

(2005) 04 AHC CK 0192

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 969 of 2000

Malik Packaging

APPELLANT

Vs

The Commissioner of Income Tax

RESPONDENT

Date of Decision : 29-04-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Income Tax Act, 1961 — Section 139(1), 139(4), 139(5), 142(1), 142(2A)

Citation : (2006) 202 CTR 417 : (2006) 284 ITR 374 : (2006) 151 TAXMAN 181

Hon'ble Judges : R.K. Agrawal, J

Bench : Single Bench

Advocate : R.S. Agrawal, for the Appellant; Govind Krishna and S.C., for the Respondent

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—By means of the present writ petition filed under Articles 226/227 of the Constitution of India, the petitioner, M/s Malik Packaging, through its partner, Smt. Sofia Malik, seeks the following reliefs:-

"(a) issue a writ, order or direction in the nature of CERTIORARI quashing the order passed by the Commissioner of Income Tax, Kanpur dated 28.2.2000 (Annexing "4") to this writ petition pertaining to assessment year 91994-95.

(b) to issue any other and further writ or order which this Hon"ble Court may deem fit and proper in the facts and circumstances of the case."

2. As the counter affidavit and rejoinder affidavit have been exchanged between the parties, with the consent of the learned counsel for the parties, the writ petition itself is being heard and disposed of finally at the admission stage itself in accordance with the Rules of Court.

3. Briefly stated, the facts giving rise to the present petition are as follows:-

According to the petitioner, it is a partnership firm consisting of two partners,

namely, Smt. Sofia Malik and Anish Khan having 60% and 40% share respectively. It is engaged in the business of manufacturing of corrugated boxes rolls used in packaging purposes. For the assessment year 1994-95, the petitioner filed return of income on 8.12.1994 showing a total income of Rs. 3,010/-. The said return was filed in the status of a firm. Alongwith the return, it is alleged that the petitioner had filed manufacturing account, trading and profit and loss account, balance sheet, list of sundry debtors, sundry creditors and unsecured loans. The return was processed u/s 143(I)(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") vide intimation dated 24.2.1995. The return was accepted in the status of a partnership firm. Subsequently, the case was selected for scrutiny on random basis and a notice dated 27.10.1995 was issued u/s 143(2) of the Act. This notice was served upon the petitioner on 7.11.1995 but on account of illness of Smt. Sofia Malik, no body could appear before the Assessing Authority. The Assistant Commissioner of Income Tax, Circle II(3), Kanpur, had made the assessment on 6.3.1997. The Assistant Commissioner had invoked the provision of Section 144 of the Act and made the assessment by best judgment. He determined the taxable income of the firm on Rs. 50,000/- and assessed it in the status of A.O.P. Penalty proceeding under Sections 271(I)(c) and 271(I)(b) of the Act was also initiated. Feeling aggrieved by the assessment order, the petitioner preferred an appeal before the Deputy Commissioner of Income Tax (Appeals), Kanpur who, vide order dated 15.10.1997, had dismissed the appeal. Still feeling aggrieved, the petitioner preferred a revision u/s 264 of the Act before the Commissioner of Income Tax, Kanpur. The Commissioner of Income Tax, Kanpur, vide order dated 28.2.2000, had dismissed the revision, which order is under challenge in the present writ petition.

4. I have heard Sri R.S. Agrawal, learned counsel for the petitioner, and Sri Govind Krishna, the learned Standing Counsel appearing for the respondent.

5. The learned counsel for the petitioner submitted that before resorting to Section 144 of the Act, it was incumbent upon the Assessing Authority to issue a notice calling upon the assessee, i.e., the petitioner, to show cause why the assessment should not be completed to the best of his judgment. In the show cause notice so to be issued, the date and time was also to be specified. According to the petitioner, no such notice was issued and, therefore, the order taking recourse to the provision of Section 144 of the Act is liable to be set aside. He submitted that before the Commissioner of Income Tax in the petition u/s 264, a specific plea was raised in paragraph 1.3 that except the above notice, i.e., the notice u/s 143(2), no other notices were served on the assessee which fact has also been noted by the Commissioner of Income Tax. He further submitted that in paragraph 7 of the writ petition specific averment has been made that apart from the above notice which refers to the notice dated 17.10.1995 issued u/s 143(2) of the Act, no other notices were served upon the petitioner.

6. In the supplementary affidavit filed by the petitioner on 23.10.2000, it has been specifically stated that no notice as provided under the proviso to Section 144 of the Act has been served upon the petitioner and as such the Assessing Authority was incorrect in making the best judgment assessment by applying the provision of Section 144 of the Act. In support of his aforesaid plea, he has relied upon a decision of the Rajasthan High Court in the case of Commissioner of Income Tax Vs. Agro Engineers, , wherein the Rajasthan High Court has held that if the statutory requirement has not been complied with, direction can be given to make a fresh assessment after complying with the provision of Section 144 of the Act before framing the fresh assessment.

7. Sri Govind Krishna, learned Standing Counsel, submitted that sufficient opportunity has been given to the petitioner to appear in the hearing for the assessment and various notices u/s 143(2) had been issued. He referred to the averments made in paragraph 5 of the counter affidavit filed by Sri Chandra Das, Income Tax Inspector, and submitted that so many notices having been issued, it is not open to the petitioner to say that no notice under the provision of Section 144 of the Act had been issued. He further submitted that even otherwise in the absence of any specific averment regarding absence of notice under the proviso to Section 144 having been made in the writ petition, it would not be correct to presume that no notice under the aforesaid provision has been issued. He further submitted that the averments made in the supplementary affidavit is an after thought and cannot be taken into consideration.

8. Having heard the learned counsel for the parties, I find that under the proviso to Section 144 of the Act before resorting to the best judgment assessment, an opportunity is to be given by the Assessing Authority by serving a notice calling upon the assessee to show cause as to why the assessment should not be made to the best of judgment. Section 144 of the Act reads as follows:-

"144. Best judgment assessment.

(1) If any person-

(a) fails to make the return required under Sub- section (1) of Section 139 and has not made a return or a revised return under Sub-section (4) or Sub- section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under Sub-section (1) of Section 142 or fails to comply with a direction issued under Sub-section (2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under Sub-section (2) of Section 143,

the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such

assessment:

Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment:

Provided further that it shall not be necessary to give such opportunity in a case where a notice under Sub-section (1) of Section 142 has been issued prior to the making of an assessment under this section.

(2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year."

9. From a perusal of the aforesaid provisions, it is seen that the present case falls under Clause (c) of Sub-section (1) and Section 144 of the Act as the petitioner had failed to comply with the terms of the notice issued under Sub-section (2) of Section 143 of the Act. Thus, under the first proviso, it was incumbent upon the Assessing Officer to give an opportunity to the petitioner by serving a notice calling upon the assessee to show cause by a date and time to be specified in the notice why the assessment should not be completed to the best of his judgment. It may be mentioned here that the second proviso which provides that the opportunity as provided under the first proviso is not to be given in case a notice u/s 142(1) of the Act has already been issued, is not attracted in the present case in as much as it is not the case of the respondent that any notice under Sub-section (1) of Section 142 of the Act had been issued prior to making of the assessment. On the other hand, it is the consistent stand of the respondent that various notices u/s 143(2) of the Act had been issued to the petitioner but it had failed to appear. Specific averment having been made in the petition u/s 264 of the Act that no notice except the notice issued u/s 143(2) of the Act, dated 27.10.1995, having been issued, which fact had also been noticed by the Commissioner of Income Tax, it goes to prove the case set up by the petitioner that no notice under the proviso to Sub-section (1) of Section 144 of the Act had been issued. Thus, the Assessing Authority could not have taken recourse to the provision of Section 144 of the Act without giving an opportunity by serving a notice.

10. In view of the foregoing discussions, the order dated 28.2.2000 passed by the Commissioner of Income Tax cannot be sustained and is hereby set aside. The Commissioner of Income Tax is directed to pass a fresh order in accordance with law. The writ petition succeeds and is allowed.