugned order dated 21.10.2011, the cross-objections were dismissed. The Tribunal in this regard reasoned as follows: -

10. Before coming to the main issue, we may mention here that after the date of the decision of Hon''ble Delhi High Court, the assessee has filed Cross Objections which are filed on 18th March, 2011 in which it has raised the following grounds: -

1) The order passed u/s 143 (3)/147 of the Income Tax Act, 1961 is without jurisdiction.

2) It is contended that there are no materials available with the A.O. to form "reason to believe" that the income has escaped assessment as per the provisions of Section 147 of the IT Act.

3) The order u/s 143 (3)/147 of the IT Act having been passed on the dictates of the investigation Department, based on the investigation report, there is no independent application of mind by the A.O. to form "reason to believe" that income has escaped assessment.

11. The aforementioned grounds of Cross Objections are identical in respect of all the years involved. At this stage, it may be mentioned that validity or otherwise of re-assessment proceedings has never been a question before the Tribunal. From the decision of Hon"ble High Court also it does not appear that validity of re-assessment proceedings was ever an issue raised by the assessee. In any case, the appeals filed by the revenue are fixed for hearing by the Tribunal to give effect to the directions of Hon"ble High Court (Reference to Section 260 (1) of IT Act, 1961). Therefore, in our humble opinion our jurisdiction is limited only to the directions given by Hon"ble High Court and no new issue can be considered at this stage. In this view of the matter, we find no justification in the argument of learned AR who supported the Cross Objections on the ground that the assessee did not get any opportunity to raise such issue. We also do not find any force in the argument of Id. AR who made reference to Rule 27 of ITAT Rules, as it has already been mentioned that the scope of the decision of the Tribunal in departmental appeal is limited to carry out of the directions of Hon"ble High Court which are only with regard to deciding an issue that in the factual matrix whether it is only the option available with the Tribunal to remit the matter to the AO.

12. Apart from above, by filing the Cross Objections after the decision of Hon"ble High Court, the assessee intends to act against the well settled proposition of law according to which what cannot be done "per directum" is not permissible to be done "per obliquum" meaning thereby whatever is prohibited by law to be done, cannot legally be effected by an indirect or circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud". Applying the above principle, we hold that relief sought by the assessee through CO cannot be given in law. Such proposition of law is supported by following judicial pronouncement: -

In Jagir Singh Vs. Ranbir Singh and Another, the Apex Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance". While deciding the said case, the Supreme Court placed reliance on the judgment in Fox v. Bishop of Chester (1824) 2 B&C 635, wherein it has been observed as under (page 384):

To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do so, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined.

Law prohibits to do something indirectly which is prohibited to be done directly. Similar view has been reiterated by the Apex Court in *M.C. Mehta v. Kamal Nath*, AIR 2000 SC 1997, wherein it has been held that even the Supreme Court cannot achieve something indirectly which cannot be achieved directly by resorting to the provisions of article 142 of the Constitution, which empowers the Court to pass any order in a case in order to do "complete justice". "(pp.477 and 478 of the report)".

13. Moreover, in Form No. 36A, i.e., form for filing Cross Objection in the Tribunal, in column No. 5 where the appellant is required to furnish the date of receipt of notice of appeal, the assessee has written "no notice received." On perusal of the monthly cause list made available by the ITAT Bar on 7th March, 2011, the respondent became aware of the fixation of the revenue's appeal. The cross objections can be filed either by the revenue or by the assessee as per provisions of Section 253 (4) which read as under: -

Appeals to the Appellate Tribunal.

253. (1)...

(2).....

(3).....

(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) has been preferred under sub-section (1) or sub-section (2) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof; within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

14. As it can be seen from the aforementioned provision, the cross objections can be filed within 30 days on receipt of notice fixing the hearing of the appeal by the other party irrespective of the fact that whether or not the appeal has already been filed against the said order. For that purpose the notice of hearing should be in the appeal which is preferred under sub-section (1) or sub-section (2) of Section 253 and sub-section (1) of Section 253 gives an authority to the assessee to prefer an appeal against the order inter alia passed by the Commissioner of income tax (Appeals). Similarly, sub-section (2) of Section 253 authorize an appeal to be filed by the Commissioner if he is aggrieved with the order inter alia passed by the CIT (A). The impugned appeals are filed by the revenue and notice of hearing by the Tribunal was not on account of hearing of the appeals filed u/s 253 (2), but, it was on account of the directions given by Hon"ble High Court. The relevant date of receipt of notice of appeal will be in

respect of original hearing when the appeals of revenue were decided by the Tribunal vide order dated 6th November, 2009. Fixing of appeal in pursuance of directions of Hon''ble High Court does not give right to the assessee to file cross objections as this right is available only when the appeal is fixed for hearing by the Tribunal of the other party in respect of an appeal filed before the Tribunal. Therefore, also the cross objections filed by the assessee cannot be considered at this stage. The assessee was an appellant before the Hon''ble High Court, therefore, the assessee was well aware of the proceedings before the Hon''ble High Court vide which appeal was fixed on 13th July, 2010 and the jurisdiction of the Tribunal is limited on that issue. Therefore, whatever has been raised by the assessee through cross objections is not admissible.

4. It was urged that in the absence of any communication as to whether notice for appeal had been issued either in the first instance or after the remission, the Tribunal could not have held as it did in the impugned order, that the cross objection was not maintainable. Learned counsel for the appellant stressed the fact that the right to file cross-objections is available even beyond the period of time as is evident from the textual reading of Section-253 (5) of the Act.

5. Learned counsel for the Revenue contended that the assessee's cross objections were correctly rejected. He relied upon the previous judgment of this Court and submitted that it was restricted in character, i.e., as to the applicability to Rule-46 (A) and whether remission was the only course available having regard to the circumstances.

6. We are of the opinion that the Tribunal could not have rejected the cross-objections without entering into the factual matrix and being satisfied itself that the appellant had not in fact filed cross-objections at the time when it could have originally when the appeals had been filed before the ITAT. This is evident from a reading of this Court's order in ITA Nos.876, 877, 878 and 880/2010 particularly the extract reproduced above where the issue of whether notice was issued was left open. Furthermore, the impugned order itself appears to have proceeded on the assumption that the assessee did not choose to file cross-objections despite service of notice. The assessee's argument here is that notice in fact was not served even after remand from this Court and that the cross-objection was filed since the pendency of appeals was noticed. We also are of the opinion that the Tribunal could have examined whether the cross objections could be entertained in the facts and circumstances of the case having regard to the independent power to entertain them contained under Section-253 (5) of the Act.

7. For the above reasons, we are of the opinion that the impugned orders cannot be sustained; they are hereby set aside. The cross-objections of the assessee shall be considered. It is open to the Tribunal to examine whether there was any delay in filing of the appeal and if so, whether the same can be condoned. The cross-objections shall be considered after giving due notice to the parties and permitting the appellant to raise such contentions including filing such affidavits as regards the issue of delay as may be necessary in the circumstances of the

case. ITA Nos.331/2012, 332/2012, 333/2012, and 334/2012 are allowed to the above extent.