

(2024) 05 GAU CK 0095
In the Gauhati High Court
Case No : Writ Petition (C) No. 2683 Of 2019

Pabitra Kumar Hira

APPELLANT

Vs

Union Of India And 2 Ors

RESPONDENT

Date of Decision : 02-05-2024

Acts Referred:

Income Tax Rules, 1962 — Rule 4, 48, 50, 51, 52(1), 53, 53(cc), 55, 56, 57, 58, 61, 65, 68B, 68B(1), 68(ii), 68(iv)
Income-Tax (Certificate Proceedings) Rules, 1962 — Rule 16(1)
Income Tax Act, 1961 — Section 156, 220, 222, 222(1), 226(3), 245I, 245D(4), 264

Citation : (2024) 05 GAU CK 0095

Hon'ble Judges : Kardak Ete, J

Bench : Single Bench

Advocate : R Dubey

Final Decision : Allowed

Judgement

1. Heard Mr. R. Dubey, learned counsel for the petitioner. Also heard Dr. B.N. Gogoi, learned Standing Counsel, Income Tax Department appearing for all the respondents.

2. By filing this writ petition, the petitioner has challenged the legality and validity of the impugned sale notice dated 27.03.2019, whereby immovable property of the petitioner is sought to be put on sale and also the attachment order dated 20.12.2018, passed by the respondent authority on the ground that the impugned sale notice as well as the order of attachment are barred under the provision of Rule 68B of the Schedule II of the Income Tax Act, 1961.

3. The petitioner is a businessman who is engaged in supply of power tillers and tractors to various Departments of the State of Assam. The petitioner is the proprietor of various firms and filed his income tax returns regularly.

4. In the year 2004, the Assessing Officer made a block assessment of the income of the petitioner and vide order dated 30.12.2004, has stated that

concealed undisclosed income of the assessee/ petitioner herein was Rs.98.62,670.00 (Rupees Ninety Eight Lakhs Sixty Two Thousand Six Hundred and Seventy) only, for the Financial Year 1996-97 to 2001-02 and from 01-04-2002 to 21-11-2002 (Assessment Year 1997-98 to 2002-03 and 2003-04 (in part)). Thereafter, a demand notice was issued under Section 156 of the Income Tax Act, 1961 vide dated 30-12-2004, along with Assessment Order and Challan.

5. On receipt of the demand notice dated 30-12-2004, the petitioner filed a Revision under Section 264 of the Income Tax Act, 1961, before the Commissioner of Income Tax, Guwahati-I, which was disposed of by an order dated 05-12-2006. Thereafter a revised assessment order dated 11-12-2006 was issued to the petitioner by the Assessing Officer and the payable income tax by the petitioner was amounting to Rs.63,10,881.00 (Rupees Sixty Three Lakhs Ten Thousand Eight Hundred and Eighty One) only, including Surcharge of Rs.2,82,841.00 (Rupees Two Lakhs Eighty Two Thousand Eight Hundred forty one) only and interest of Rs.3,71,228.00 (Rupees Three Lakhs Seventy One Thousand Two Hundred Twenty Eight) only. Thereafter, as many as seven Certificates vide dated 19.11.2007 and 30.07.2008, respectively were drawn against the petitioner for a total amount of Rs. 1,15,54,004/-.

6. It is the contention of the petitioner that in view of the Revision Order dated 05-12-2006 and the consequential revised assessment order dated 11.12.2006, it become conclusive in terms of provision of Chapter XX of the Income Tax Act, 1961 in the financial year ending 31.03.2010.

7. According to the petitioner, due to his illness, he could not clear the revised dues on account of his poor financial condition. Thereafter, the authority in the Income Tax Department has issued a demand notice vide dated 07.12.2017, for clearing the outstanding dues of Rs.1,14,32,906/-.

8. Vide letter dated 18.12.2018, the respondent authority namely, the Tax Recovery Officer-I, Guwahati issued a letter to the Senior Sub-Registrar, Mangaldoi to restrain the sale of immovable property of the petitioner, in terms of the provisions contained in Schedule-II, Rule 16(1) of the I.T.C.P. Rules, 1962. Another letter was also issued to the Circle Officer, Mangaldoi Revenue Circle to restrain the sale of property by the petitioner on the ground that huge amount of income tax is outstanding against the petitioner and the Certificate proceeding has been drawn against him.

9. The respondent authority by an order dated 20.12.2018, notice of attachment of the property in question was issued under Section 226(3) of the Income Tax Act, 1961 and on the same day i.e. on 20.12.2018, by another order prohibited and restrained the petitioner from transferring or charging, which is included in property of the petitioner. Finally, the authority has issued the impugned notice of public auction/proclamation of sale of the property of the petitioner to be held on 27.08.2019.

10. The petitioner has filed a representation stating to accede to the deposit of Rupees One lakh against the impugned order and requested to postpone the auction, which was rejected vide order dated 09.04.2019 by the Tax Recovery Officer-I, Guwahati. Grieved, the petitioner has filed the present petition on the ground that same is hit by rule 68B of the Schedule II of the Income Tax Act, 1961.

11. Mr. R. Dubey, learned counsel for the petitioner, while not disputing the dues/liabilities of the petitioner, submits that since the impugned orders have been issued after lapse of three years, it is barred by the provision of Rule 68 B of the Schedule II of the Income Tax Act, 1961. Rule 68 B (1) of the Schedule II of the Income Tax Act, 1961 provides for a three years (now seven years, which has been amended in the year 2019) in view of the conclusiveness of the Assessment Year in 2010. He submits that no attachment could have been made. He submits that since the notice of sale is barred under Rule 68 B (1) of the Schedule II of the Income Tax Act, 1961, the attachment would be automatically deemed to have been vacated.

12. Mr. Dubey, learned counsel, in support of his submission, has relied the following two decisions: (1) The decision of High Court of Judicature at Madras in the case of Nooruddin vs. Tax Recovery Officer, reported (2001) 251 ITR 357 and (2) The decision of the High Court of Bombay in the case of M.U. Joshi vs. Tax Recovery Officer, reported in [2006]281 ITR 289 (BOM).

13. Dr. B.N. Gogoi, learned Standing Counsel, Income Tax Department, fairly submits that indeed the impugned order is barred under Rule 68B (1) of the Schedule II of the Income Tax Act, 1961. However, he submits that the authorities cannot be barred from recourse to other provisions of the Act for recovery of the dues from the petitioner and as such liberty may be granted to the authorities to take recourse to the provisions under the Act to recover the dues.

14. Dr. Gogoi, the learned standing counsel, has relied upon the decision of the High Court of Madras, in the case of S. Sebastine vs. Commissioner of Income Tax, reported in (2022) 140 taxmann.com 604 (Madras), which is reproduced here-in-below for ready reference:

"12. Rule 4 of the IInd Schedule to the Income-tax Act, 1961 makes it clear one of the alternate method for recovering the tax. Apart from attaching the property and bringing the property for sale, the Department can also arrest the defaulters and detain such person in prison or appoint a Receiver for the management of the defaulter's property both movable and immovable property. The tax liability of the petitioner does not get effaced by efflux of time. The Department can attach the property under rule 48 r/w rule 60 and bring the same property for sale in terms of the provisions of the IInd schedule to the Income-tax Act, 1961.

13. Even if Rule 68(b) contemplates no sale beyond the period of limitation specified therein t.e., 3 years during the period when the impugned proclamation

of sale was issued on 28-3-2014 in Form ITCP-13 does not mean that the Department cannot issue a fresh order of attachment of the property. There are also other methods available under the Rules for recovering the tax due together with interest. Therefore, while I am inclined to allow this writ petition in the light of the limitation prescribed in Rule 68(b) of the IIInd schedule to the Income-tax Act, 1961, while giving liberty to the respondents to initiate proceedings to recover the tax due and the interest thereon from the petitioner in terms of the other provisions of the aforesaid Rules including a fresh proceeding for attaching the subject property.”.

15. Due consideration has been extended to the submissions of learned counsel for the parties.

16. The simple issue to be considered is as to whether the impugned sale notice dated 27.03.2019 and the attachment is barred by limitation under Rule 68B of the Schedule II of the Income Tax Act, 1961.

17. There would not be any dispute that proclamation for sale/ auction has to be made before the expiry of period of three years (now seven years as amended in the year 2019) from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-1 or, as the case may be, final in terms of the provisions of Chapter XX.

18. Rule 68 B of the Schedule II of the Income Tax Act, 1961, provides which is reproduced here-in-below:

“68B. (1) No sale of immovable property shall be made under this Part after the expiry of [seven) years from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-1 or, as the case may be, final in terms of the provisions of Chapter XX:

(Provided that the Board may, for reasons to be recorded in writing, extend the aforesaid period for a further period not exceeding three years:]

Provided [further) that where the immovable property is required to be re-sold due to the amount of highest bid being less than the reserve price or under the circumstances mentioned in rule 57 or rule 58 or where the sale is set aside under rule 61, the aforesaid period of limitation for the sale of the immovable property shall stand extended by one year.

(2) In computing the period of limitation under sub-rule (1), the period-

(i) during which the levy of the aforesaid tax, interest, fine, penalty or any other sum is stayed by an order or injunction of any court, or

(ii) during which the proceedings of attachment or sale of the immovable

property are stayed by an order or injunction of any court; or

(iii) commencing from the date of the presentation of any appeal against the order passed by the Tax Recovery Officer under this Schedule and ending on the day the appeal is decided, shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation for the sale of the immovable property is less than 180 days, such remaining period shall be extended to 180 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

(3) Where any immovable property has been attached under this Part before the 1st day of June, 1992, and the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has also become conclusive or final before the said date, that date shall be deemed to be the date on which the said order has become conclusive or, as the case may be, final.

(4) Where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified under this rule.]

19. A bare reading of the provision of Rule 68 B of the Schedule II of the Income Tax Act, 1961, clearly shows that no sale of immovable property shall be made after the expiry of seven years (earlier three years) from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-I or, as the case may be, final in terms of the provisions of Chapter XX.

20. Section 245-I of the Income Tax Act, 1961 provides as follows:

"Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force".

21. Considered the fundamental question of sale proclamation being barred by limitation as prescribed in Rule 68B of the Second Schedule of Income Tax Act, 1961 in the context of above facts.

22. It is noticed that the relevant facts are not in dispute. The immovable property belongs to the petitioner. The immovable property put to sale was under attachment on 20.12. 2019 and the notice to sale/proclamation of sale was issued on 27.03.2019.

23. Rule-68B, which was inserted by Finance Act, 1992, w.e.f. 01.06.1992, permits sale of immovable property for recovery of unpaid taxes only within three years from the date of order given rise to the tax dues, after which the sale

of immovable property would not be permitted.

24. Chapter XVII of the Act pertains to correction and recovery of the tax. Section-220 contents provisions as to when the assessee will be deemed to be in default of tax. Section-222 pertains to Certificate to Tax Recovery Officer. Sub-Section-1 of Section-222 provides that- when an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may draw up a statement in the prescribed form specifying the amount of arrears due from the assessee and shall proceed to recovery the amount specified in the certificate by one or more of the modes mentioned in the above, in accordance with the rules laid down in the Second Schedule. One of the modes is attachment and sale of the assessee's property.

25. Schedule II to the Act pertains to procedure for recovery of tax. The Schedule contents rules for recovery of unpaid taxes through various modes envisaged in Sub-Section-(1) of Section-222 of the Act. Part-II of the Schedule-II pertains to attachment and sale of immovable property. Rule-48 content in the said part provides that the attachment of the immovable property of the defaulter shall be made by in order prohibiting the defaulter from transferring on in charging the property in any way and prohibiting all process from taking any benefit under such transfer of charge. Under Rule-50 the order of attachment shall be proclaimed at some place on or adjacent to the property attachment. Rule-51 provides that where any immovable property is attached under this Schedule, the attachment shall relate back to and take effect from, the date on which the notice to pay the arrears was served upon the defaulter. Sub Rule-1 of Rule-52 provides that the Tax recovery Officer may direct that any immovable property which has been attached, or such portion thereof as may seem necessary to satisfy the certificate, shall be sold. Rule-53 pertains to contents of proclamation, this rule requires proclamation of sale of immovable property and various details including the details of the property to be sold in the reserve price, if any, below which the property may not be sold. Rule-55 provides that no sale of immovable property under this schedule, without the consent in writing of the defaulter, take place until after the expiration of at least thirty days calculated from the date on which a copy of the proclamation of sale has been affixed on the property or in the office of the Tax Recovery Officer, whichever is later. Rule-56 provides that the sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer. Proviso to Rule- 56 provides that no sale under this rule shall be made if the amount bid by the highest bidder is less than the reserve price, if any, specified under clause (cc) of Rule 53. Rule-58 to 65 provides for both scheme for attachment and sale of property of an SSC in default.

26. Rule 68B, which is relevant for the present case was inserted by the Finance Act, 1992 w.e.f. 01.06.1992, (which has been amended 2019, to seven years now), provides that no sale of immovable property shall be made under this Part after the expiry of three [now seven) years from the end of the financial year in

which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-1 or, as the case may be, final in terms of the provisions of Chapter XX. Provided that the Board may, for reasons to be recorded in writing, extend the aforesaid period for a further period not exceeding three years. Provided [further) that where the immovable property is required to be re-sold due to the amount of highest bid being less than the reserve price or under the circumstances mentioned in rule 57 or rule 58 or where the sale is set aside under rule 61, the aforesaid period of limitation for the sale of the immovable property shall stand extended by one year. In computing the period of limitation under sub-rule (1), the period-

(i) during which the levy of the aforesaid tax, interest, fine, penalty or any other sum is stayed by an order or injunction of any court, or

(ii) during which the proceedings of attachment or sale of the immovable property are stayed by an order or injunction of any court; or

(iii) commencing from the date of the presentation of any appeal against the order passed by the Tax Recovery Officer under this Schedule and ending on the day the appeal is decided, shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation for the sale of the immovable property is less than 180 days, such remaining period shall be extended to 180 days and the aforesaid period of limitation shall be deemed to be extended accordingly. Where any immovable property has been attached under this Part before the 1st day of June, 1992, and the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has also become conclusive or final before the said date, that date shall be deemed to be the date on which the said order has become conclusive or, as the case may be, final. Where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified under this rule.]

27. As seen above, as per Rule-68B no sale of immovable property would be made after the expiry of three years (now seven years) from the end of the financial year in which the order giving rise to a demand of tax, interest, fine, penalty or any other sum for recovery of which immovable property has been attached has become conclusive under the provision of Section-245-I or chapter-XX of the Act, which deals with the appeals and revisions. Proviso to Sub-Rule-I, however give some leverage in case where the immovable property is required to be sold due to the Act of the highest bids is less than the reserve price or where the case falls under Rule-57 or Rule-58 of the same is set aside under Rule-61. In such a case, the period of limitation of sale would be stand extended by one year. Sub Rule-(ii) of Rule-68B provides for exclusion of certain periods while

computing the period of limitation. Sub Rule-(iii) of Rule-68B provides that special provision for cases where any immovable property has been attached before 01.06.1992 and the order giving rise to a demand of any tax, interest, etc has also become conclusive or final before the said date. In such a situation the period of limitation as referred by Sub-Rule-I would commenced from 01.06.1992, this Sub-Rule (1), thus, makes it clear that limitation provided under Sub Rule-I for sale of immovable property would appear also to be attachment of immovable property and finalisation of tax demand which have occurred where from 01.06.1992. In such a case, computing the period of limitation would be 01.06.1992, i.e. the date on which the said rule was inserted. Sub-Rule (IV), of Section-68 provides that where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation.

28. It provides for a time limit of a period of three years for sale of attached immovable property starting from the end of the financial year in which the order giving rise for demand of tax, interest etc. has become conclusive. Sub-Rule-IV of the Rule-68B provides for the consequence of the immovable property not being sold within such time. As per the Sub-Rule-IV, the attachment order in the relation to the said property would be deemed to have been vacated on the expiry of the time limit as provided.

29. Having considered above, in my considered view in the facts and circumstances of the present case, Rule-68B would apply. The attachment of the said immovable property was made on 20.12 2018 and the notice of proclamation of sale/auction was made on 27.03.2019 from the end of the financial year in which the order giving rise to a demand of tax etc, has become conclusive in the year 2010. Thus, hit by the period of limitation prescribed under the said rule. By virtue of Sub-Rule-(IV) of Rule-68B, upon completion of the period of limitation, the attachment would be deemed to have been vacated.

30. In view of above, I am of the view that by virtue of Rule-68B of the schedule II of Income Tax Act, 1961, the impugned notice of proclamation of sale is barred by limitation and as such is deserve to be set aside and quashed. Accordingly, the impugned notice of proclamation of sale is set aside. Consequently, attachment over the immovable property of the petitioner is also set aside. However, it is made clear that the respondent authorities are at liberty to proceed for recovery of the dues against the petitioner that may be permissible under the provisions of the Act and Rules.

31. The Writ Petition stands allowed and disposed of. No order as to cost.