(2007) 01 CAL CK 0012

In the Calcutta High Court

Case No : A.P.O. No. 360 of 2006 with W.P. No. 1988 of 1996

CESC Ltd. and Another APPELLANT

Vs

Income Tax Officer (TDS) and Others RESPONDENT

Date of Decision : 03-01-2007

Acts Referred:

Income Tax Act, 1961 — Section 120(1), 120(2), 131, 131(1), 131(3)
Limitation Act, 1963 — Section 14

Citation : (2007) 211 CTR 343 : (2007) 290 ITR 237 : (2007) 162 TAXMAN 156

Hon'ble Judges : Sankar Prasad Mitra, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Debi Prosad Pal, P.K. Pal and Manisha Seal, for the Appellant; Dipak Shome and Ramesh Kr. Chowdhary, for the Respondent

Judgement

1. The appellant is an assessee under the Income Tax Act, 1961. The appellant employs several persons in employment. u/s 206 of the said Act of 1961 the appellant is bound to deduct tax at source from the respective employees on the basis of their estimated salary income. It is the case of the appellant that they duly deducted at source the tax from the respective employees out of their salary income on tentative basis and deposited the same with the appropriate authority and submitted Form No. 24 as required for the said purpose.

2. The Central Government for the purpose of looking after the mode of recovery through tax deduction at source from time to time by notification entrusted several officials who are usually called as Income Tax Officer (TDS). As per a 1989 circular officers were appointed for the said purpose. There had been a further circular in this regard in 1996 which was almost identical to the 1989 circular as there was no change in respect of the subject controversy. However, in 1999 the Central Government issued a further circular by which the TDS officials were also empowered to make queries from the employer u/s 131 which was usually the power of the Assessing Officer. Such power was not expressly given by the Central Government prior to 1999.

3. In the early part of 1990s the TDS officials after receipt of Form No. 24 from the appellant raised several queries which were replied to by the appellant. However, the officials were not satisfied with the explanations and went on making further queries on the subject issue which gave rise to the present litigation.

4. The appellant filed the instant writ petition in 1996 challenging the authority and propriety of the tax deducted at source officials to make such queries which was otherwise entrusted to the Assessing Officers. It was the case of the appellant before the learned single judge (C.E.S.C. Ltd. Vs. Income Tax Officer,), that the power so enjoyed by the Assessing Officers u/s 131 was not given to the TDS officials and as such the queries made by the TDS officials were without jurisdiction.

5. This Court passed interim orders from time to time. The matter was ultimately heard by the learned single judge on March 9, 2004 (see C.E.S.C. Ltd. Vs. Income Tax Officer,), when his Lordship dismissed the writ petition after considering the 1989 circular and 1999 circular which by this time came into force.

6. Being aggrieved by and dissatisfied with the judgment and order of the learned single judge (see C.E.S.C. Ltd. Vs. Income Tax Officer, , the appellant preferred the instant appeal. The appeal was heard by us yesterday.

7. On a perusal of the judgment and order under appeal we find that before the learned single judge it was contended on behalf of the Revenue that the 1999 circular was issued as and by way of clarification. The power so enjoyed by the Assessing Officers u/s 131 was already with the TDS officials. In support of such contention the Revenue relied on two Division Bench decisions, one of this Court reported in Reckitt and Colman of India Ltd. and Another Vs. Assistant Commissioner of Income Tax (TDS) and Others, and the other of the Allahabad High Court reported in Peerless General Finance and Investment Co. Ltd. and Another Vs. Assessing Officer and Others, .

8. In the case of Reckitt and Colman of India Ltd. and Another Vs. Assistant Commissioner of Income Tax (TDS) and Others, the Division Bench considered an identical controversy where the 1999 circular was very much in force. The Division Bench considering the 1999 circular held that TDS officials were duly empowered to make queries u/s 131. In the case of Peerless General Finance and Investment Co. Ltd. and Another Vs. Assessing Officer and Others, the Allahabad High Court, however, considered an issue prior to issuance of the circular of 1999. The Allahabad High Court held that since the Commissioner of Income Tax had designated the Assessing Officer, Kanpur, as TDS official, he had requisite jurisdiction u/s 131 to make queries with regard to Form No. 24. The Allahabad High Court judgment in the case of Peerless General Finance and Investment Co. Ltd. and Another Vs. Assessing Officer and Others, was subsequently set aside by the apex court. The relevant extract of the apex court

decision is quoted below:

Being aggrieved by the actions taken by the Assessing Officer, the appellants challenged the notices issued as well as the orders of impounding documents before the High Court. The appellants urged two grounds. First, they contended that the Assessing Officer Ward III(9), (TDS), Kanpur, was not ''the Assessing Officer'' of the appellants within the meaning of Section 2(7A) of the Act who could only be the concerned officer in Kolkata ; therefore, the Assessing Officer at Kanpur had no jurisdiction u/s 131. Secondly, it was contended that, in any event, assuming there was jurisdiction, the notices issued and the orders passed were wholly beyond the scope of Section 131 as also not in compliance with the requirements thereof. The High Court negatived both contentions. Aggrieved thereby, the appellants are before this Court.

Though learned Counsel for the appellants canvassed for considerable time the issue of jurisdiction, after having perused the different notices and orders under challenge, we are of the view that the appellants are entitled to succeed on the second point. The issue of jurisdiction, therefore, need not be gone into in depth and decided in this appeal as it is unnecessary. Though learned Counsel appearing for the Revenue also had a number of arguments to address on the issue of jurisdiction, in the facts and circumstances of the case, we feel that the issue of jurisdiction need not be decided and can be kept open to be decided in any other more appropriate case as the appellants are, in any case, entitled to succeed on the second point, even if we assume that the Assessing Officer in Kanpur had jurisdiction to issue the impugned summons and orders u/s 131.

Section 131 empowers the Assessing Officer to exercise the issue contemplated by Clauses (a), (b), (c) and (d) of Sub-section (1) ''for the purposes of the Act''. Sub-section (3) of Section 131 empowers the Assessing Officer to impound and retain in his custody the documents produced ''in any proceeding'' under the Act. We shall, for the purpose of this appeal assume that the returns filed u/s 206 and whatever limited role is assigned to the prescribed authority thereon amounts to a proceeding under the Act. Even then, the order of impounding can only be made for reasons recorded, as indicated by Clause (a) to the proviso of Sub-section (3). The order of impounding made by the Assessing Officer singularly lacks any reasons and for that reason alone illegal.

Secondly, the powers u/s 131(1) are to be used ''for the purposes of the Act'' and, therefore, the documents with regard to which the powers are exercised must be relevant to the functions which the prescribed authority is required to discharge u/s 206 of the Act. Though Mr. V. Gauri Shankar, learned senior counsel for the Revenue, attempted to impress upon us, by reference to Circular No. 285 dated October 21, 1980, issued by the Central Board of Direct Taxes that the function assigned to the prescribed authority u/s 206 is much larger than what the appellants contend, we refrain from going into this for the reason that this circular was not placed before the High Court, nor were arguments based thereupon addressed to the High Court and the High Court did not have the benefit of these aspects of the submissions sought to be made before us. Nor is there anything in the impugned orders/summons to show that there was advertance of mind to what is contained in the circular issued by the Central Board of Direct Taxes.

Learned counsel for the appellants contends that if the judgment of the High Court is not set aside, they would be precluded from raising the issue of jurisdiction of the prescribed authority because of the binding judgment of the Division Bench of the High Court. This grievance need to be accepted and suitably redressed.

In the result, we set aside the judgment of the High Court under appeal and quash the orders/summons collectively at exhibit P-1 to the appeal memo making it clear that the Assessing Officer, Ward 3(9) TDS, Kanpur, shall be free to exercise his powers u/s 206 read with Section 131 only for the purpose of discharging his functions u/s 206 of the Act and subject to the restrictions and conditions prescribed in Section 131 and also subject to the documents and other books of account being relevant to his functions required to be discharged u/s 206 of the Act.

It is preferable that the Central Board of Direct Taxes or the Central Government lays down clear guidelines indicating the functions, procedure and the manner in which the prescribed authority u/s 206 shall exercise powers u/s 131.

We make it clear that we have not decided the issue of jurisdiction of the prescribed authority u/s 206 to exercise powers u/s 131. The contention of the appellants as to his lack of jurisdiction is kept open to be decided in any appropriate proceedings, if necessary.

9. The learned single judge considered both the Division Bench decisions as well as the apex court decision in the case of Peerless General (supra). The learned judge held that both the Division Bench decisions were not applicable in the instant case. The learned single judge, however, was of the view that since the TDS official was given power to assess penalty in the case of default he had the implied power to make queries. His Lordship dismissed the writ petition on the said ground.

10. Dr. Debi Prosad Pal appearing for the appellant has contended before us that once the Allahabad High Court judgment was set aside by the apex court, the decision in the case of Peerless General Finance and Investment Co. Ltd. and Another Vs. Assessing Officer and Others, has no application in the instant case. Similarly the decision in the case of Reckitt and Colman of India Ltd. and Another Vs. Assistant Commissioner of Income Tax (TDS) and Others, relates to a controversy when the 1999 circular was in force and as such the said decision is of no help to us.

11. Dr. Pal has also submitted that once a circular makes it clear that it would have effect from the date when it was issued, such circular cannot be

retrospectively given effect to. In support of such contention he has relied upon an apex court decision in the case of CIT v. Patel Brothers and Co. Ltd., (1995) 215 ITR 165 (SC) . He has taken us to the relevant provisions of the Act including the definition of Assessing Officer being Section 2(7A) of the said Act of 1961. He has lastly contended that once the learned single judge held in his favour that both the decisions in the case of Reckitt and Colman of India Ltd. and Another Vs. Assistant Commissioner of Income Tax (TDS) and Others, and Peerless General Finance and Investment Co. Ltd. and Another Vs. Assessing Officer and Others, did not have any application in the instant case, his Lordship should not have dismissed the writ petition, inter alia, holding that the TDS official had the implied power to make such queries u/s 131.

12. Mr. Dipak Shome, learned senior counsel appearing for the Revenue, on the other hand, has contended that the TDS official was not an authority only to put his rubber stamp on Form No. 24. Since he was entrusted to look after recovery of the tax through the tax deduction at source method he was entitled to make queries incidental to such recovery. Mr. Shome has contended that once the employer was duty bound to deduct at source the tax from the salary income u/s 206 of the said Act of 1961 the official had the power to make queries so as to satisfy himself that the tax was duly deducted u/s 206 and deposited with the Revenue. Mr. Shome has also contended that the apex court did not specifically set aside the decision of the Allahabad High Court by holding the same not a good law. According to him the apex court only remanded the matter back to the appropriate forum keeping the issue open.

13. Before we decide on the subject controversy let us have a little recapitulation of the relevant provisions of the Act.

14. u/s 2(7A) "Assessing Officer" means an appropriate official having relevant jurisdiction by virtue of directions or orders issued under Sub-section (1) or Sub-section (2) of Section 120 or any other provision of the said Act and he is empowered to exercise or perform all or any of the powers and functions conferred on or assigned to him under the said Act.

15. u/s 131 of the Act, the Assessing Officer shall have the same power as vested in a court of law under the CPC while trying a suit.

16. u/s 131 the Assessing Officer is entitled to have discovery and inspection, enforcing attendance of any person or compelling any person to produce books of account and other documents as also issuance of commissions.

17. If we look into the 1999 circular we would find that this power was extended to the TDS official as would appear from page 5 of the said circular which made it clear that such notification would take effect from the date of the said order meaning thereby the date of issuance of the said circular. Hence such power was given to the TDS official in 1999 for the first time. The learned judge held that such power was impliedly had with TDS official as he had the power to impose penalty in case of non-fulfilment of the requirement of Section 206.

18. Tax deduction at source is a method of recovery of the tax in advance. Section 206 obligates the employer to deduct such tax from the salaries of the employees who would otherwise come within the tax net. This is a method of recovery and not an assessment or adjudication. Once an employee is deducted certain sums as tax deducted at source such deduction is not final, he has to file his return and pay tax accordingly. While paying tax he is entitled to have credit for the amount which has already been deducted at source. Before the Assessing Officer he is still entitled to claim refund in case out of a sum total of his income it is found that he has been deducted tax in excess. Similarly if it is found that he has paid less he is bound to pay the balance amount. This process is complete when an assessment is made by the concerned Assessing Officer under whose jurisdiction the concerned employee falls.

19. In the instant case on a perusal of the queries made by the TDS official it appears to us that certain sums paid to the employees on account of flat maintenance, reimbursement of entertainment and other perquisites were not taken into account by the employer while deducting the tax at source. In case the Assessing Officer holds that such payment or any part thereof falls within the mischief of payment of tax he is still entitled to impose such tax in respect of the concerned employee and the concerned employee would have to pay tax on the basis of such adjudication. With regard to the employer''s Assessing Officer in case this payment was shown as capital expenditure and if the employer has claimed tax exemption on this account, the concerned Assessing Officer is still empowered to deny such exemption and adjudicate the return accordingly. It is true that u/s 206 the employer has to deduct appropriate tax in accordance with the appropriate tax pattern so prescribed in law. If the TDS official finds that such tax is not properly deducted or deposited he would be entitled to impose penalty. While doing so he could make queries to satisfy himself and making of such queries is not irrelevant. However, in the absence of an appropriate authority being given under the statute he is not entitled to do so. The Government felt such difficulty and the 1999 circular is a result of such rethinking. We fully appreciate the difficulty of the IDS official prior to 1999 as felt by the learned single judge. However, in the absence of appropriate authority being given to those officials, we are of the view that making of such query in the absence of authority is without jurisdiction. The IDS official could have passed on the infirmities in the return as found out by him to the respective Assessing Officers of the concerned employer and/or the employees as the case may be and the concerned Assessing Officers could have taken up the issue at the appropriate level at the appropriate time. This might complicate the issue. However, such complication cannot be avoided in the absence of an express authority being given to the TDS official.

20. In the result the appeal succeeds. The judgment and order under appeal is set aside.

21. The requisition made by the TDS official dated September 9, 1996, as

challenged in the writ petition is quashed and set aside.

22. We, however, make it clear that this judgment and order would not preclude the authorities to take any other appropriate steps if available to them under the statute and/or the notification issued thereunder at the relevant time. In case such proceeding is initiated and steps are taken accordingly, the concerned assessee would not be entitled to raise the plea of limitation and for the purpose of limitation the relevant date would be the date of delivery of this judgment. The Revenue would be entitled to rely upon the principles of Section 14 of the Limitation Act in this regard.

23. The appeal is disposed of without any order as to costs.

24. Urgent xerox certified copy of this judgment, if applied for, be made available to the parties upon compliance with all requisite formalities.