(1996) 03 MAD CK 0148

In the Madras High Court

Case No : Tax Case No. 864 of 1983

Commissioner of Income Tax APPELLANT

Vs

Sara Enterprises RESPONDENT

Date of Decision : 12-03-1996

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 33, 33(4)
Income Tax Act, 1961 — Section 143(3), 256(1), 263, 263(3), 271(1)(a)
Wealth Tax Act, 1957 — Section 25, 25(1)

Citation : (1996) 89 TAXMAN 244

Hon'ble Judges : Thanikkachalam, J;N.V. Balasubramanian, J

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant;

Judgement

Thanikkachalam, J.—At the instance of the department, the Tribunal referred the following two questions, for the opinion of this Court, u/s 256(1) of the income tax Act, 1961 (''the Act''): 1. Whether, on the facts and in the circumstances of the case and having regard to the provisions of section 263, read with section 275, of the income tax Act, 1961, the Appellate Tribunal was justified in cancelling the order passed by the Commissioner of income tax Act u/s 263 of the income tax Act, 1961?"

2. Whether the bar of limitation contained u/s 275 of the income tax Act, 1961, would attenuate or curtail the powers of the Commissioner of income tax, vested in him u/s 263 of the said Act?

The assessee is a firm with five partners. The assessment for the assessment year 1976-77 was completed by the ITO on 2-11-1977 u/s 143(3) of the Act. In the course of assessment proceedings, penal action u/s 271(1)(c) of the Act was initiated for the detailed reasons stated in the assessment order. The ITO subsequently dropped the penalty proceedings on 22-3-1980 on the ground that the assessment was made on agreed basis and the assessee did not go on appeal against the assessment. The Commissioner of income tax (Administration) scrutinised the records in exercise of his powers vested in him u/s 263 of the Act. On his scrutiny he found that the ITO had without considering the various facts and circumstances of the case, which led to the initiation of the penal proceedings u/s 271(1)(c), dropped the same. He, therefore, felt that the order of the ITO in dropping the penalty proceedings was erroneous and prejudicial to the interest of the revenue. Accordingly the Commissioner initiated proceedings u/s 263 and after hearing the assessee, set aside the order passed by the ITO and directed the latter to consider the case in the light of the observations made by him in his order and pass appropriate orders in accordance with law.

2. Aggrieved by the order of the Commissioner, the assessee preferred appeal before the Appellate Tribunal. The assessee contended that the Commissioner was not justified in interfering with the order passed by the ITO, wherein the ITO had exercised his discretionary powers.

3. The Tribunal hold that a statutory authority should not be permitted to achieve by indirect means that it cannot be achieved by direct means. According to the Tribunal any proceedings by way of imposition of penalty should have been completed by 31-3-1980, and if no penalty is imposed by that time, the assessee would naturally got a vested right, which cannot be titled. The Tribunal further pointed out that if the impugned order of the Commissioner were to be upheld by the Tribunal, then the ITO gets an extended time to impose penalty and that is against the scheme and provisions of the Act. Accordingly, the Tribunal cancelled the order of the Commissioner passed u/s 263.

4. Before us the learned standing counsel appearing for the department submitted that the Commissioner can invoke his jurisdiction u/s 263 within two years from the date of the order passed by the ITO. In the present case, the ITO dropped the penalty proceedings by his order, dated 22-3-1980 and the Commissioner invoked his jurisdiction u/s 263 by issuing a notice on 3-11-1980. The learned standing counsel further submitted that the provision s contained in section 275 of the Act would apply only to the suo motu order passed by the ITO and not to an order passed by the ITO in pursuance of the direction given by the Commissioner. Under such circumstances, it was submitted that it cannot be argued that the direction given by the Commissioner u/s 263 in the present case would virtually make the ITO to pass an order after the period of two years initiating the penalty proceedings. In order to support this contention, the learned standing counsel relied upon the decisions in Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders, J.P. Sharma and Sons Vs. Commissioner of Income Tax, , Commissioner of Income Tax Vs. Vakharia Cotton Traders, and H. H. RAJDADI SMT. BADAN KANWAR MEDICAL TRUST Vs. COMMISSIONER OF WEALTH-TAX.,

5. We have heard the learned standing counsel for the department and perused the records carefully. The fact remains that in the present case the ITO during

the course of the assessment proceedings, initiated penalty proceedings u/s 271(1)(c). Subsequently the ITO dropped the penalty proceedings on 22-3-1980. The Commissioner (Administration), on a scrutiny of the order passed by the ITO, came to the conclusion that the order passed by the ITO in dropping the penalty was erroneous and prejudicial to the interest of the revenue. Therefore, the Commissioner initiated proceedings u/s 263, set aside the order passed by the ITO in dropping the penalty proceedings initiated u/s 271(1)(c) and directed him to reconsider the case in the light of the observation made by him in his order.

6. u/s 275, no order imposing a penalty under this Chapter, shall be passed after the expiration of a period of two years from the end of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed. Therefore, normally when the penalty proceedings are initiated u/s 275(1) the ITO was to complete the proceedings within two years from the date of initiating the proceedings; as otherwise the order passed by the ITO would be barred by limitation. In the present case, the penalty proceedings were dropped by the ITO on 22-3-1980. Within two years from this date, on 3-11-1980 the Commissioner initiated proceedings u/s 263. Therefore the Commissioner is well within the period of limitation in invoking his jurisdiction u/s 263. But the point for consideration is that if the ITO completed his penalty proceedings as directed by the Commissioner in Ms order u/s 263, beyond the period of two years prescribed u/s 275(1), whether such an order is hit by the provisions of section 275(1).

7. The Supreme Court had an occasion to consider a question of similar nature in the decision of National Taj Traders'' case (supra) wherein while considering sections 33(4), 33B(2)(b), (4) of the Indian income tax Act, 1922 and section 263(3) of the 1961 Act, held the words "no order shall be made under sub-section (1) after the expiry of two years from the date of the order sought to be revised, in section 33B(2)(b) of the Indian income tax Act, 1922, are applicable only to suo motu orders of the Commissioner in revision and not to orders made by him pursuant to a direction or order passed by the Appellate Tribunal under sub-section (4) or by a higher authority. Section 33 is not a charging section."

The enactment of section 263(3) must be regarded as declaratory of the law which was already prevailing. The enactment of an ex majore cautola provision in the 1961 Act would be a legislative recognition of the legal position that obtained as a result of judicial pronouncement qua the 1922 Act.

8. In similar circumstances, the Rajasthan High Court in J.P. Sharma & Sons ''case (supra) while considering the provisions of sections 271(1)(a) and 274(1) of the Act, was of the opinion that "it is firmly established that the bar created by the provisions of section 275 of the income tax Act, 1961, refers only to the initial order and if an order of penalty is passed on account of the direction by a higher authority in appeal or revision or an account of an answer given in a reference by the High Court in exercise of original jurisdiction under Article 226

of the Constitution, then the time limit laid down in section 275 will not apply".

9. So also the Gujarat High Court in Vakharia Cotton Traders'' case, (supra), while considering the provisions of section 275, held that the bar of limitation u/s 275 would apply only to the initial order of the authority, which imposes penalty and the bar would not apply to a fresh order passed on remand.

10. In H.H. Rajdadi Smt. B. Kanwar Medical Trust''s case (supra), the Rajasthan High Court, while considering the provisions of section 25(1) of the Wealth-tax Act, 1957, hold that the Commissioner of Wealth-tax can invoke his revisional jurisdiction u/s 25 of the Wealth-tax Act, even with regard to an order dropping the penalty proceedings.

11. Thus, we have seen that even though the order passed by the Commissioner u/s 263 empowers the ITO to complete the penalty proceedings after two year period prescribed u/s 275(1), such an order is a valid order and it is not hit by the provisions of section 275 as per the decisions cited supra. Accordingly the order passed by the Tribunal, cancelling the order passed by the Commissioner u/s 263 is not in order. In that view of the matter, we answer the first question referred to us in the negative and in favour of the department. Inasmuch as question No. 1 is answered in the negative and in favour of the department, it is not necessary to answer question No. 2, which is of academic nature. No costs. Under these circumstances, it is open to the assessee to contest the order passed by the Commissioner u/s 263, on merits, while the Tribunal proceeds to pass the consequential order in pursuance to the order passed by this Court in this tax case.

