

(2014) 07 DEL CK 0219
In the Delhi High Court
Case No : W.P. (C) 226/2014

Narinder Kumar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Income Tax Act, 1961 — Section 143(2), 144, 264, 271(1)(c), 271D

Citation : (2014) 369 ITR 49

Hon'ble Judges : Vibhu Bakhru, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Vibha Mahajan Seth, Advocate for the Appellant; Balbir Singh, Sr. Standing Counsel, Abhishek Singh Baghel and Arjun Harkauli, Jr. Standing Counsel, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The petitioners are partners of a firm M/s. Dewan Chand Dholan Das & Co. (hereinafter referred to as the "assessee") and have filed this writ petition under Article 226 and 227 of the Constitution of India, inter alia, impugning the Assessment Order dated 28.02.2003 and the order dated 02.12.2013 passed by the Commissioner Income Tax (CIT), whereby the revision petition of the assessee u/s 264 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") against the Assessment Order was dismissed.

2. Briefly stated the relevant facts of the case are as under: -

2.1. The assessee filed its return for the Assessment Year 2000-01 on 31.10.2000 declaring a loss of Rs. 3,80,68,466/- during the previous year ending 31.03.2000. The case of the assessee was picked up for scrutiny and a notice u/s 143(2) of the Act was dispatched by the Income Tax Authorities on 30.10.2001. The Assessing Officer, thereafter, sent further notices for the purposes of the scrutiny assessment. In response to the said notices, Mr. Nihal Chand, one of the then partners of the assessee firm, appeared before the Assessing Officer. He, however, showed his inability to produce any accounts or other details as sought

by the Assessing Officer. He stated that there were certain disputes between the partners of the assessee firm and a suit being CS(OS) No. 981/2001 had been instituted in this Court. In those proceedings, the Court had appointed a Local Commissioner to inspect and sign the books of accounts relating to the businesses of the partners including the assessee firm. The books and other accounts were stated to be in the custody of the Local Commissioner appointed by the Court.

2.2. Since, the assessee had failed to produce the requisite books of accounts and other relevant documents supporting the return, the Assessing Officer passed an assessment order on 28.02.2003 u/s 144 of the Act on best judgment basis. The Assessing Officer determined the total income of the assessee at Rs. 1,96,47,232.25/-. The Assessing Officer observed that while the opening stock of Walnut Kernels was valued at Rs. 173.81 per kg., the closing stock had been valued at Rs. 44.53 per kg. The Assessing Officer also noticed that there was a shortage of 23,817.516 kgs of Kernels. During the previous year relevant to the Assessment Year 2000-2001, there was an increase in sundry creditors to the extent of Rs. 15,811,668/- and increase in unsecured loans to the extent of Rs. 31,89,455.25. There was addition in the partners' capital accounts to the extent of Rs. 6,46,109/-. The Assessing Officer disallowed the losses claimed and made additions u/s 68 of the Act with regard to the addition in the capital accounts of partners as well as on account of increase in unsecured loans and sundry creditors. In addition, the Assessing Officer also initiated penalty proceedings u/s 271(1)(c), 272A(1)(c), 271D and 271E of the Act.

2.3. The disputes between the partners of the assessee were, apparently, settled and a Memorandum of Understanding dated 26.02.2005 was executed. Accordingly, a compromise decree was passed by this Court on 16.09.2005 in CS(OS) No. 981/2001.

2.4. Thereafter, the assessee preferred a revision petition u/s 264 of the Act impugning the assessment order dated 28.02.2003 and on 17.09.2007, the said revision petition was rejected by the CIT as being belated. Aggrieved by the same, the petitioners/assessee preferred a writ petition (W.P.(C) 7892/2009) which was allowed by this Court by an order dated 23.04.2012, and the order dated 17.09.2007 passed by the CIT was set aside and the matter was remanded to CIT to decide the same on merits in accordance with law and after affording the petitioners/assessee an opportunity of being heard.

2.5. On remand, the CIT passed an order dated 16.08.2012, once again rejecting the revision petition preferred by the assessee. Aggrieved by the same, the petitioners/assessee preferred yet another writ petition before this Court being W.P.(C) 6352/2012, inter alia, alleging that the CIT had failed to consider the assessee's contention that no notice u/s 143(2) of the Act had been served on the assessee within the period prescribed and, consequently, the assessment proceedings were liable to be set aside. This Court was of the view that the CIT had not examined the petitioner's contention with regard to non-service of

notice and, accordingly, by order dated 06.05.2013, remanded the matter to CIT to examine the contentions of the assessee and decide the revision petition afresh.

2.6. Pursuant to the order dated 06.05.2013 passed by this Court, the CIT passed the impugned order dated 02.12.2013. The present writ petition, inter alia, challenges the said order.

3. It was contended on behalf of the petitioner that in terms of proviso to Section 143(2) of the Act, a notice u/s 143(2) of the Act calling upon the assessee to produce evidence in support of its claim could not be served after expiry of one year from the end of the month in which the return had been furnished. Since, in the present case, the assessee had filed its return on 31.10.2000 the last date for serving the notice would be 31.10.2001. It was asserted that the assessee had not received any notice within the specified period and, therefore, the assessment proceedings were without jurisdiction.

4. The learned counsel for the assessee referred to Section 292BB of the Act and argued that the said Section had been introduced by Finance Act, 2008 w.e.f. 01.04.2008. By virtue of the said provision, any notice under any provision of this Act would be deemed to have been served on an assessee who has appeared in the proceedings without raising any objection before the completion of the assessment. It was submitted that the period in question in the present matter was prior to 01.04.2008 and in the absence of that provision, it could not be deemed that the petitioner was precluded from raising the objection that it had not received the notice as prescribed.

5. The learned counsel for the petitioners referred to the acknowledgement of dispatch of notice by speed post and contended that the address as printed indicates that the notice was sent to an address in New Delhi whereas the office of the assessee firm was in Delhi. It was next contended in accordance with Section 282(2)(a), a notice to a firm was required to be addressed to the partners and in the present case, there was no evidence that the notice had been so addressed. On the contrary, it was not disputed that the notice was addressed to the firm and not its partners.

6. The learned counsel for the petitioner also stated that the Assessing Officer had erred in making additions on account of unexplained creditors and unsecured loans. It was urged that since the Assessing Officer had rejected the books of accounts and thereby disallowed the losses, the Assessing Officer could not make any additions on account of increase in the sundry creditors and unsecured loans as reflected in those books of accounts as the name had already been rejected. The learned counsel contended that the Assessing Officer erred in mechanically disallowing the losses and making additions only on the ground that the assessee had been unable to produce books of accounts and other material. It was submitted that the Assessing Officer was required to apply his mind and in absence of the books of accounts, try to ascertain the correct income of the

assessee.

7. We have heard the learned counsel for the parties.

8. Indisputably, a notice u/s 143(2) of the Act was dispatched by the Income Tax Authorities on 30.10.2001; The proof of dispatch by speed post has been produced. Undisputedly, subsequent notices dispatched at the same address had been received by the assessee who was represented at hearings before the Assessing Officer, information of which were communicated through those notices. It must, therefore, be presumed that the notice dispatched on 30.10.2001 was also correctly addressed. The fact that the speed post receipts mentioned New Delhi, in our view, would not be determinative of question whether the notice in question was correctly addressed. In this view, it must be presumed that the assessee had duly received the notice in question.

9. More importantly, the assessee had not disputed the service of notice at the relevant stage. The Assessing Officer, on 27.02.2002, issued another notice including a questionnaire. Apparently, the said notice also referred to the issuance of notice on 30.10.2001 and noted that the same had been duly received by the assessee on 31.10.2001. Thereafter, further notices were served by the Assessing Officer which were duly received or returned on account of the assessee refusing to accept the same. On 27.12.2002, the Assessing Officer issued yet another notice/questionnaire which also referred to the earlier notices u/s 143(2) of the Act. Concededly, this notice/questionnaire was received by the assessee who sought an adjournment of the date of hearing scheduled under the said notice. It is stated that the assessee sought adjournments on one ground or the other. During the proceedings before the Assessing Officer, the assessee did not dispute the contents of any of the letters/questionnaire, although, the representative of the assessee did enter appearance. The fact that the notice dispatched on 30.10.2001 had been duly received by the assessee on 31.10.2001 was not disputed or controverted by the assessee during the assessment proceedings.

10. The dispute with respect to non receipt of notice was raised for first time in the revision petition filed on 16.01.2007; more than three years after the assessment order, dated 28.02.2003, had passed. At that stage, obtaining any evidence from the postal Authorities was not possible. The delay on the part of the assessee in raising the dispute cannot be permitted to prejudice to the revenue.

11. The CIT has considered the aforesaid facts and concluded that the notice dispatched on 30.10.2001 had been received by the assessee on 31.10.2001, as the statement that the assessee had received the notice in question on 31.10.2001, had not been objected to by the assessee before the Assessing Officer. The Commissioner also noted that there were several other notices on record which had been issued to the assessee through speed post at the same address subsequent to 31.10.2001. Whilst, some of them had been served, the

others had been returned on the ground that the assessee had refused to accept the same. The Commissioner also noted that there was no evidence that the notice dispatched on 30.10.2001 had been returned. In the given facts, the CIT returned finding that the notice had been duly served on the assessee. We find no infirmity in the finding of the CIT as it is not disputed that the subsequent questionnaire/notice sent by the Assessing Officer to the assessee which mentioned that the notice u/s 143(2) had been duly received by the assessee on 31.10.2001 was not controverted during the assessment proceedings. In our opinion, the assessee cannot be permitted to raise this plea at a subsequent stage.

12. We are also unable to accept the contention that the petitioner cannot be precluded from raising the objection as to receipt of notice since Section 292BB of the Act was not in force during the relevant Assessment Year. There is distinction between precluding a person who has not raised the plea of non-receipt of notice during the assessment proceedings, from subsequently raising such plea, and a case where the assessee has not controverted a statement during the assessment proceedings that it had duly received the notice u/s 143(2) of the Act. In the latter case, where an assessee does not controvert an affirmative statement that it had duly received the notice on a particular date, the assessee would be precluded from controverting the same at a later stage and it would not be erroneous to hold that, as a matter of fact, the assessee had duly received the notice of the proceedings. Thus in the present case, the conclusion of the CIT that the assessee had duly received the notice in question on 31.10.2001 cannot be faulted. Although, it is the Revenue's view-as articulated in Circular No. 1 of 2009 dated 27.03.2009- that Section 292BB of the Act would be applicable to all pending proceedings as on 01.04.2008. In view of our aforesaid opinion, it is not necessary to examine the correctness of this view.

13. The contention that the notice issued by the Assessing Officer in the name of the assessee was invalid by virtue of Section 282(2)(a) of the Act, is also bereft of any merit. Section 282 was substituted by the Finance (No. 2) Act, 2009 w.e.f. 01.10.2009. Prior to the substitution, the said Section read as under:-

282. Service of notice generally.-(1) A notice or requisition under this Act may be served on the person therein named either by post or as if it were a summons issued by a court under the Code of Civil Procedure, 1908 (5 of 1908).

(2) Any such notice or requisition may be addressed

(a) in the case of a firm or a Hindu undivided family, to any member of the firm or to the manager or any adult member of the family;

(b) in the case of a local authority or company, to the principal officer thereof;

(c) in the case of any other association or body of individuals, to the principal officer or any member thereof;

(d) in the case of any other person (not being an individual), to the person who

manages or controls his affairs.

14. A plain reading of the opening words of Sub-section 2 of Section 282 indicates that the same only enables a notice to be addressed in the manner as specified in various clauses of Section 282(2); In terms of clause (a), a notice may be addressed in case of a firm to any member of the firm. This provision cannot be read to mean that a notice which is addressed in the name of the firm is invalid. On the contrary, the import of the Section 282(2)(a) is that a notice to a firm could also be addressed to any of its members.

15. Insofar as the petitioners' contention that the best judgment assessment made by the Assessing Officer is arbitrary and unreasonable is concerned, it is relevant to note that the assessee had not produced the books of accounts or any other material as required by the Assessing Officer. It is not disputed that pursuant to the notice dated 27.12.2002, one Mr. Nihal Chand, who was admittedly a constituent partner in the assessee firm at the material time, had appeared before the Assessing Officer. He had explained that the books of accounts and other records of the company were under the control of a Court appointed Local Commissioner and had sought time to obtain the records. However, thereafter he neither produced the books of accounts nor appeared before the Assessing Officer. The only explanation given by the petitioners for the non-production of books of accounts is that the same were not under their control but in control of a Local Commissioner appointed by this Court in a civil suit instituted on its Original side. It was submitted that the possession of the premises in which the Books of Accounts and other material had been kept was taken over by Standard Chartered Bank and subsequently, handed over to the purchaser of the said property. The petitioners have, thus, submitted that they were not in control of the Books of Accounts and records of the assessee firm. In our view, this contention cannot be accepted, because it was always open for the assessee and/or its partners to approach this Court and seek an inspection of the records even if the same were in possession of the Local Commissioner. There is nothing on record to indicate that any efforts were made to obtain either copies of Books of Accounts or other relevant records of the assessee. In absence of the material sought by the Assessing Officer, he had no alternative but to make a best judgment assessment.

16. The contention that the assessment is unreasonable or made mechanically by simply disallowing the losses and arbitrarily making additions, is also without merit. One of the well accepted methods of making a best judgment assessment is to refer to the past years and estimate the income based on the operational results and trends of the preceding years. The petitioners had produced a statement of comparison between the trading result and profit and loss during the period relevant to the Assessment Year 1999-2000 and 2000-01. The said statement indicates that there was no major variance in sales and purchases made during the years 1999-2000 & 2000-01. Whereas, the assessee made sales aggregating Rs. 7,70,38,592/- in the previous year ending 31.03.1999, the

sales made during the previous year ended 31.03.2000 (AY 2000-01) were to the tune of Rs. 8,06,92,897/-. Similarly, the purchases made during the year ended 31.03.1999 aggregated Rs. 6,18,74,488/- and the purchases made during the previous year ended 31.03.2000 added up to Rs. 6,92,07,695/-. Whilst the assessee had made a gross profit of Rs. 1,42,13,364/- (i.e. disclosed a gross profit margin of about 18.22%) for the Assessment year 1999-2000 (i.e. previous year 1998-1999), the gross loss for the period in question (Assessment Year 2000-2001) was Rs. 2,42,62,900/-. This variance in profit was not in conformity with the profile of the final accounts of the preceding year.

17. It was explained by the assessee that the loss had occurred on account of a drop in the value of the closing stock and shortage in stocks. It is apparent from the statement of comparison submitted by the assessee, that the Assessing Officer could not accept the losses in the year in question on the basis the financial results in the earlier years. The final accounts of the preceding year did not indicate that the assessee had written off any stock as having perished and thus it could not be assumed that such loss was normal for the business. However, the assessee had claimed a shortage of 28,817 kgs in the year in question and in addition, the assessee had also claimed that almost the entire opening stock of Walnut Kernels on 01.04.1999 had deteriorated. Such losses were clearly an aberration and in absence of sufficient material could not be accepted by the Assessing Officer in a best judgment assessment, especially where there was no material to substantiate the loss as declared in the returns and the statement of accounts furnished along with it. The Assessing Officer, therefore, rejected the loss as returned by the assessee and in our view, rightly so.

18. The Assessing Officer also made additions on account of increase in sundry creditors and unsecured loans. The assessee could easily obtain confirmation of outstanding balances from third parties, however, no confirmation was supplied to the Assessing Officer. The scale of operations of the assessee during the year was not materially different from that in the preceding year, and in the circumstances a significant increase in the sundry creditors and unsecured loans was clearly unexplained and in the circumstances the Assessing Officer added the same u/s 68 of the Act. The Assessing Officer also added the increase in the account of the partners. The assessee attempted to explain the same by stating that the additions were from the funds withdrawn by the partners. However, the individual accounts of the partners which could have substantiated such claim were, apparently, not produced before the Assessing Officer. Thus, the said explanation was also not accepted. We are unable to find any flaw in the approach of the Assessing Officer.

19. In the given circumstances, we are unable to accept the contention that the assessment order dated 28.02.2003 is arbitrary or unreasonable.

20. For the above reasons, the Court finds no infirmity with the impugned order, the writ petition is accordingly dismissed of.