(2005) 01 AHC CK 0205

In the Allahabad High Court

Case No : Income-tax Reference No. 151 of 1991

Commissioner of Income Tax APPELLANT

Vs

Ashok Construction Co. RESPONDENT

Date of Decision : 28-01-2005

Acts Referred:
Income Tax Act, 1961 — Section 154, 256(1), 263, 271B, 44AB

Citation : (2006) 280 ITR 368 : (2005) 147 TAXMAN 37

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : A.N. Mahajan, for the Appellant; None, for the Respondent

Judgement

1. The Income Tax Appellate Tribunal, Allahabad, has referred the following question of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), for opinion to this Court :

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in cancelling the order u/s 263 of the Income Tax Act when the order of the Income Tax Officer was erroneous and prejudicial to the interests of the Revenue on account of his failure to initiate penalty proceedings u/s 271B which attracted in the assessee''s case due to contravention of the provisions of Section 44AB ?

2. The reference relates to the assessment year 1986-87. Briefly stated the facts giving rise to the present reference are as follows :

The respondent/assessee is a firm engaged in the execution of contract work. It was required to obtain audit report in terms of Section 44AB of the Act by June 30, 1986. The respondent did not obtain the report and the same was enclosed with the return for the assessment year, which we find was filed on September 15, 1986. The assessment was completed by the Assessing Officer. He failed to initiate penalty proceedings as envisaged u/s 271B of the Act for the failure to obtain the audit report within the specified period. The Commissioner of Income

Tax examined the assessment record and other materials and being of the opinion that the failure to initiate penalty proceedings u/s 271B of the Act by the assessing authority while passing the assessment order had caused the assessment order to be erroneous as also prejudicial to the interests of the Revenue warranting action u/s 263 of the Act, he issued notice and after giving an opportunity of hearing set aside the assessment order with a direction that the feasibility of initiation of proceedings u/s 271B of the Act be examined and after providing necessary opportunity of hearing to the respondent/assessee the issue decided be in accordance with law. He was also of the opinion that the wrong credit for tax deducted at source be also looked into and necessary relief be granted after examining as to whether the tax deducted at source was deposited for the assessment year in question or not and credit should be given accordingly. Feeling aggrieved the respondent/assessee preferred an appeal before the Tribunal. The Tribunal had set aside the order of the Commissioner of Income Tax u/s 263 of the Act on the following grounds :

Coming to the substantiality of the Commissioner''s order u/s 263 of the Income Tax Act, we notice that the same cannot be sustained by us. There are definite parameters within which alone the provisions of Section 263 can be invoked. Unless the order of the Income Tax Officer is erroneous and prejudicial to the interests of the Revenue, in clear terms the provisions of Section 263 cannot be invoked. Applying this test we notice that this primary condition for invoking and sustaining the provisions of Section 263 is not fulfilled. Judicial courts even otherwise are very slow in allowing the executive a free hand in initiating penalty proceedings in such matters. Therefore, it will be a travesty of justice if we agree with the Revenue in invoking the provisions of Section 263 for initiating penalty proceedings. For this reason we annul the order of the Commissioner of Income Tax and cancel the order dated March 28, u/s 263 of the Income Tax Act, 1961.

3. So far as the credit for tax deducted at source certificate was concerned it had recorded the statement of the respondent that necessary action u/s 154 of the Act be taken and the respondent would not raise any objection.

4. We have heard Shri A. N. Mahajan, learned standing counsel for the Revenue. Nobody has appeared on behalf of the respondent-assessee.

5. We find that this Court in I. T. R. No. 148 of 1984, Commissioner of Income Tax Vs. Surendra Prasad Agrawal, decided on September 1, 2004, has held that failure to initiate penalty proceedings at the time of passing of the assessment order does render the order erroneous and prejudicial to the interests of the Revenue. In this view of the matter the Tribunal was not justified in setting aside the order passed by the Commissioner of Income Tax u/s 263 of the Act. That apart proceedings u/s 263 of the Act were initiated by the Commissioner of Income Tax also on the ground that certain tax deducted at source certificates bearing the date June 17, 1986 have been given credit towards the tax deposited by the Assessing Officer, when the date falls outside the assessment year in question and, therefore, on this ground also the assessment order had been

rendered erroneous and prejudicial to the interests of the Revenue. No doubt the said mistake could be rectified u/s 154 of the Act but none the less it does not oust the jurisdiction of the Commissioner of Income Tax u/s 263 of the Act.

6. In view of the foregoing discussion, we are of the considered opinion that the Tribunal was not justified in setting aside the order passed by the Commissioner of Income Tax u/s 263 of the Act. We, therefore, answer the question referred to us in the negative, i.e., in favour of the Revenue and against the assessee. However, there shall be no order as to costs.