

(2000) 09 BOM CK 0021

In the Bombay High Court

Case No : I. T. A. No"s. 127 to 129, 137, 148, 150 and 158 to 161 of 2000 8
September 2000 A.Y. 1993-94

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

BHARATKUMAR MODI

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Income Tax Act, 1961 — Section 260A

Citation : (2001) 113 TAXMAN 386

Hon'ble Judges : S. H. Kapadia, J;J. N. Patel, J

Bench : Full Bench

Advocate : R.V. Desai, J. P. Deodhar and P.S. Jetly, for the Revenue and S. E. Dastur, F.V. Irani and Rajesh Shah, for the Assessee, for the Appellant;

Judgement

Kapadia, J.

Since the above appeals raise common question of law and fact, they are disposed of together by this common judgment.

2. The short question which arises for determination in this appeal is as follows :

Whether, the Tribunal erred in annulling the assessments on the ground that the assessing officer had decided the matter without making relevant enquiries and without confronting the assessees with all the material against the assessees (i.e., on the ground of violation of the rules of natural justice) ?

3. To decide the above question, briefly, the facts are required to be stated.

4. In appeal No. 127 of 2000, the assessee filed return of income for the assessment year 1993-94. The total income included agricultural income of Rs. 64,90,951 which was taken for aggregation for rate purpose. The return of income declared total income of Rs. 3,63,400. During the assessment years 1991-92 and 1992-93, investigations were carried out. The farmers and Tahsildar were examined to ascertain genuineness of the nature of income. The finding for

both the assessment years 1991-92 and 1992-93, as given by the assessing officer, was that the assessee had laundered concealed income by showing such income as agricultural income. During the course of the assessment proceedings, the assessee filed an affidavit from farmers confirming that lands were leased to them. The assessee also relied upon certificates from Tahsildar. The assessing officer had certain material in his possession which was not shown to the assessee. The assessing officer declared Rs. 64,90,951 as income from undisclosed sources. Being aggrieved, the assessee carried the matter in appeal to the Commissioner (Appeals) who came to the conclusion that the assessing officer ought to have given an opportunity to the assessee to explain the material gathered by the assessing officer against the assessee. The first appellate authority came to the conclusion that the assessing officer had rejected, wrongly, the assessee's claim of income from agriculture without examining all the evidence and without confronting the assessee with all the material used against them. In the circumstances, the Commissioner (Appeals) set aside the assessment order and restored the matter back to the file of the assessing officer with a direction to make enquiries. Being aggrieved by the order of the first appellate authority, the assessee carried the matter in appeal to the Tribunal. Before the Tribunal, the assessee contended that there was violation of the rules of natural justice. That, no enquiry was held by the assessing officer. That, no opportunity was given to the assessee to rebut the evidence of material gathered by the assessing officer. Therefore, it was contended that the entire assessments be declared null and void and not merely set aside the order of the assessing officer. In other words, the assessee contended that the proceedings be annulled in their entirety for violation of rules of natural justice. In support of their contention, they relied upon the orders of the Tribunal for the earlier years, viz., the assessment years 1991-92 and 1992-93 where, for similar defects, the assessee's prayer for annulment of the assessments came to be accepted. The contention of the assessee was accepted by the Tribunal. Accordingly, the order of the Commissioner (Appeals) remitting the matter back to the assessing officer was set aside by the Tribunal. The Tribunal further declared annulment of the assessments following its earlier judgments. Hence, this appeal is filed u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

Mr. Desai, the learned senior counsel appearing for department appellant, urged that the judgment of the Tribunal was fundamentally erroneous. He contended that an irregularity in the exercise of jurisdiction cannot result in annulment of the entire assessment proceedings that, such annulment can only take place if the action of the department falls outside the jurisdiction or authority. That, no case of lack of jurisdiction has been made out in the present case. That, lack of opportunity to the assessee is an irregularity which affects the legality of the impugned order passed by the assessing officer. It does not affect jurisdiction. Hence, the first appellate authority was right in only setting aside the order of the assessing officer and remanding the matter back to the assessing officer with

specific directions. In this connection, he relied upon the judgment of the Supreme Court in the case of Commissioner of Income Tax, West Bengal II Vs. Electro House, . He also relied upon the judgment of this court in the case of Commissioner of Income Tax Vs. Mrs. Ratanbai N.K. Dubhash, . He contended that infraction of the rules of natural justice is an example of irregular exercise of jurisdiction which only results in cancellation of the order of the authority. It can never result in annulment of the entire assessment. He contended that consequences of setting aside the assessment order are different from the consequences of annulling the assessments. He contended that u/s 251, the Commissioner has the power to annul the assessments or set aside the assessment order and refer the case back to the assessing officer for making fresh assessment. He pointed out that these two powers are separate and distinct. On the other hand, it was contended by Mr. Dastur, the learned senior counsel on behalf of the assesseees that in the present matter, the Tribunal has followed its earlier judgments for the assessment years 1991-92 and 1992-93. He contended that proceedings, therefore, by way of rectification application/reference application filed by the department are pending and, therefore, this court should not interfere as the result would be that, by this judgment, the pending matters would also be disposed of without giving opportunity to the parties to contest the pending matters. He contended that, in the present matter, the Tribunal has only followed its earlier judgments for the earlier years. Secondly, he contended that consequences of annulment are the same as the consequences of setting aside of the assessment order. Mr. Dastur relied upon the judgment of the Punjab and Haryana High Court in the case of Commissioner of Income Tax Vs. Sham Lal, , in support of his contention that in cases of violation of rules of natural justice, the only course open to the Tribunal was to annul the assessments made by the assessing officer. He further contended that annulment of assessments will not preclude the department from adopting appropriate proceedings. In any event, he contended that this court may clarify the order of the Tribunal that the assessment proceedings may restart from the stage when irregularity came in. He also relied upon the judgment of the Kerala High Court in the case of POKUNNAM TRADERS Vs. ADDITIONAL Income Tax OFFICER, KOTTAYAM, AND ANOTHER., .

6. We find merit in this appeal. At the outset, we may mention that a substantial question of law arises u/s 260A. It is well-settled principle of law that there is a difference between lack of jurisdiction and irregular exercise of authority/jurisdiction. This fundamental difference has not been appreciated by the Tribunal. A proceeding is a nullity when the authority taking it has no power to have seisin over the case. The omission of the assessing officer, in the present case, to confront the assesseees with the material in his possession does not affect the ab initio jurisdiction enjoyed by the assessing officer in respect of the above proceedings. The first appellate authority has come to the conclusion that there was no bias against the assesseees. However, there was violation of the rules of natural justice and, therefore, the Commissioner exercised his authority

u/s 251 of the Act by remitting the matter back to the assessing officer after setting aside the impugned order passed by the assessing officer. There was no justification for the Tribunal to hold that the assessment was a nullity. The Tribunal should not have interfered with the order of the Commissioner on the facts of this case. The question raised herein goes to the root of the matter. In the circumstances, we are not impressed by the arguments advanced on behalf of the assesseees that this court should not decide the matter u/s 260A till the department's reference applications for earlier years are disposed of. u/s 260A, this court is required to decide substantial questions of law. u/s 251, the Commissioner has the power to annul the assessment or to set aside the same and remit the case back to the assessing officer which has been done in the present case. The Tribunal has failed to notice the difference between irregular exercise of jurisdiction and lack of jurisdiction. This difference goes to the root of the matter. Therefore, the error was required to be rectified as early as possible by this court. Therefore, mere pendency of reference applications of the department will not preclude this court u/s 260A from deciding the above question. Further, a decision arrived at in breach of rules of natural justice, as in the present case, can be no justification for holding that there was no jurisdiction or that the decision was a nullity. It is not necessary to multiply the authorities as the above principles are well-settled. There is no merit in the contention advanced on behalf of the assesseees that the consequence of annulment of assessment is the same as setting aside the assessment order. If that was so, we fail to understand the reason why the assesseees preferred an appeal to the Tribunal against the order of the first appellate authority setting aside the assessment order. Annulment of assessment would only mean that the entire assessment proceedings become void ab initio, It would have certain consequences which are different from merely setting aside the impugned order of assessment. The judgment in the case of Sham Lal (supra) does not deal with the controversy at hand. It has no application to the facts of this case. Infraction of the rules of natural justice affects the legality of the order and not the jurisdiction. Before concluding, it may be mentioned that the assesseees vehemently contended before us that the Commissioner should not have remanded the matter with directions. We do not see any merit in the said contention. The order of the Commissioner is in accordance with section 251. Hence, the argument is rejected.

7. For the above reasons, all the above appeals stand allowed. Impugned judgment of the Tribunal is hereby set aside. Above question is answered in the affirmative. i.e., in favour of the department.