(2003) 01 KL CK 0045

In the High Court Of Kerala

Case No : IT Appeal No. 2 of 2000

Commissioner of Income Tax — APPELLANT

Vs

A.V. Thomas and Co. — RESPONDENT

Date of Decision : 21-01-2003

Acts Referred:
Income Tax Act, 1961 — Section 143(1), 143(2)

Citation : (2003) 182 CTR 116

Hon'ble Judges : J.M. James, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P.K.R. Menon and George K. George, for the Appellant; Anil D. Nair and A.M. Shaffique, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—This is an appeal filed by the CIT, Trivandrum, against the order of the Tribunal, Cochin Bench, in ITA No. 712/Coch/95, dt. 17th Aug., 1999. The assessment year concerned in 1992-93. The following questions of law are formulated by the appellant, and notice was ordered on the said questions :

"1. Whether, on the facts and in the circumstances of the case and also in the light of the decision Apogee International Ltd. Vs. Union of India and Another, the Tribunal is right in holding the intimation issued by the AO u/s 143(1)(a) on 26th Nov., 1993, after issuing the notice u/s 143(2) on 13th July, 1993, was not a valid intimation that could be upheld in law."

(ii) "such an invalid order u/s 143(1)(a) could not be rectified u/s 154 of the IT Act. Hence, the impugned order of rectification is to be annulled."

"2. Whether, on the facts and in the circumstances of the case and also in the light of the principle laid down in Commissioner of Income Tax, Calcutta Vs. Bidhu Bhushan Sarkar (Dead) through his Legal Representative Mihir Kumar Sarkar, , Seshasayee Paper and Boards Ltd. Vs. Inspecting Assistant Commissioner of Income Tax, and Commissioner of Income Tax Vs. V.

Ramakrishna Sons (P.) Ltd., , the Tribunal is right in considering and in deciding the validity of intimation u/s 143(1)(a) in an appeal filed against the order u/s 154 of the IT Act ?"

2. The brief facts necessary for decision of this appeal is as follows. The respondent-assessee filed return of its income under the IT Act, 1961, for short ''the Act'', on 31st Dec., 1992. The respondent-assessee is a public limited company engaged in the business of dealing in pesticides, acting as commission agents, dealing in various types of plants using tissue culture technology, exporting tea, spices and also doing civil construction. The assessment year concerned is 1992-93. The due date for filing the return for the assessment year was 31st Dec., 1992. However, the assessee filed the original return on 4th March, 1993. Later, the assessee filed a revised return on 26th April, 1993, and further revised return on 28th July, 1993. The AO issued a notice u/s 143(2) of the Act, to the assessee on 13th July, 1993. The AO processed the latest revised return filed on 28th July, 1993, u/s 143(1)(a) of the Act and issued an intimation on 26th Nov., 1993, (Annexure-A). It would appear from the said intimation that the return was accepted. The Department filed an application for rectification u/s 154 of the Act. The assessee filed objections to the said rectification petition. However, the AO ordered rectification vide Annexure-A1 order. Being aggrieved by the said order, the assessee filed appeal before the CIT(A), Cochin. The said appeal was dismissed confirming the order of the AO. However, in second appeal by the assessee, the Tribunal allowed the appeal by holding that the processing of the return u/s 143(1)(a) after the issuance of a notice u/s 143(2) of the Act is invalid. The Tribunal had also entered a finding that only valid return filed u/s 139(4) of the Act is the return dt. 4th March 1993, and the subsequent two revised returns cannot be treated as returns filed u/s 139(5) of the Act. The contention taken by the Department before the Tribunal was that since the assessee has not challenged the original intimation (Annexure-A), the validity of the same is not open to challenge in any appeal against the rectification order made at the instance of the Department. The said contention was also rejected by the Tribunal holding that for considering the validity of the rectification order, it is necessary to consider the validity of the order passed u/s 143(1)(a) of the Act. It is against the said order of the Tribunal that the Department has filed this appeal, and raised the questions of law extracted earlier.

3. Sri. P.K.R. Menon, senior Central Government standing counsel, appearing for the appellant submits that since the assessee had not challenged the proceedings u/s 143(1)(a) of the Act, the same cannot be challenged in an appeal filed against the rectification order passed by the AO at the instance of the Revenue. The senior counsel in support of his contention relied on the decision of the Supreme Court in Commissioner of Income Tax, Calcutta Vs. Bidhu Bhushan Sarkar (Dead) through his Legal Representative Mihir Kumar Sarkar, , and the decisions of the Madras High Court in Seshasayee Paper and Boards Ltd. Vs. Inspecting Assistant Commissioner of Income Tax, , and the decision of the same Court in Commissioner of Income Tax Vs. V. Ramakrishna

Sons (P.) Ltd., , All the above decisions are relied in support of the proposition that even an invalid order terminating assessment proceedings has the effect of terminating them, and in such a case, an appropriate method for correcting the illegality committed is to have that order vacated by the appellate or higher authorities having jurisdiction to intervene. In other words, the contention of the appellant is that as long as the order is not set aside, it remains in force and takes full effect. On the basis of these three decisions, the counsel submits that the Tribunal was not justified in holding that Tribunal has got the jurisdiction to consider the validity of the proceedings u/s 143(1)(a) of the Act, which has become final, while considering the appeal against the rectification order.

4. The senior counsel also submitted that question No. 1 formulated by the appellant having two limbs is covered by a decision of this Court in ITA No. 101 of 2000, wherein this Court has held that the AO has no jurisdiction to process a return u/s 143(1)(a) of the Act, after the issuance of a notice u/s 143(2) of the Act, and that since the return filed by the assessee was processed u/s 143(1)(a) of the Act only after issuance of the notice u/s 143(2), the proceedings u/s 143(1)(a) cannot survive.

5. We have also heard the learned counsel appearing for the respondent-assessee. The counsel submits that in the case of the assessee-company the due date for filing the return was 31st Dec., 1992, that the assessee had filed the return on 4th March, 1993, which itself was a belated one, that the assessee had filed two revised returns on 26th April, 1993, and 28th July, 1993, and further that the AO has processed only the last return dt. 28th July, 1993, u/s 143(a)(1) of the Act, He submitted that before the Tribunal, the assessee had taken a contention that the only valid return is the return filed on 4th March, 1993, and that the AO has processed only the last revised return, which is an invalid one, and therefore, the intimation (Annexure A) issued u/s 143(1)(a) of the Act is void and non est in law.

6. It was also contended before the Tribunal, even assuming that the return dt. 4th March, 1993, is a valid one, it can (sic-not) be processed u/s 143(1)(a) of the Act, since the AO has processed the said return after the issuance of a notice u/s 143(2) on 13th July, 1993, the intimation issued u/s 143(1)(a) is invalid and without jurisdiction. The counsel also contended that for considering the validity of the rectification order, necessarily, the authorities and the Tribunal has to consider the validity of the original order itself. We find that the Tribunal has accepted all the three contentions taken by the assessee.

7. As already noted, the first question which has got two limbs relates to the correctness of the findings of the Tribunal that the proceedings u/s 143(1)(a) evidenced by Annexure-A is invalid for the reason that the same was issued after the issuance of a notice u/s 143(2) of the Act on 13th July, 1993. As already pointed out, this question is covered by the judgment of this Court in ITA No. 101/2002 (supra) against the Revenue and in favour of the assessee. In view of the above, the first question has to be decided in favour of the assessee and

against the Revenue.

8. What remains to be considered is as to the correctness of the decision of the Tribunal to the effect that it is open to the Tribunal to consider the validity of the order passed u/s 143(1)(a) of the Act, in an appeal filed against a rectification order, without it being challenged by a separate appeal. According to us, the said question no longer survives to be considered, in view of the fact that we have upheld the findings of the Tribunal that the proceedings--Annexure-A issued by the AO u/s 143(1)(a) has been held to be without jurisdiction by the Tribunal. That apart, even going by the decision of the Supreme Court in Bidhu Bhusan Saikar''s case mentioned (supra), it is seen that the Supreme Court has made a rider with regard to the finality of the order which has not been challenged by the assessee. It is seen that the Supreme Court has clearly stated that "the order was not totally without jurisdiction; at best it was an order not contemplated by law and it could not be treated as a non-existent order." In the present case, by virtue of the finding of the Tribunal which has been upheld by us, in the light of the judgment in ITA No. 101/2000 (supra), it has to be held that the proceedings u/s 143(1)(a) (Annexure-A) is one passed without jurisdiction and consequently non est in law, attracting the rider mentioned in the said Supreme Court decision. In view of the above, it is unnecessary for us to go "into the question as to whether it is open to the Tribunal to consider the question of validity of an intimation u/s 143(1)(a) in an appeal filed against the order u/s 154 of the IT Act.

In the view which we have taken as above, we hold that the Tribunal was perfectly justified in its conclusion. There is no merit in this appeal, and it is accordingly dismissed.