(2004) 07 AHC CK 0094

In the Allahabad High Court

Case No : IT Ref. No. 336 of 1982

Commissioner of Income Tax — APPELLANT

Vs

Bhagwan Das — RESPONDENT

Date of Decision : 26-07-2004

Acts Referred:
Income Tax Act, 1961 — Section 263

Citation : (2004) 191 CTR 531 : (2005) 272 ITR 367 : (2005) 142 TAXMAN 1

Hon'ble Judges : R.K. Agrawal, J;K.N. Ojha, J

Bench : Division Bench

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

Judgement

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

"Whether, on the facts and in the circumstances of the case, the order of the CIT was rightly set aside by the Tribunal ?

2. Briefly stated facts giving rise to the present revision are as follows :

The respondent-assessee is an individual. For the asst. yr. 1973-74, the relevant previous year being 1st April, 1972 to 31st March, 1973, the respondent filed his return of income showing an income of Rs. 10, 450/-. Notice u/s 143(2) of the Act was issued. In response the respondent appeared and after discussion, the ITO, Circle-II (9), Kanpur, vide order dt. 27th Nov., 1976, assessed a total income of Rs. 24, 750/-. He granted exemption of income from agriculture amounting to Rs. 30, 446/- and income from poultry-farming amounting to Rs. 33, 849/-. The CIT initiated proceedings u/s 263 of the Act on the ground that in- making the assessment the ITO did not make any enquiry or investigation as regards the nature, source or extent of income derived from agriculture and poultry-farming or investment from which these income arose.

Further, the ITO also did not take any steps to verify whether the income from these sources as claimed were fully exempt. In response to the notice issued u/s 263, the respondent appeared before the CIT and stated that he has maintained proper accounts for these sources of income and will be in a position to produce evidence and proof to substantiate his claim. The CIT passed an order setting aside the assessment made by the ITO with a direction to reframe the assessment after making full and proper investigation in the nature, sources and extent of the income earned from these sources and the source of the investment made for earning these incomes. In doing so, the ITO will give full and proper opportunity to the assessee to present his side of the respondent. The respondent feeling aggrieved, preferred an appeal before the Tribunal. The Tribunal vide order dt. 27th Nov., 1979, had allowed the appeal filed by the respondent-assessee and had set aside the order of the CIT passed u/s 263. The Tribunal, while doing so had held as follows :

"In our view, there is case for interference in the order of the GIT. The requirement of the provisions of Section 263 of the Act are that the order of the ITO should be erroneous insofar as it could be prejudicial to the interest of the Revenue. The CIT nowhere applied his mind in respect of the order of the ITO being erroneous or prejudicial to the interest of the Revenue. Besides the above, we have noted that during the original assessment proceedings, the assessee, in support of his claim for exemption of agricultural and poultry-farm income from tax, the assessee filed copies of certain agreements and after considering the same, the ITO allowed exemption to the assessee. Thus, it is a case of change of opinion on the part of the CIT which is not warranted under the provisions of Section 263 of the Act. In view of this matter, the order of the CIT is reversed and the appeal filed by the assessee is allowed."

3. We have heard Shri A.N. Mahajan, learned standing counsel appearing for the Revenue. In spite of service of notice, nobody has put in appearance and the Court vide order dt. 11th of February, 2004, held the services to be deemed sufficient under the rules of the Court and directed for hearing of the revision. Shri A.N. Mahajan, learned standing counsel, submitted that from the perusal of the assessment order, it would be seen that the ITO had not applied his mind as to whether the income which has been claimed by the respondent assessee has been earned or whether it is exempted in full or in part. Thus, the order granting exemption to income from agriculture and poultry-farming has been without any application of mind. The CIT was, therefore, fully justified in taking recourse to proceedings u/s 263 of the Act and after giving an opportunity of hearing to the assessee, had rightly set aside the assessment order as the same was erroneous and prejudicial to the interest of Revenue. He relied upon the decision of Hon''ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CTT (2000) 243 HR 83.

4. Having heard the learned counsel for the Revenue, we find that in the assessment order, there is no discussion regarding the question as to whether the amount of income shown by the assessee which is being claimed to be

exempt has actually been earned by him or not and, further, whether the entire amount of income from agriculture and poultry-farming is exempt from tax. The CIT has rightly initiated proceedings u/s 263 of the Act as exemption has been granted without any application of mind. The apex Court in the case of Malabar Industrial Co. Ltd. (supra), while interpreting Section 263 of the Act, held as follows :

"A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the CIT suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the Revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to Section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO. It is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind". (emphasis, italicised in print, supplied).

5. Thus, an order, which has been passed without application of mind, will also fall under the expression erroneous and prejudicial to the interest of Revenue. Since the ITO has granted exemption to the assessee in respect of income from agriculture and poultry-farming without any discussion and without any application of mind, respectfully following the aforesaid decision, we are of the opinion that the Tribunal had committed error in holding that the assessment order insofar as it granted exemption to income from agriculture and poultry-farming was not erroneous or prejudicial to the interest of Revenue. We, therefore, answer the question referred to us in the negative, i.e., in favour of the Revenue and against the assessee. Since nobody has put in appearance on behalf of the assessee, there shall be no Order as to cost.