
(2014) 09 MAD CK 0053
In the Madras High Court
Case No : T.C.(A.) No. 825 of 2013

Commissioner of Income Tax

APPELLANT

Vs

Gitsons Engineering Co.

RESPONDENT

Date of Decision : 16-09-2014

Acts Referred:

Income Tax Act, 1961 — Section 139, 142, 143(1), 143(2), 292BB

Citation : (2015) 370 ITR 87

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : T. Ravi Kumar, Senior Standing Counsel, Advocates for the Appellant; V.S. Jayakumar, Advocates for the Respondent

Judgement

R. Sudhakar, J.—The Revenue has filed this appeal calling into question the order of the Income-tax Appellate Tribunal "D" Bench, Chennai, dated July 22, 2011, made in I.T.A. No. 796/Mds/2010 for the assessment year 2007-08, by raising the following questions of law:

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in permitting the issue relating to the service of notice for the first time before the Tribunal, which issue was not agitated before the Assessing Officer or the Commissioner of Income-tax (Appeals)?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in not applying the provisions of section 292BB of the Income-tax Act?"

The facts in a nut-shell are as under: The assessee filed return of income for the assessment year 2007-08 admitting nil income on October 31, 2007, and the same was processed under section 143(1) of the Income-tax Act, 1961 (for brevity, "the Act"). The case was selected for scrutiny on the basis of computer assisted scrutiny system and notice under section 143(2) of the Act was issued to the assessee and the case was taken up for hearing.

1.2. The Assessing Officer, on scrutiny of the records and details filed by the

assessee, found that the assessee has not produced bills for Rs. 15,000 in respect of expenditure claimed under the head "Office equipment". With regard to the claim under the head "Travelling and conveyance", it was found that the assessee claimed Rs. 16,00,656 and out of the said sum, Rs. 50,000 was disallowed, being personal in nature, and the same was added to the total income. Anent the claim of the assessee towards TDS of Rs. 1,36,290 on labour charges received from Alpump Ltd., Perungudi, Chennai, of Rs. 60,73,014, the Assessing Officer, on verification of the TDS certificates and the records filed, held that the amount received towards labour charges and credited in the profit and loss account is only Rs. 56,99,791 and, therefore, added the difference of Rs. 3,73,313 to the total income as undisclosed business income.

1.3. Aggrieved by the said order, the assessee appealed to the Commissioner of Income-tax (Appeals), who confirmed the order passed by the Assessing Officer.

1.4. The assessee thereafter pursued the matter before the Tribunal taking a legal plea that pursuant to scrutiny through Computer Assisted Scrutiny System, the notice under section 143(2) of the Act was served on the assessee only on August 27, 2009, beyond the prescribed time limit and, therefore, the assessment is liable to be annulled. Even though the Department pleaded that the notice under section 143(2) of the Act was prepared on September 18, 2008, it was found that the Department has not produced any record to show that the said notice was despatched and served on the assessee. The Tribunal considering the fact that the Department issued another notice under section 143(2) of the Act only on August 27, 2009, beyond the time prescribed under section 143(2) of the Act, held that such notice is invalid and the consequential assessment is bad.

1.5. Assailing the said order passed by the Tribunal, the present appeal is filed by the Department on the substantial questions of law, referred to supra.

2. We have heard Mr. T. Ravikumar, learned senior standing counsel appearing for the Department and Mr. V.S. Jayakumar, learned counsel appearing for the assessee.

3. Before advertng to the merits of the case, it would be apposite to refer to section 143(2) of the Act, which reads as under:

143. Assessment.--... (2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,--

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or

after the 1st day of June, 2003;

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that no notice under clause (ii) shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished."

(emphasis supplied)

4. The word "shall" employed in section 143(2) of the Act contemplates that the Assessing Officer should issue notice to the assessee so as to ensure that the assessee has not understated income or has not computed excessive loss or has not underpaid the tax in any manner. It is, therefore; clear that when the Assessing Officer considers it necessary and expedient to ensure that the tax is paid in accordance with law, he should call upon the assessee to produce evidence before him to ensure that the tax is paid in accordance with law. A reading of the said provision makes it clear that service of notice under section 143(2) of the Act within the time limit prescribed is mandatory and it is not a mere procedural requirement.

5. In the instant case, even though a plea is taken by the learned counsel for the Revenue that the objection in relation to non-service of notice contemplated under section 143(2) of the Act was not an issue before the Assessing Officer and the Commissioner of Income-tax (Appeals) and the same was raised for the first time before the Tribunal, we find that it is a legal plea which goes to the root of the matter and, therefore, the assessee is entitled to raise such a plea before the Tribunal, which is the ultimate fact finding body.

6. In the case on hand, it is beyond any cavil that the assessee filed return of income on October 31, 2007. Even though the Department claims to have sent a notice under section 143(2) of the Act on September 17, 2008, the Revenue failed to produce any records to show that the said notice was despatched and served on the assessee. However, it is stated that the Department subsequently issued another notice under section 143(2) of the Act on August 27, 2009, which, on the face of it, is beyond the period of limitation prescribed under section 143(2) of the Act.

7. The basic requirement of section 143(2) of the Act having not been satisfied, the Department's further proceedings, in our considered opinion, becomes non est in law.

8. The above said view of this court is fortified by a decision of the Supreme Court in Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon,

and it was observed as under (page 369):

"Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with."

In such view of the matter, we do not find any substantial question of law in this appeal and accordingly, this appeal is dismissed. No costs.