(1981) 12 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 21 of 1980

Commissioner of Income Tax — APPELLANT

Vs

Prem Syndicate — RESPONDENT

Date of Decision : 03-12-1981

Acts Referred:
Income Tax Act, 1961 — Section 263, 263(1)

Citation : (1982) 31 CTR 301 : (1983) 141 ITR 290

Hon'ble Judges : K.N. Shukla, J;G.C. Sohani, J

Bench : Division Bench

Advocate : R.C. Mukati, for the Appellant; Harish and Kohali, for the Respondent

Judgement

Sohani, J.—By this reference u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act"), the Income Tax Appellate Tribunal, Indore Bench, has referred the following questions of law to this court for its opinion :

" (1) Whether, on the facts and in the circumstances of the case, the notice issued u/s 263(1) of the I.T, Act, 1961, met all the requirements of law and was a valid notice and, therefore, the CIT exercised his jurisdiction validly ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that proper opportunity of being heard was not afforded to the assessee ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the order passed by the Commissioner of Income Tax u/s 263 was void ab initio ?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in refusing to direct the CIT to pass a fresh order u/s 263 of the I.T. Act, 1961, after giving the assessee a further opportunity of being heard ? "

2. The, material facts giving rise to this reference briefly are as follows :

The assessee is a registered firm and the assessment years in question are 1967-68 and 1968-69. The assessee had filed its return of income for these two assessment years and before the ITO, the assessec claimed exemption in respect of profits earned by the assessee by sale of land in the two assessment years. The assessee had purchased agricultural land measuring 18''69 acres on 12th April, 1966, and sold the same in four lots in the aforesaid assessment years. The assessee contended that the profit earned by sale of these lands was not chargeable to tax. The contention of the assessee was upheld by the ITO by his orders dated April 29, 1971, and January 3, 1972. The Addl. Commissioner, in exercise of powers u/s 263 of the Act, issued notices to the assessee. One of these notices was served on Shri Sachdev, advocate, on April 25, 1973, the other was served on Shri P.S. Kalani, husband of Smt. Padma Kalani, a partner of the assessee-firm on April 25, 1973, and another notice was served by registered post on Shri B.N. Kalani, a partner of the assessee-firm, on April 28, 1973. In all these notices, it was stated that the case of the assessee in connection with the proceedings u/s 263 of the Act in respect of assessment years 1967-68 and 1968-69, would be taken up by the Addl. Commissioner, Bhopal, in his office at Bhopal on April 26, 1973. None appeared before the Commissioner on behalf of the assessee on April 26, 1973, and the Commissioner passed a consolidated order for the two assessment years. The Commissioner held that the order of the ITO exempting the profits earned by the assessee by sale of land was erroneous and prejudicial to the Revenue as the amount was chargeable to tax as income from business carried on by the assessee because the transaction amounted to an adventure in the nature of trade. The Commissioner, therefore, set aside the assessments made by the ITO and directed him to make fresh assessments in accordance with law. Aggrieved by this order, the assessee preferred appeals before the Tribunal. There was a difference of opinion in the Bench, which heard the appeal. The learned Judicial Member of the Tribunal was of the view that the order of the Commissioner was not liable to be set aside while the learned Accountant Member was of the opinion that the order of the Commissioner was bad in law and deserved to be set aside. The matter was, therefore, referred to the third Member, who agreed with the view taken by the learned Accountant Member and held that the order passed by the Commissioner was riot a valid and legal order. When the matter came up for final disposal before the Tribunal, it was argued on behalf of the Revenue that the order of the Commissioner need not be quashed altogether but the Commissioner should be directed to pass a fresh order in accordance with law. The Tribunal was, however, of the opinion that in view of the majority opinion, that the impugned order was void ab initio, the appeals deserved to be allowed. The Tribunal, therefore, allowed the appeals and set aside the order of the Addl. Commissioner. At the instance of the Revenue, the Tribunal has referred the aforesaid questions of law to this court for its opinion :

Question No. (1) :

Now, as regards the first question, the matter, in our opinion, is concluded by the decision of the Supreme Court in Commissioner of Income Tax, West Bengal II Vs. Electro House, . The Supreme Court held that Section 33B(1) of the Indian I.T. Act, 1922, corresponding to Section 263(1) of the Act did not prescribe any notice to be given. The Supreme Court further observed as follows (p. 827):

" It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice. It is unfortunate that the High Court failed to notice the difference in language between Sections 33B and 34. For the assumption of jurisdiction to proceed u/s 34 the notice as prescribed in that section is a condition precedent. But no such notice is contemplated by Section 33B. The jurisdiction of the Commissioner to proceed u/s 33B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, is that he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner. "

In view of the aforesaid decision of the Supreme Court, our answer to the first question is that on the facts and in the circumstances of the case, no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed u/s 263(1) of the Act and hence the question of its validity or invalidity does not arise and it does not, therefore, affect the jurisdiction of the Commissioner to exercise power u/s 263(1) of the Act.

Question No. (2):

Now one of the requirements of Section 263(1) of the Act is that before reaching his decision, the Commissioner must give the assessee an opportunity of being heard. This opportunity has to be a reasonable opportunity. In the instant case, the Tribunal has found that notice of hearing before the Commissioner was not served on any of the partners of the assessee, but was served on the authorised representative of the assessee and the (family) member of one of the partners on 25th April, 1973, at Indore. Now, the hearing was fixed at Bhopal on April 26, 1973. Thus, notice of that hearing was served on the assessee one day before the date of hearing, assuming that notice to the authorised representative of the assessee and to the (family) member of one of the partners was notice to the assessee, as urged by the Revenue, It must, therefore, be held that there was no proper opportunity to the assessee to show cause why an order against the assessee be not passed by the Commissioner u/s 263(1) of the Act. Oar answer to the second question is, therefore, in the affirmative and against the Department.

Question No. (3):

Learned counsel for the assessee contended that the Tribunal having found, by a majority decision, that by not giving proper opportunity to the assessee before passing an order u/s 263(1) of the Act, the Commissioner had violated the principles of natural justice, the Tribunal was right in holding that the order of the Commissioner was void ab initio. The contention cannot be upheld. As already observed, the Supreme Court has held in Commissioner of Income Tax, West Bengal II Vs. Electro House, , that breach of the principles of natural justice may affect the legality of the order but that does not affect the jurisdiction of the Commissioner. Therefore, it must be held that the Commissioner validly exercised his jurisdiction u/s 263(1) of the Act. In this view of the matter, the Tribunal, in our opinion, was not justified in holding that the order passed by the Commissioner was void ab initio.

Question No. (4) :

The Tribunal held that the order of the Commissioner passed u/s 263(1) of the Act was void ab initio, as observed by the third Member of the Tribunal, to whom the case was referred on a difference of opinion. The relevant observations of the third Member referred to by the Tribunal are as follows:

" With this opinion of mine, the matter will now go to the regular Bench for disposal of the appeal according to the majority of opinion on the point. The other points debated before me by the departmental representative have not been gone into because I thought they were not necessary in the view that I have taken on the legality of the order of the Commissioner. To repeat, in my opinion, the order of the Commissioner of Income Tax is void ab initio for lack of proper opportunity. "

3. We have already held relying on the decision of the Supreme Court in Commissioner of Income Tax, West Bengal II Vs. Electro House, , that the question of giving an adequate opportunity to the assessee has no impact on the question of jurisdiction of the Commissioner to pass an order u/s 263(1) of the Act. The question of adequate opportunity will affect only the question of legality of the order of the Commissioner. In such a case, the Tribunal undoubtedly had jurisdiction to remand the matter to the Commissioner and to direct him to dispose of the proceedings u/s 263(1) of the Act, afresh, after giving due opportunity to the assessee. This question came up for consideration before the Supreme Court in CIT v. National Taj Traders [1980] 121 ITR 535. The Tribunal in that case had held that the Commissioner had not conformed to the requirements of natural justice by putting it to the assessee what case it had to meet and by giving due opportunity for explaining the same and the Tribunal, therefore, vacated the order of the Commissioner and remanded the case to him with the observation to dispose it of afresh after giving due opportunity to the assessee. On a reference being made, the High Court held that the Tribunal did not act properly in directing the Commissioner to dispose of the case afresh. On appeal, the Supreme Court held that the order of the Tribunal was proper. It is thus clear that in a case, when the order of the Commissioner u/s 263(1) of the Act is set aside by the Tribunal on the ground that there was no adequate opportunity to the assessee, the Tribunal has jurisdiction to remand the case to

the Commissioner for deciding the case afresh in accordance with law.

4. Learned counsel for the assessee contended that in the instant case, in view of the fact that there was a flagrant violation of the principles of natural justice, the Tribunal did not deem it proper to remand the case to the Commissioner for fresh disposal. This contention is not founded on facts. The decision of the Tribunal flows from the finding of the Tribunal that the order of the Commissioner was void ab initio. That is the only reason given by the Tribunal for not remanding the case to the Commissioner. As the finding of the Tribunal about the jurisdiction of the Commissioner was not justified, it must be held that the Tribunal was not justified in refusing to direct the Commissioner to pass an order u/s 263(1) of the Act, afresh, after giving due opportunity to the assessee. Our answer to question No. (4) referred to us is, therefore, in the negative and against the assessee.

5. In the circumstances of the case, parties shall bear their own costs of this reference.

6. Reference answered accordingly.

