
(2014) 11 CAL CK 0054

In the Calcutta High Court

Case No : I.T.A.T. No. 54 of 2014 and G.A. No. 1637 of 2014

Commissioner of Income Tax

APPELLANT

Vs

Binani Industries Ltd.

RESPONDENT

Date of Decision : 19-11-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 153, 260A

Citation : (2015) 372 ITR 414 : (2015) 233 TAXMAN 14

Hon'ble Judges : Soumitra Pal, J; Arindam Sinha, J.

Bench : Division Bench

Advocate : A.G. Gutgutia, Advocate, for the Appellant; J.P. Khaitan, Senior Advocate, Malay Dhar and A.K. Dey, for the Respondent

Judgement

1. This appeal under section 260A of the Income-tax Act, 1961, preferred by the Revenue against the consolidated order dated November 21, 2013, passed by the Income-tax Appellate Tribunal "A" Bench in I.T.A. No. 1420/Kol/2008 and CO No. 132/kol/2008 filed by the assessee for the assessment year 2002-03 has been preferred on the questions of law stated in paragraph 7 of the application. We formulate the question for hearing of the appeal as under:

"Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the assessment order under section 143(3) of the Income-tax Act, 1961, dated March 31, 2005, received by the respondent-assessee on April 13, 2005, was barred by limitation and as such perverse?"

By consent of the parties, the appeal is treated to be ready for hearing and taken up as such.

2. Mrs. Gutgutia, learned advocate appearing on behalf of appellant-Revenue, urged before us the order of assessment was dated March 31, 2005, and there was no evidence on record to show that the Assessing Officer revisited me same in the period thereafter till the time the respondent-assessee received it on April 13, 2005. She submitted the assessment order was made on the last day of the

prescribed period under section 153 of the Income-tax Act, 1961, and as such the Tribunal went wrong in reversing the order of the Commissioner of Income-tax (Appeals) to hold the same as barred by limitation.

3. Mr. Khaitan, learned senior advocate appearing on behalf of the respondent-assessee, submitted the issuance of the order could be said to be complete only when the same was despatched as communication of the order could only then be complete on the part of the Department. Till before despatch, the order was within the power of the Assessing Officer who could have made addition or alteration thereto and it was the settled position that in such circumstances it cannot be said the order was duly issued. He relied on the following judgments:

- (1) State of Punjab Vs. Khemi Ram, ;
- (2) Government Wood Works Vs. State of Kerala, ;
- (3) India Ferro Alloy Industry Pvt. Ltd. Vs. Commissioner of Income Tax, ;
- (4) State of Andhra Pradesh v. Khetmal Parekh [1994] 93 STC 406 (Cal);
- (5) Commissioner of Agricultural Income Tax Vs. Kappumalai Estate, .

4. In all the above cases except Khetmal Parekh (supra) it was held, issuance of an order was complete only upon the despatch of the same so as to put the order beyond the control of the person making it. In Khetmal Parekh it was held as under (page 407 of 93 STC):

"We are of the opinion that the theory evolved by the High Court may not be really called for in the circumstances of the case. We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973, i.e., precisely 10 1/2 months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper explanation, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made."

5. By that decision it appears there was room for the order to have been held to be duly made if there was a proper explanation from the Deputy Commissioner regarding the delay in service thereof.

6. The case before us is, according to us, distinguishable on facts from the decisions cited and relied upon by Mr. Khaitan. Admittedly, there was no attempt on the part of the Department to despatch the order said to have been made on March 31, 2005, being the last date on which it could have been made within the time prescribed by section 153 of the Act.

7. It appears from the order of the Tribunal the representative of the assessee had filed an affidavit in which he had said he was served with the assessment

order on April 13, 2005, when he visited the office of the Income-tax Department. It further appears from the said order the Commissioner of Income-tax, Departmental representative was confronted with that affidavit and asked whether the assessment order left the control of the Assessing Officer or his office as on March 31, 2005, or not. The Commissioner of Income-tax, Departmental representative stated whatever records were available, he had produced, which record did not contain the despatch register. On further enquiry, the Commissioner of Income-tax, Departmental representative opined that once the assessment order including the demand notice was served on the assessee on April 13, 2005, by hand, there was no question of any entry in the despatch register.

8. These were the facts on which the respondent-assessee had based its challenge before the Tribunal. We have before us the affidavit evidence to show that a representative of the assessee, on his own volition and without intimation to the Department, visited the office and found the assessment order ready to be served upon him. We also find from the oral evidence of the Commissioner of Income-tax, Departmental representative that all records were produced and the Department had not made any attempt to despatch the order for service on the assessee. In the facts as above, there is no indication that the Assessing Officer revisited the order after March 31, 2005. The probability of the order being made and ready to be collected by the representative of the assessee as on April 1, 2005, cannot also be ruled out.

9. For the reasons aforesaid, we find the order of the Tribunal requires interference and the same is set aside with regard to the quashing of the assessment as barred by limitation and, consequently, the cross-objection of the assessee before it being allowed. The rest of the questions before the Tribunal must now be adjudicated by it. We, therefore answer the question formulated above in the affirmative, in favour of the Revenue and against the assessee. The appeal is disposed of.