

(2010) 09 DEL CK 0280
In the Delhi High Court
Case No : ITR No. 225 of 1991

Commissioner of Income Tax		APPELLANT
	Vs	
Triveni Engineering Works Ltd.		RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Income Tax Act, 1961 — Section 120, 125, 125(1), 125(2), 125(2A)
Taxation Laws (Amendment) Act, 1984 — Section 47

Citation : (2011) 336 ITR 366 : (2011) 196 TAXMAN 345

Hon'ble Judges : Reva Khetrapal, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Prem Lata Bansal, for the Appellant; Ajay Vohra, Kavita Jha and Akansha Aggarwal, for the Respondent

Judgement

Reva Khetrapal, J.—At the instance of the Revenue, the following questions of law are referred for the opinion of this Court:

1. Whether on the facts and in the circumstances of the case the ITAT was correct in holding that the CIT(A) cannot revise u/s 263 an order of the IAC u/s 143(3), made by him by virtue of the jurisdiction conferred upon him u/s 125, especially when Sub-section (2) of Section 125 clarifies that a reference to the ITO in the Act shall be deemed to be a reference to the IAC?
2. Whether on the facts and in the circumstances of the case, the ITAT was correct in holding that the Commissioner of Income Tax wrongly directed setting aside of the assessment framed by the IAC(A)?
2. The assessment pertains to the assessment year 1979-80. The assessment was completed u/s 143(3) of the Income Tax Act, 1961 by the Inspection Assistant Commissioner of Income Tax (Asstt.), Range-III ("the IAC(A)") on 27th February, 1982. The income of the assessee-company was determined by the IAC(A) at Rs. 45,23,972/- against the declared income of Rs. 35,46,190/-. Interest u/s 216 was not charged while making the assessment. Aggrieved by

the aforesaid order, the assessee-company filed an appeal before the Commissioner of Income Tax (A) which was disposed of by order dated 14th September, 1983. The assessee-company filed a second appeal before the Tribunal. While the said appeal was pending before the Tribunal, the Commissioner (Appeals) assumed jurisdiction u/s 263 of the Act and by order dated 25th February, 1984, set aside the assessment order passed by the IAC(A), holding it to be erroneous and pre-judicial to the interest of the Revenue, on the ground that the IAC (A) had failed to charge interest under Sections 215, 216 and 139(8) and had also failed to initiate penalty proceedings u/s 271(1)(a) and Section 273 of the Act.

3. The assessee appealed to the Tribunal, inter alia, on the ground that for the assessment year 1977-78, the Tribunal on identical facts had cancelled the order of the Commissioner (Appeals) on the ground of lack of jurisdiction (ITA No. 219/DEL/83 dated 27-02-1984). The Revenue's case before the Tribunal was that Explanation (1) to Section 263(1) was inserted with effect from 1st October, 1984 by virtue of which even the order which was subject of the appeal before the First Appellate Authority could be revised by the Commissioner (Appeals) in exercise of its powers u/s 263.

4. The Tribunal vacated the order of the Commissioner (Appeals) passed u/s 263 for the following three reasons: (i) Firstly, similar order for the assessment year 1977-78 had been vacated by the Tribunal; (ii) Secondly, Explanation (1) to Section 263(1) having been inserted with effect from 1st October, 1984 (though the enactment was passed earlier) could not be effective prior to 1st October, 1984; and (iii) thirdly, the order of the Income Tax Assistant Commissioner (Appeals) having been subject matter of appeal before the Commissioner (Appeals), Section 263 could not be invoked.

5. With regard to the direction of the Commissioner (Appeals) relating to the initiation of the penalty proceedings, the Tribunal was of the view that the issue was directly covered by the decision of this Court rendered in the case of P.C. Puri Vs. Commissioner of Income Tax, Delhi-II,

6. First, a look at the relevant provisions of law. Indubitably, by virtue of the provisions of Sub-section (1) of Section 263 of the Act as it stood prior to its amendment by the Taxation Laws Amendment Act, 1984, the Commissioner could call for and examine the records of any proceedings under this Act, and if he considered that any order passed therein "by the Income Tax Officer was erroneous in so far as it was pre-judicial to the interest of the Revenue, he could, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deemed necessary, pass such order thereon as the circumstances of the case justified."

7. By virtue of Section 47 of the Taxation Laws Amendment Act, 1984, reported in 149 ITR 97, however, the legislature with effect from the 1st day of October, 1984, inserted an Explanation at the end of Sub-section (1) of Section 263 as

follows:

Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this Sub-section, an order passed by the Income Tax Officer shall include-

(a) an order of assessment made on the basis of directions issued by the Inspecting Assistant Commissioner u/s 144A or Section 144B; and

(b) an order made by the Inspecting Assistant Commissioner in exercise of the powers or in performance of the functions of an Income Tax Officer conferred on, or assigned to, him under Clause (a) of Sub-section (1) of Section 125 or under Sub-section (1) of Section 125A.

8. By the Circular No. 394 of 1984 dated 14th September, 1984, reported in 150 ITR (St.) 3, purpose for amending the provision with the insertion of the Explanation was sought to be clarified by Explanatory Notes on the provisions thereof, the relevant portion whereof reads as follows:

AMENDMENT OF Section 263 of THE Income Tax ACT RELATING TO REVISION OF ORDERS PREJUDICIAL TO REVENUE

35.1 The Amending Act has modified the provisions of Section 263 of the Income Tax Act in certain respects.

35.2 Under one of the amendments, a new Explanation has been inserted at the end of Sub-section (1) of Section 263. The new Explanation declares, for the removal of doubts, that for the purposes of the said Sub-section, an order passed by the Income Tax Officer shall include an order of assessment made on the basis of directions issued by the Inspecting Assistant Commissioner u/s 144A or Section 144B of the Income Tax Act. The new Explanation also provides that an order made by the inspecting Assistant Commissioner in exercise of the powers or in performance of the functions of an Income Tax Officer conferred on, or assigned to, him u/s 125(1)(a) or Section 125A(1) of the Income Tax Act, shall also be regarded as an order passed by the Income Tax Act. The new Explanation seeks to clarify the aforesaid position with a view to removing further controversy and litigation on these points.

9. At the outset, Ms. Prem Lata Bansal, the Learned Counsel for the Revenue, strongly contended that the provisions of the Explanation being declaratory/clarificatory in nature have retrospective effect, as has been held by various High Courts See: Commissioner of Income Tax Vs. Vithal Textiles, ; Commissioner of Income Tax Vs. Dulichand Bhatia, ; Commissioner of Income Tax Vs. Satish Kumar and Co., Commissioner of Income Tax Vs. Gangaram Mohanlal Mittal and Sons., ; Commissioner of Income Tax Vs. Vincentian Orissa Society, ; Commissioner of Income Tax Vs. V.V.A. Shanmugam, and Tarajan Tea Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Alternatively, it was submitted by her that even before the insertion of the Explanation, the Commissioner (Appeals) was armed with sufficient powers u/s 263 to revise the order passed by the IAC (A) in

view of the clear-cut provisions of Section 125(1)/125(2)(a)/125A(4)(a). According to her, by virtue of the provisions of Section 125(2A) reference to Income Tax Officer in Section 263(1) shall be deemed to be reference to the IAC.

10. The contention of Mr. Ajay Vohra, the Learned Counsel for the respondent, on the other hand, was that action u/s 263 of the Act by the Commissioner (Appeals) was not warranted, inter alia, on the ground that the assumption of jurisdiction by the Commissioner (Appeals) has to be decided vis-?-vis the law on the date when the Commissioner (Appeals) passed the order u/s 263 of the Act, i.e. on 25th February, 1984. The amendment made by the Taxation Laws Amendment Act, 1984, by insertion of Clause (b) of Explanation with effect from 1st October, 1984 could not validate jurisdiction assumed by the Commissioner (Appeals), which was lacking at the time when action was taken under the said Section. He contended that the issue whether an order passed by the IAC(A) could be rectified u/s 263 was clearly debatable and it is settled law that action u/s 263 of the Act cannot be taken in respect of a debatable issue. Reliance was placed by him in this context on the decisions of the Supreme Court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, and Commissioner of Income Tax Vs. Max India Ltd.,

11. We may note at this juncture that the precise question as to whether prior to 1st October, 1984, the Commissioner could revise an assessment order passed by the IAC(A) had arisen before the ITAT, Delhi Bench "E" in the case of Ms. Asha M. Primlani v. Inspecting Assistant Commissioner in Income Tax Appeal No. 2624 of 1984. The Tribunal opined that the legislature in its legislative wisdom having made the Explanation to Section 263 effective from 1st October, 1984, and there being no indication in the Explanation itself or anywhere else that it is retrospective in nature, the inference that the words "income tax Officer" mentioned in Section 263 could imply also and could include the IAC was not justified and hence the Commissioner, on the date when the Commissioner made the order, lacked the lawful authority to revise the assessment order passed by the IAC, more so, as the statute itself does not confer powers of the Income Tax Officer upon the IAC. In fact, the statute in Sections 125 and 125A merely invests the Commissioner with the enabling powers to confer upon the IAC powers conferred on the Income Tax Officer and also by general or special order in writing, to confer concurrent jurisdiction upon the IAC and the ITO to exercise the same concurrently.

12. Endorsing the above view of the Tribunal, this Court in ITR No. 532 of 1986, Commissioner of Income Tax v. Smt. Asha M. Primlani (supra) opined in favour of the assessee holding that the amendment to Section 263 of the Act, which was the subject matter of the reference, was with effect from 1st October, 1984. Significantly, the Division Bench in the course of opining on the reference undertook the exercise of comparing and contrasting the language used in Section 47 of the Taxation Laws (Amendment) Act, 1984 with the language used in the subsequent amendment to Section 263 of the Act by the Finance Act,

1989, which introduced Clause (c) to the Explanation. For the sake of ready reference, the Explanation to Section 263 as inserted by Section 47 of the Taxation Laws (Amendment) Act, 1984 and the Explanation as amended by the Finance Act, 1989 are reproduced hereunder:

The Explanation as inserted by the Taxation Laws (Amendment) Act, 1984

47. Amendment to Section 263.- In Section 263 of the Income Tax Act, with effect from the 1st day of October, 1984,-

(a) In Sub-section (1), the following Explanation shall be inserted at the end, namely:

Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this Sub-section, an order passed by the Income Tax Officer shall include-

(a) an order of assessment made on the basis of directions issued by the Inspecting Assistant Commissioner u/s 144A or Section 144B; and

(b) an order made by the Inspecting Assistant Commissioner in exercise of the powers or in performance of the functions of an Income Tax Officer conferred on, or assigned to, him under Clause (a) of Sub-section (1) of Section 125 or under Sub-section (1) of Section 125A.;

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The Explanation as inserted by the Finance Act, 1989 which made the amendment operative from 1st June, 1988

(b) for Sub-section (2), the following Sub-section shall be substituted, namely:

(2) No order shall be made under Sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(Explanation: For the removal of doubts, it is hereby declared that, for the purposes of this Sub-section,-

(a) An order passed (on or before or after the 1st day of June, 1988) by the Assessing Officer shall include-

(i) An order of assessment made by the Assistant Commissioner or the Income Tax Officer on the basis of the directions issued by the Deputy Commissioner u/s 144A;

(ii) An order made by the Deputy Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf u/s 120;

(b) "record" (shall include and shall be deemed always to have included) all record relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) Where any order referred to in this Sub-section and passed by the Assessing Officer had been the subject matter of any appeal (filed on or before or after the 1st day of June, 1988), the powers of the Commissioner under this Sub-section shall extend (and shall be deemed to have extended) to such matters as had not been considered and decided in such appeal.

13. It is worth mentioning that in the case of Asha M. Primlani (supra) the above context, this Court also relied upon the decision of the Supreme Court in COMMISSIONER OF Income Tax Vs. SHRI ARBUDA MILLS LTD., and concluded as follows:

Reading the differences in the language used in the 1984 Amendment Act as well as in the Finance Act, 1989, there can be no doubt that the amendment to Section 263 of the Act, which is the subject matter of the present reference, was with effect from 1st October, 1984.

14. The view expressed in Asha M. Primlani (supra) was reiterated by this Court in the case of Mitsui and Co. Ltd. v. CIT 167 Taxman 179. In paragraphs 7 to 11 of the said judgment of this Court, the following apposite observations were made:

7. The subsequent amendment in 1989 has been interpreted by the Supreme Court in COMMISSIONER OF Income Tax Vs. SHRI ARBUDA MILLS LTD., This has been reiterated in Commissioner of Income Tax, Bangalore Vs. Shree Manjunatheaware Packing Products and Camphor Works, a decision cited by Learned Counsel for the revenue.

8. Thus within the same provision, that is, the Explanation to Section 263, two different types of languages are used. The words "shall be deemed always to have extended to such matters" occurring in Clause (c) is absent in Clause (a). It was the presence of those words in Clause (c) that persuaded the Supreme Court in Shri Arbuda Mills Ltd.'s case (supra) to hold that Clause (c), which was introduced by the 1989 Amendment was retrospective, that is, even prior to the date of the said amendment. On the other hand, apart from the fact that such words are absent in Clause (a), the opening line of Section 47 of the Amendment Act of 1984 indicates that such provision has been inserted only with effect from 1-10-1984. Recognition of this fact is of crucial importance.

9. We, have examined the decisions cited by Learned Counsel for the revenue. We may straightway point out that the decision in K.C. Rangaiah & Co.'s case (supra) deals with the subsequent amendment concerning Clause (b) of the Explanation and therefore is not immediately relevant for the present case. However, what is significant is that even in Clause (b), the words "shall include and shall be deemed always to have included" occur and therefore puts this

Clause on a different footing as regards its retrospective nature.

10. As regards the other decisions of the Calcutta, Orissa and Madhya Pradesh High Courts, there was no occasion for those High Courts to compare the 1984 Amendment with the subsequent amendment in 1989 which has been explained by the Supreme Court in Shri Arbuda Mill's case (supra). It must be pointed out that the judgment of a learned Single Judge of the Calcutta High Court in Duncan Agro Industries Ltd.'s case (supra) given in 2001, does refer to Shri Arbuda Mills Ltd.'s case (supra) but does not notice the contrast in the language of the two amendments, that is, the amendment in 1984 and the subsequent amendment in 1989.

11. We are accordingly not persuaded to reconsider the view already expressed by us in Smt. Asha M. Primlani's case (supra).

15. In view of the aforesaid, in our opinion the answer to the question No. 1 must be in the affirmative in favour of the respondent-assessee and against the Revenue.

16. Since we have held that the Commissioner (Appeals) had no jurisdiction to revise the order of the Inspecting Assistant Commissioner (IAC) u/s 143(3) the findings on question No. 2 would be of academic interest only and therefore we do not propose to give any findings thereon.

17. The Reference is answered accordingly.