(2011) 04 KAR CK 0156

In the Karnataka High Court

Case No : Writ Appeal No. 3397 of 2011 (A.Y. 2006-07)

Jagadish N. Hinduja APPELLANT

Vs

CIT and Another RESPONDENT

Date of Decision : 21-04-2011

Acts Referred:
Income Tax Act, 1961 — Section 2 (22) (e), 220 (6), 246 A, 254, 254 (1)

Citation : (2011) 04 KAR CK 0156

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : K.R. Prasad, for the Appellant; M.V. Seshachala, for the Respondent

Final Decision : Allowed

Judgement

Ravi Malimath, J.—Sri. M.V. Seshachala, learned standing counsel is directed to take notice for the respondents.

2. The assessee has preferred this appeal against the order passed by the learned Single Judge who declined to entertain the writ petition on the ground that the assessee is at liberty to approach the CIT (Administration).

3. The Dy, CIT passed an order of assessment on 24-12-2010 for the assessment year 2006-07 levying tax on the assessee on a sum of Rs. 5 crores as deemed dividend by invoking section 2(22)(e) of the IT Act, 1961 (hereinafter referred to as an Act). Aggrieved by the said order, the assessee has preferred an appeal u/s 246A of the Act before the first respondent-CIT(A). Along with the appeal memo, he has filed an application for stay of the demand for payment of tax. The first respondent dismissed the application on the ground that under the Act he has not been conferred a power to stay such levying of tax. Aggrieved by the said order, the assessee has preferred a writ petition before this Court. The learned Single Judge declined to entertain this petition but however, held that the petitioner shall approach the second respondent--Dy. CIT seeking a relief of stay and until the matter shall not be determined by the second respondent.

Aggrieved by the said order, the assessee is before this Court in this appeal.

4. Annexure F is the order passed by the first respondent wherein it held that the appeal is always against an order and it is in a way a review of an order of a lower authority by a higher authority and there is no order of rejection of any stay application. The appellant has put the cart before the horse by making an application for stay of demand without filing any petition before the AO. He therefore held that he had no authority to admit such petition or appeal and dismissed the same. A reliance was also placed on a judgment in the case of Mrs. R. Mani Goyal Vs. Commissioner of Income Tax and Another, and also the circular of CBDT dt. 3-4-1992 (sic) and declined to grant the stay.

5. The Supreme Court had an occasion to consider this question in the case of Income Tax Officer Vs. M.K. Mohammed Kunhi, wherein it was held as under :.

The arguments advanced on behalf of the appellant before us that, in the absence of any express provisions in ss. 254 and 255 of the Act relating to stay of recovery during the pendency of an appeal, it must be held that no such power can be exercised by the Tribunal, suffers from a fundamental infirmity in as much as it assumes and proceeds on the premise that the statute confers such a power on the ITO who can give the necessary relief to an assessee. The right of appeal is a substantive right and the question of fact and law are at large and are open to review by the Tribunal. Indeed, the Tribunal has been given very wide powers u/s 254(1), for it may pass such orders as it thinks fit after giving full hearing to both the parties to the appeal. If the ITO and the AAC have made assessments or imposed penalties raising very large demands and if the Tribunal is entirely helpless in the matter of stay of recovery, the entire purpose of the appeal can be defeated if ultimately orders of the Departmental authorities are set aside. It is difficult to conceive that the legislature should have left the entire matter to the administrative authorities to make such orders as they choose to pass in exercise of unfettered discretion. The assessee, as has been pointed out before, has no right to even move an application when an appeal is pending before the Tribunal u/s 220(6) and it is only at the earlier stage of appeal before the AAC that the statute provides for such a matter being dealt with by the ITO. It is a firmly established rule that an express grant of statutory power carries with it by necessary implications the authority to use all reasonable means to make such grant effective. The powers which have been conferred by section 254 on the Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective.

In the end, the Supreme Court has held as under :

Section 255(5) of the Act does empower the Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion, the Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when section 220(6) deals expressly with a situation when an appeal is pending before the AAC, but the Act is silent in that behalf when an appeal is pending before the Tribunal. It could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying roceeding as will prevent the appeal if successful from being rendered nugatory.

6. This Court following the aforesaid judgment in the case of CCE v. Indian Oil Corporation in Central Excise Appeal No. 29 of 2008 disposed of on 24-8-2010, held as under :

7(b). The right of appeal is a substantive right, and the question of fact and law are at large and are open to review by the Tribunal. It is firmly established rule that an express grant of statutory power carries with it by necessary implications the authority to use all reasonable means to make such grant effective. One such authority is the duty in proper cases to make such orders for staying proceedings as will prevent the appeal, if successful from being rendered nugatory. Therefore, the Tribunal has the power to grant stay as incidental and ancillary to its appellate jurisdiction. When the Parliament introduced the amendment restricting the operation of the stay order, they recognized this settled legal position that the Tribunal has the power to grant an order of stay even in the absence of a specific provision conferring such power, and such power flowing from the appeal provision itself. What they intended by the amendment is to restrict the duration of the stay order which is passed by virtue of such power. Expressly they have not taken away the power of the Tribunal to extend the period of stay granted. To extend the period of stay granted no express provision is required. Once the power to grant stay exists and is conceded, the power to extend the period of stay follows from such power.

7. Therefore, the view of the first appellate authority that what is preferred is a statutory appeal and the statutory provision did not expressly confer the power to grant stay to the appellate authority, and therefore the authority has no power to grant stay is erroneous. When a statute provides a right of appeal and the said statute does not expressly provide a power on the appellate authority to grant an order of stay, such appellate authority has the inherent power to grant stay in the absence of statutory provision. That is precisely what has been held in the apex Courts judgment.

8. In this view of the matter, both the first appellate authority as well as the learned Single Judge were in error in declining to entertain the application filed for stay of the demand and therefore, the same cannot be sustained.

9. Hence, we pass the following order :

Appeal is allowed and the impugned order passed by the learned Single Judge as well as the appellate authority rejecting the request for stay are hereby set aside. The appellate authority shall consider the application for stay filed by the assessee on merits and in accordance with law. It is made clear that he has inherent power to grant or not to grant stay though such power is not expressly conferred on him u/s 246A of the IT Act. Until the application of the applicant for stay is considered on merits and order is passed, the Eevenue shall not precipitate the recovery proceedings.

