(2014) 03 GUJ CK 0121

In the Gujarat High Court

Case No : Tax Appeals Nos. 1353 and 1354 to 1357 of 2007

Commissioner of Income Tax — APPELLANT

Vs

Sukhini P. Modi — RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:
Income Tax Act, 1961 — Section 142, 142(1), 142(2), 143, 143(1)

Citation : (2014) 367 ITR 682

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Mauna M. Bhatt, Advocate for the Appellant; R.K. Patel, Advocate for the Respondent

Judgement

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Sonia Gokani, J.—All the tax appeals are decided by a common judgment inasmuch as the question of facts and law are identical in all of them. For the purpose of deciding these tax appeals, the facts contained in Tax Appeal No. 1353 of 2007 shall be taken into consideration:

1.1 The Revenue has preferred these appeals raising the following substantial question of law for our consideration:

"Whether the Appellate Tribunal was right in law and on facts in confirming the order passed by the Commissioner of Income-tax (Appeals) annulling the reassessment order passed under section 143(3) read with section 147 of the Act as bad in law on the ground that notice under section 143(2) was not issued within the prescribed time?"

2. We have heard learned counsel, Ms. Mauna Bhatt, for the Revenue and Shri R.K. Patel for the assessee-respondent.

3. For the assessment year 1996-97, the assessee had preferred the return of income. The same was processed by the Assessing Officer under section 143(1)

of the Income-tax Act ("the Act" for short). On receipt of the sale price of the shares. The Assessing Officer was of the belief that the assessee had not offered for the purposes of tax receipt of sale price on sale of shares and, hence, the capital gains received from the sale of the shares escaped the assessment. Therefore, the notice of reopening under section 148 of the Act was issued. In response to the said notice, the assessee had asked his return originally filed to be treated as return in response to the notice under section 148 of the Act. The Assessing Officer finalised the assessment under section 143(3) read with section 147 of the Act making certain additions.

4. This was challenged before the Commissioner of Income-tax (Appeals) on the ground that the notice under section 143(2) had not been issued and the only notice served was under section 142(1) of the Act. Following the decision of the apex court, on detailed examination of the issue, the Commissioner of Income-tax (Appeals) concluded that the assessment framed was not sustainable. The Commissioner of Income-tax (Appeals) relied upon the decision of the apex court rendered in the case of R. Dalmia and Another Vs. Commissioner of Income Tax, to hold that after notice of reassessment under section 148 has been issued, the procedure as required under section 142(1) and section 143 for completing the assessment requires to be carried out. It eventually concluded that if the return is filed under section 148 the requirement of issuance of notice under section 142(2) of the Act within a year of filing of the return cannot be on the ground that the assessment framed was without issuance of notice under section 143(2) within the stipulated period of 12 months of filing of the return, it did not sustain assessment.

5. When challenged before the Tribunal, it also concurred with the view of the Commissioner of Income-tax (Appeals). Therefore, the present appeals by the Revenue challenging these concurrent findings. The Tribunal exhaustively dealt with this issue and referred to various pronouncements on the subject. It also had at length discussed the issue of 12 months of issuance of notice from the date of filing of the return. It concluded thereafter that the Revenue''s contention is not sustainable that when details were called for by virtue of the issuance of notice under section 142(1), in substance the notice under section 143(2) was issued. We notice that this court in the case of Deputy Commissioner of Income Tax Vs. Mahi Valley Hotels and Resorts, considered this question at length and held such requirement absolute in all cases. Holding further that any neglect to attend such requirement would invalidate the whole proceedings (page 362):

"The scheme of the Act broadly permits the assessment in three formats; (i) acceptance of the returned income; (ii) acceptance of returned income subject to permissible adjustments under section 143(1) of the Act by issuance of intimation; and (iii) scrutiny assessment under section 143(3) of the Act. This scheme was originally introduced by the Direct Tax Laws (Amendment) Act, 1989, with effect from April 1, 1989. The issuance of notice under section 143(2) of the Act is in the course of assessment in the third mode, namely, scrutiny assessment.

Section 143(2) of the Act requires that where return has been made by an assessee, if the Assessing Officer 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 tax in any manner, he shall serve on the assessee a notice requiring him either to attend his office, or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Therefore, the language of the main provision requires Assessing Officer to prima facie arrive at satisfaction of existence of any one of the three conditions. Proviso under the said sub-section states: ''provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished''. On a plain reading of the language in which the proviso is couched it is apparent that the limitation prescribed therein is mandatory, the format of provision being in negative terms. The position in law is well settled that if the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, such requirements are, in all cases absolute and neglect to attend to such requirement will invalidate the whole proceeding."

6. The question in the present form has been answered by this court in the case of Deputy CIT v. Mahi Valley Hotels and Resorts [2006] 287 ITR 360 (Guj.). However, without attaching the question of limitation which again by the Finance Act, 2008, has been reduced to six months. The issue is no longer res integra.

7. The apex court in the case of Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon, has considered the very issue. The apex court held that the Assessing Officer has to necessarily follow the provisions of section 142 and sub-sections (2) and (3) of section 143. It did not accept the submission of the Revenue that the requirement of the notice under section 143 can be dispensed with and the same is mere procedural irregularity. In the words of the apex court, it is held as under (page 370):

"The case of the Revenue is that the expression ''so far as may be apply'' indicates that it is not expected to follow the provisions of section 142, sub-sections (2) and (3) of section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression'' so far as may be apply''. In our view, where the Assessing Officer in repudiation of the return filed under section 158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of section 142, sub-sections (2) and (3) of section 143."

In the instant case, we notice that both the Commissioner of Income-tax (Appeals) and the Tribunal have held that the procedure prescribed of issuance of notice under section 143(2) has not been followed at all. This realm of fact has not been disputed by the Revenue. In view of this decision of the apex court, the assumption of the jurisdiction of issuance of notice of reopening itself would not be sustainable, and, therefore, this court does not require to indulge into the concurrent findings of both the authorities. In the absence of fulfillment of mandatory requirement of issuance of notice under section 143(2) both the authorities rightly and validly held against the Revenue and in favour of the assessee. Resultantly, the tax appeals deserve no further consideration and are dismissed with no order as to costs.