(1998) 11 CAL CK 0018

In the Calcutta High Court

Case No : Matter No. 1950 of 1991

Peico Electronics and Electricals Limited and Another — APPELLANT

Vs

Deputy Commissioner of Income Tax and Others — RESPONDENT

Date of Decision : 24-11-1998

Acts Referred:
Income Tax Act, 1961 — Section 143, 143(1), 143(2)

Citation : (2000) 160 CTR 365 : (1999) 236 ITR 702 : (1999) 103 TAXMAN 98

Hon'ble Judges : Y.R. Meena, J

Bench : Single Bench

Advocate : Debi Prosad Pal, Pronab Kumar Pal and Manisha Seal, for the Appellant;Dipak Kumar Shome and Md. Nizamuddin, for the Respondent

Judgement

Y.R. Meena, J.—By this petition, the petitioner has prayed that the intimation u/s 143(1)(a) of the Income Tax Act, 1961, issued by the Assessing Officer should be quashed and no effect should be given to any order which is issued under intimation u/s 143(1)(a) of the Act.

2. The petitioner has filed the Income Tax return on December 27, 1989, for the assessment year 1989-90 showing a loss of Rs. 28,74,24,579, Thereafter the petitioner has filed a revised return claiming a sum of Rs. 45,08,85,300 to be carried forward as loss. Before the petitioner filed the second revised return he received a notice dated May 31, 1990, u/s 143(2) of the Act on June 1, 1990, whereby respondent No. 1 required the petitioner to produce the documents and accounts on which the petitioner wanted to rely in support of the return on June 18, 1990. In pursuance of that notice, the authorised representative of the petitioner produced all the books of account and documents. In the course of hearing, respondent No. 1 required the authorised representative of the petitioner to furnish certain particulars for which he fixed the next date of hearing on September 3, 1990. The matter was adjourned time and again. But before completion of the assessment u/s 143(3) of the Act, the petitioner has received an intimation u/s 143(1)(a) of the Act along with an adjustment

explanation sheet both dated March 27, 1991, relating to the assessment year 1989-90.

3. The grievance of the petitioner is that once the notice u/s 143(2) of the Act has been issued, the Assessing Officer has no power to issue the intimation u/s 143(1)(a) of the Act.

4. Section 143(1)(a) of the Income Tax Act, 1961, reads as under :

"143(1)(a). Where a return has been made u/s 139, or in response to a notice under Sub-section (1) of Section 142,--

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of Sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued u/s 156 and all the provisions of this Act shall apply accordingly ; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee :

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :--

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified ;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed ;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed ;"

Counsel for the petitioner further placed reliance on the decisions of this court and the Gujarat High Court which are as follows :

(1) Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others, ; (2) Gujarat Poly-Avx Electronics Ltd. Vs. Deputy Commissioner of Income Tax, and (3) Lakhanpal National Ltd. Vs. Deputy Commissioner of Income Tax, .

In Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others, this court has observed as under :

"The omission by the Legislature to make the issuance of a notice u/s 143(2) without prejudice to an intimation u/s 143(1)(a) while specifically providing that the issuance of an intimation u/s 143(1)(a) would be without prejudice to Section 143(2), was, in my view, deliberate because of the difference in the nature of the jurisdictions exercised by the Assessing Officer under the two sections. The jurisdiction u/s 143(1)(a) as already seen is a summary one, whereas Section 143(2) precedes an assessment u/s 143(3) or what has been described as the scrutiny or regular assessment. The language of Section 143(3) shows the object of the issuance of notice u/s 143(2) and reads : . . . .

The respondents'' submission that the issuance of an intimation is compulsory is incorrect. To accept the submission would be to read the provisions of Section 143(1)(a) in a manner not warranted by the language. It is true that the word ''shall'' has been used in connection with the issuance of an intimation but it is well-established that the construction of the expression ''shall'' depends upon the provisions of the Act, the setting in which the direction is given and the consequences that would follow from the infringement of the direction and other such considerations (see Commissioner of Income Tax Vs. Rai Bahadur Bissesswarlal Motilal Malwasie Trust, . The context in which the word ''shall'' has been used in section 143(2) has to be read in the background of the proviso to the section and that is where there is no scope for any adjustments in terms of the proviso, there would be no scope for sending any intimation."

In Gujarat Poly-Avx Electronics Ltd. Vs. Deputy Commissioner of Income Tax, , the Gujarat High Court has observed as under :

"Looking to the language of Section 143(2) of the Act, it is clear that the Assessing Officer has to follow the procedure u/s 143(3) of the Act for making assessment. Mr. Shah, learned counsel, submitted that in the instant case by issuing notice u/s 143(2) of the Act, proceedings commenced u/s 143(3) of the Act. According to him, once the proceedings u/s 143(3) of the Act have commenced the Assessing Officer has no power to pass order u/s 145(1) of the Act."

In both the cases, referred to above, it was observed that once there is a notice u/s 143(2), the assessment should be completed u/s 143(3) and not u/s 143(1) of the Act.

5. In Lakhanpal National Ltd. Vs. Deputy Commissioner of Income Tax, , the Gujarat High Court has reiterated its earlier view that once a notice u/s 143(2) has been issued, the Assessing Officer has to complete the assessment u/s 143(3) of the Act.

6. Counsel for the petitioner, Dr. Pal, submits that when there was a notice u/s 143(2) of the Act that was issued in 1990, no intimation can be issued thereafter u/s 143(1)(a), which has been issued in this case in 1991. Therefore, it should be quashed.

7. Counsel for the respondents, Mr. Shome, submits that in pursuance of the order of this court dated June 6, 1991, the assessment u/s 143(3) has been

completed in pursuance of the notice u/s 143(3) of the Act. Therefore, that should be permitted to be communicated to the assessee and be allowed for recovery of the tax in pursuance of the assessment order.

8. Dr. Pal, has not objected to this limited submission, but he insisted that the intimation u/s 143(1)(a) in 1991, should be quashed.

9. The plain reading of the provisions of Section 143(1)(a) of the Act shows that a notice u/s 143(2) can be issued even after intimation u/s 143(1)(a), but no intimation can be issued u/s 143(1)(a) after issuance of the notice u/s 143(2) of the Act. In the instant case, admittedly, a notice u/s 143(2) has been issued on May 31, 1990, being annexure-"A" to the writ petition, and an intimation u/s 143(1)(a), being annexure-"B" to the writ petition, has been issued on March 27, 1991, that is, after issuance of the notice u/s 143(2). The notice u/s 143(2) is a notice of regular assessment while the intimation u/s 143(1)(a) is the adjustment which can be made on the basis of the record available to the Assessing Officer which is filed along with the return by the assessee.

10. Therefore, I agree with Dr. Pal that after issuance of the notice u/s 143(2) the Assessing Officer has no jurisdiction to issue an intimation u/s 143(1)(a). Hence, that intimation, being annexure "B", dated March 27, 1991 is quashed.

11. Counsel for the respondents, Mr. Shome, submits that in pursuance of the order of this court dated June 6, 1991 the assessment now completed u/s 143(3) should be allowed to be communicated to the petitioner for necessary action.

12. Dr. Pal has no objection in case the assessment order is given effect to.

13. In view of this undisputed fact, referred to above, and the provisions of law, I quash the intimation, being annexure-"B" to the writ petition, dated March 27, 1991. It will be open to the respondent to communicate the assessment order which has been passed u/s 143(3) in pursuance of the notice u/s 143(2) to the assessee for necessary action.

14. In the result, the petition is disposed of in the light of the above observations.

15. All parties shall act on a xerox signed copy of this judgment duly counter signed by the Assistant Registrar of this court on the usual undertaking.