(2014) 02 RAJ CK 0075

In the Rajasthan High Court

Case No : IT Appeal No. 126 of 2007

Commissioner of Income Tax APPELLANT

Vs

Hari Singh RESPONDENT

Date of Decision : 20-02-2014

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 148, 263

Citation : (2014) 267 CTR 442

Hon'ble Judges : Pratap Krishna Lohra, J;Dinesh Maheshwari, J

Bench : Division Bench

Advocate : Dinesh Mehta, Advocate for the Appellant; Sunil Bhandari, Advocate for the Respondent

Judgement

1. This appeal by the Revenue is directed against the order dt. 4th Oct., 2005 passed by the income tax Appellate Tribunal, Jodhpur Bench, Jodhpur (''the Tribunal'') in ITA No. 412/JDPR/2005 [reported as (2006) 154 TAXMAN 109] relating to the asst. yr. 1996-97. By the order impugned, the Tribunal has allowed the appeal filed by the assessee and has set aside the order passed by the Commissioner of income tax-II, Jodhpur (''the CIT) on 24th March, 2005 in exercise of his powers under s. 263 of the IT Act, 1961 (''the Act''). This appeal has been admitted on the following substantial question of law:

1. Whether in the facts and circumstances of the case, the Tribunal was legally justified in setting aside the order passed by the CIT-II, Jodhpur under s. 263 of the Act treating the said order as invalid and without jurisdiction ?

The sum and substance of the case, so far relevant for the appeal, is that the assessee, an AOP came into being in the year 1993 to carry on the business of purchase and sale of agricultural land. It had filed the return of income for the asst. yr. 1996-97 declaring net loss of Rs. 64,298 but ultimately, the income of the assessee was assessed at Rs. 42,78,794 under s. 143(3)/148 by the order dt 31st March, 2004.

2. Against the assessment order dt. 31st March, 2004, the assessee preferred an appeal which was pending before the CIT(A)-II, Jodhpur. However, during the pendency of this appeal, the CIT-II, Jodhpur proceeded to issue a show-cause notice under s. 263 on 1st March, 2005 and ultimately, set aside the assessment order, treating the same as erroneous and prejudicial to the interest of Revenue. The only ground on which the learned CIT set aside the order of the AO was that the addition of Rs. 38,17,000 ought to have been towards undisclosed income of AOP instead of being taxed under the head ''Income from business''. The related parts of the order impugned read as under:

I have carefully considered the submissions and it is clear from the assessment order that the AO was in dilemma and he has mentioned two contradictory things in different paras of the assessment order. The AO had the suspicion and he had stated that it might be possible that M/s. Hari Singh & Associates have used their undisclosed income and invested in the purchase of land. He further stated, ''I am of the view the learned AO should have made the addition of Rs. 38,17,000 considering the same as undisclosed income of the AOP instead of treating the same as business income of the assessee and to this extent the order passed by the AO is erroneous and requires to be set aside under s. 263 of the IT Act.''......... ''The order of the AO is erroneous in treating Rs. 38.17 lakhs as business income as money received as advance cannot be treated as income. I, therefore, set aside this order passed by the AO in considering Rs. 38.17 lakhs as business income whereas the addition should have been considering the same as undisclosed income of the AOP and to this extent the order of the AO is erroneous and is set aside, insofar as it is prejudicial to the interest of Revenue.

3. In appeal, the Tribunal found such an approach of the CIT erroneous and wholly without jurisdiction. The Tribunal also observed that when the matter was pending in appeal, passing of the revisional order under s. 263 of the Act was unjustified. The Tribunal found that so far the amount of Rs. 38,17,000 was concerned, it could have been treated by the AO as income from other sources or income from undisclosed sources; and the AO opted for one of the legally permissible option available before him. The Tribunal, inter alia, observed as under:

9. In the given case the learned AO has discussed both the options available before him, as discussed in the impugned order itself. The learned AO opted for one course of action out of two legally possible options before him. So the order cannot be said to be erroneous. It may be prejudicial to the interest of the Revenue. Therefore, one conditions of the two sine qua non is missing, and which ousts the jurisdiction of the learned CIT. The learned CIT cannot substitute his own option under s. 263 of the Act. The above decision of the Hon''ble apex Court further held that when an ITO has adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the ITO has taken one view with which the learned CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue,

unless the view taken by the ITO is unsustainable in law. In this case the AOP received as signing (advance) money of Rs. 38,17,000 for the sale of agricultural land and the learned AO considered the same as business income and taxed the same under the head ''Income from business'' that is sale of agricultural land. This view of the learned AO is legally permissible view. Nothing has been argued by the Department that it is not a legally permissible act of the learned AO.

4. Aggrieved by the order aforesaid, the Revenue has preferred this appeal which has been admitted on the question of law as noticed at the outset.

5. After having heard on the matter and having examined the record with reference to the law applicable, we find absolutely no force in this appeal.

6. In the case of Commissioner of Income Tax Vs. Ganpat Ram Bishnoi, , this Court has observed, as regards jurisdiction under s. 263, as under:

From the record of the proceedings, in the present case, no presumption can be drawn that the AO had not applied his mind to the various aspects of the matter. In such circumstances, without even prima facie laying the foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on specious ground that the AO was required to make an enquiry, cannot be held to satisfy the test of necessary condition existing for invoking jurisdiction under s. 263 of the IT Act.

Undoubtedly, the jurisdiction under s. 263 is wide and is meant to ensure that due revenue ought to reach the public treasury and if it does not reach on account of some mistake of law or fact committed by the AO, the CIT can cancel that order and require the concerned AO to pass a fresh order in accordance with law after holding a detailed enquiry. But when enquiry in fact has been conducted and the AO has reached a particular conclusion, though reference to such enquiries has not been made in the order of assessment, but the same is apparent from the record of the proceedings, in the present case, without anything to say how and why the enquiry conducted by the AO was not in accordance with law, the invocation of jurisdiction by the CIT was unsustainable. As the exercise of jurisdiction by the CIT is founded on no material, it was liable to be set aside. Jurisdiction under s. 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiries ought to have been conducted to find something. The finding of the Tribunal that the ITO had passed the assessment order after relevant enquiries and considering the aspects of the matter required by the CIT to be considered by him is a finding of fact and on the basis of which, the jurisdiction assumed by the CIT being nonexistent must be held to be not sustainable.

7. In the present case, it is more than apparent that the learned CIT has proceeded to invoke his jurisdiction under s. 263 of the Act only on his own opinion as to how the amount of the income concerned ought to have been treated. We may observe that so far this amount of Rs. 38,17,000 is concerned,

it was not the case that the assessee had not disclosed the same at all. It is different matter that the same was treated by the AO to be part of income of business after consideration of the record and with the finding that the same was to be treated as profit from the business of sale of agricultural land.

8. In the given set of facts and circumstances of the case, particularly when the said income has been duly added to the income of the assessee, neither the order of the AO on this ground could have been considered as erroneous nor it could have been treated as operating prejudicial to the interest of Revenue.

9. In the aforesaid view of the matter, and when we find that the order passed by the Tribunal is in consonance with the law applicable and cannot be said to be legally unjustified, the formulated question in this case is required to be answered in the affirmative i.e., against the Revenue and in favour of the assessee.

10. Before parting, we may take note of the position that assessee concerned had otherwise filed the regular appeal bearing No. 148/2004-05/CIT(A)-II/JDR, which was pending before the CIT(A)-II, Jodhpur at the relevant time. However, the CIT(A), by the order dt. 27th Sept., 2005, chose to close the proceedings in the appeal in view of the fact that the assessment order under appeal had been set aside under s. 263 of the Act by the CIT. When the order passed under s. 263 of the Act has been set aside by the Tribunal and the order of Tribunal stands affirmed by this Court, obviously the said order under s. 263 of the Act, shall have to be treated as non est from its inception.

11. As a necessary consequence, the aforesaid appeal, which was earlier dismissed only because of the order under s. 263 of the Act, shall require consideration on its merits. It is, therefore, made clear that the said appeal by the assessee bearing No. 148/2004-05/CIT(A)-II/JDR shall stand revived for consideration in accordance with law. Subject to the observations foregoing, this appeal stands dismissed.

