
(2004) 07 AHC CK 0138
In the Allahabad High Court
Case No : IT Ref. No. 161 of 1984

Pt. Lashkari Ram

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Income Tax Act, 1961 — Section 263

Citation : (2004) 191 CTR 534 : (2005) 272 ITR 309

Hon'ble Judges : R.K. Agrawal, J; K.N. Ojha, J

Bench : Division Bench

Advocate : Vikram Gulati, for the Appellant; A.N. Mahajan, for the Respondent

Final Decision : Dismissed

Judgement

1. The Tribunal, Allahabad, has referred the following question of law u/s 256(1) of the IT Act, 1961, hereinafter referred to as the Act for opinion to this Court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that despite the inquiries made by the CIT beyond the record of assessment, the CIT was well within his jurisdiction in passing the order u/s 263 based on the record of assessment ?"

2. Briefly stated the facts giving rise to the present reference are as follows :

The assessee filed on 23rd Aug., 1977, a return showing income of Rs. 33, 310/- which include Rs. 28, 068/- as profit u/s 41(2) of the Act on the sale of truck No. UPL 9030. After receipt of the return the ITO made a note "investment in new truck No. UTY 355 to be looked into" on the return and issued notice dt. 4th March, 1980, u/s 143(2) r/w Section 142(1) of the Act requiring the assessee to produce account books and bank pass books, etc. on the 17th March, 1980. That day i.e., the 17th March, 1980, the assessee appeared before the ITO and filed a revised return showing an income of Rs. 53, 310/- instead of Rs. 33, 310/- as disclosed in the original return. The increase of Rs. 20, 000/- in the revised return was accounted for as the profit u/s 41(2) of the Act on the sale of truck

No. UPL 9030 which was Rs. 48, 068/- and not Rs. 28, 068/- as shown in the original return. Originally, the sale price was disclosed .Rs. 35, 000/- and subsequently it was shown Rs. 55, 000/-. The assessment was framed on the same day by the ITO u/s 143(3) of the Act. Tax was computed, interest was charged under Sections 217 and 139(8) of the Act and penalty proceeding was also instituted and penalty was imposed.

The assessee thereafter filed an application before the CIT, Allahabad, u/s 273A of the Act for waiver of penalty and interest. That application led the CIT to hold an inquiry. The CIT called for the reports of the ITO on the said application. Another comprehensive report was called by the CIT in the same connection from the ITO. The CIT eventually rejected the application of the assessee u/s 273A of the Act on 15th Oct., 1981. However, from the said record of assessment, the CIT noticed the following :

(i) The assessment was completed by the ITO on the same very date on which date the revised return increasing income of Rs. 20, 000/- was filed and in due haste the ITO did not appear to have made inquiry about the bank accounts, copy of which was filed by the assessee.

(ii) The ITO also did not inquire the reason for variation in the profit u/s 41(2) of the Act as Rs. 28, 068/- was shown earlier and Rs. 48, 068/- later.

(iii) The ITO also did not consider applicability of Section 271(1)(c) of the Act in respect of income shown in the revised return. The CIT recorded a finding that the assessment was erroneous insofar as it was prejudicial to the interest of the Revenue, and, therefore, he issued notice dt. 26th Feb., 1982, u/s 263 of the Act to the assessee who appeared through lawyer on the date of hearing i.e., 6th March, 1982, and ordered fresh assessment after hearing the assessee.

The assessee came in appeal before the Tribunal. The Tribunal had dismissed the appeal.

3. We have heard Sri Vikram Gulati, learned counsel for the applicant, and Sri A.N. Mahajan, learned standing counsel, who appears for the Revenue.

4. Sri Gulati, learned counsel for the applicant, submitted that the assessment was made on agreed basis and the applicant had furnished all the details which were asked for by the AO and, therefore, even if there is no discussion in the assessment order, it cannot be said that the assessment order has been passed without any application of mind. He submitted that the assessment order had been passed after the applicant had filed the revised return enhancing the value of the sale price of the truck sold during the year in question and also enclosing the copies of the statement of the bank account and other particulars. He further submitted that the proceedings u/s 263 of the Act cannot be initiated if the AO has failed to initiate penalty proceedings at the time of completion of the assessment. He relied upon a decision of the Delhi High Court in the case of Addl Commissioner of Income Tax, Delhi-I Vs. J.K. D'costa, , wherein the Delhi High

Court has said that the mere fact that there is some minor omission or mistake in the assessment order it cannot justify the action of the CIT in setting aside the whole of the assessment order and further Section 263 of the Act refers to a particular proceeding that is being considered by the CIT and it is not possible, when the CIT is dealing with the assessment proceedings and the assessment order, to expand the scope of the these proceedings which are being sought to be revised by the CIT. As the proceedings for the levy of a penalty are proceedings independent of and separate proceeding from the assessment proceedings and there is no identity between the two, the assessment cannot be said to be erroneous or prejudicial to the interest of the Revenue because of the failure of the ITO to record his opinion about the levability of penalty in the case. He further relied upon a decision of the Madhya Pradesh High Court, Indore Bench, in the case of CIT v. Ratlam Coal Ash Co., (1988) 171 ITR 141 , wherein it has been held that an order of assessment cannot be revised merely because the ITO had not made proper enquiries.

5. Sri A.N. Mahajan, appearing for the Revenue, submitted that from perusal of the assessment order it is absolutely clear that the ITO had not applied his mind at all to the various issues on which the applicant was asked to furnish the details. He submitted that the assessment order has been passed without any application of mind and, therefore, the CIT was well within the jurisdiction to initiate the proceedings u/s 263 of the Act. He relied upon a decision of the Hon"ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT, (2000) 243 UR 83 (SC).

6. Having heard the learned counsel for the parties, we find that the ITO had passed assessment order in the following terms :

"Assessed u/s 143(3) on total income of Rs. 55, 000/- after giving deduction u/s 80C on agreed basis. Issue notice of demand and challan. Penalty notices under Sections 273(C) and 10(1) of CDS has also been issued."

The aforesaid order was passed in the notice of demand issued u/s 156 of the Act. From perusal of the aforesaid order it cannot be termed as a speaking order. Moreover, no reasons have been assigned. In the assessment order it has also not been dealt that earlier the applicant was asked to furnish certain details and the assessee had furnished those details by filing a revised return. There is no mention of the details, which had been furnished by the assessee. The Hon"ble Supreme Court in the case of Malabar Industrial Co. Ltd. (supra), has held as follows :

"A bare reading of this provision makes "it clear that the prerequisite to the exercise of jurisdiction by the CIT suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the Revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is Oprejudicial to the interests of the Revenue. If one of them is absent-If the order of the ITO is erroneous but is not prejudicial

to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to Section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind". (emphasis, italicised in print, supplied).

7. In the present case the CIT by initiating the proceedings u/s 263 of the Act had given reasons as to why the order is erroneous and prejudicial to the interest of the Revenue. Even if it is held that no penalty proceeding has been initiated by the ITO in course of the assessment proceeding, the CIT can exercise jurisdiction u/s 263 of the Act on other valid grounds. Therefore, the order of the CIT-does not suffer from any illegality. The Tribunal was justified in upholding the order of the CIT.

8. In this view of the foregoing discussion, we answer the question referred to us in the affirmative i.e., in favour of the Revenue and against the assessee. However, there shall be no order as to costs.