(2010) 06 CAL CK 0030

In the Calcutta High Court

Case No : Writ Petition No. 3801 (W) of 2010

Purnima Das APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 11-06-2010

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 220(6), 226(3), 246A

Citation : (2010) 329 ITR 278

Hon'ble Judges : Soumitra Pal, J

Bench : Single Bench

Advocate : Raja Basu Chowdhury and Sayantan Bose, for the Appellant; M.P. Agarwal, Onkar Ganguly, Rajarshi Dutta and Ishita Bose, for the Respondent

Final Decision : Allowed

Judgement

Soumitra Pal, J.—In this writ petition, the Petitioner, an Assessee under the Income Tax Act, 1961 (for short "the Act"), has challenged the attachment notices u/s 226(3) of the Act dated February 10, 2010 issued by the Assistant Commissioner of Income Tax, Circle-2, Hooghly, Respondent No. 2 (for short "the said Respondent ") and has prayed for refund of Rs. 1,66,000 appropriated by the said Respondent from the current account No. 659 maintained by M/s. P.D. Enterprises with the Indian Overseas Bank, Chandannagar Branch, Respondent No. 4. Incidentally, the pro forma Respondent No. 8 is a partnership firm in which the Petitioner is a partner.

2. The facts relevant for adjudication are that for the assessment year 2007-08 the Petitioner had filed her Income Tax return. The return was scrutinized. On December 24, 2009 assessment order u/s 143(3) of the Act was passed by the said Respondent. Aggrieved by the order of assessment, the Petitioner preferred appeal before the Commissioner of Income Tax (Appeals), XXXVI, Kolkata, Respondent No. 3. Thereafter, on February 11, 2010 the Petitioner filed an application for stay before the said Respondent in respect of the demand for the said assessment year. On February 15, 2010, the Petitioner was served with four

notices of attachment dated February 10, 2010 in respect of the demand for the said assessment year. Thereafter, on February 16, 2010 the Petitioner received a letter dated February 12, 2010 issued by Respondent No. 4 whereby she was informed that a sum of Rs. 1,66,000 was debited from the current account No. 659 and has been paid to the Income Tax Department in accordance with the orders of attachment. According to the Petitioner, the action of the said Respondent in attaching the bank account of a partnership firm by reason of the fact that the Petitioner is a partner thereof, is illegal and arbitrary. Realizing a part of the demand raised by the authority without disposing of the application for stay does not have the sanction of law. Moreover, the notices of attachment which were in stereotyped format did not reflect whether the said Respondent had taken into consideration the factum of pendency of the appeal. Since no notice preceding attachment was issued, the entire action is bad in law.

3. The matter was moved upon notice on February 25, 2010 when after hearing the learned advocates for the parties directions were issued for filing of affidavits and interim order was passed in terms of prayer (g) of the writ petition. It was observed that pendency of the writ petition would not prevent Respondent No. 3 from hearing out the appeal in accordance with law. Pursuant to the directions affidavits have been filed and are on record.

4. Learned advocate appearing on behalf of the Petitioner relying on the statements in the writ petition and in the reply, has submitted that as no copy of notice of attachment was served on her as postulated u/s 226(3)(iii) of the Act, the action of the said Respondent in issuing the notices of attachment and in debiting a sum of Rs. 1,66,000 from the account maintained with Respondent No. 4 is illegal. As evident from paragraph 8 of the affidavit-in-opposition filed by the Revenue, notice was served on the asses-see after order of attachment was passed. Further, as appeal has been preferred against the order of assessment and the same is pending, the action of the said Respondent in issuing the notices of demand and in issuing the order of attachment is against the provisions contained in Section 220(6) of the Act. Moreover, the action of the said Respondent in debiting a sum of Rs. 1,66,000 is uncalled for as the stay application filed on February 11, 2010 is yet to be disposed of. According to him, while attaching and debiting the sum, the said Respondent ought to have followed the provisions contained in the Second Schedule to the said Act, particularly Rule 32 thereof.

5. Learned advocate appearing on behalf of the Revenue supporting the action of the said Respondent has submitted that as the notices u/s 226(3) of the Act were issued on February 10, 2010, that is, the day before the stay petition was filed, the said Respondent was justified in directing the bank to debit the sum which Respondent No. 4, the bank, did. According to him, the action of the said Respondent is to be seen taking a comprehensive picture of the facts of the case and withdrawal of the four attachment notices by order dated March 17, 2010 indicates fairness on the part of the said Respondent.

6. Learned advocate appearing on behalf of the bank relying on the affidavit-in-opposition has submitted that the entire action attaching the bank account and withdrawing the attachment was pursuant to the orders issued by the Income Tax authorities.

7. Learned advocate appearing on behalf of the pro forma Respondent No. 8 submits that as the amount has been debited from the account of his client, the firm is seriously prejudiced and appropriate order may be passed directing refund.

8. Admittedly, for the assessment year 2007-08 on December 24, 2009 order of assessment u/s 143(3) of the Act was passed by the said Respondent. Being aggrieved, on January 22, 2010 the Petitioner preferred an appeal before Respondent No. 3. Thereafter, on February 11, 2010 an application for stay u/s 220(6) of the Act for the assessment year 2007-08 was filed before the said Respondent. It appears that on February 10, 2010 the Income Tax authorities had issued four notices u/s 226(3) of the Act upon the concerned branches of the Indian Overseas Bank, Syndicate Bank, Bank of India and Central Bank of India who are the Respondent s herein. Thereafter, as noted, pursuant to the directions by the Income Tax authorities on February 12, 2010 the branch manager of Respondent No. 4 debited a sum of Rs. 1,66,000 and consequently a debit note was issued. Thereafter, as evident from paragraph 8 of the affidavit-in-opposition filed by the Revenue, on February 15, 2010 copies of the notices u/s 226(3) of the Act were served on the Petitioner.

9. Now, the question is whether it was proper on the part of the Assessing Officer to attach and debit a sum without serving a copy of the notice of attachment on the Assessee. Looking at the language of Section 226(3)(iii) of the Act which stipulates that "A copy of the notice shall be forwarded to the Assessee at his last address known to the (Assessing) Officer ..." the answer has to be in the negative. The argument on behalf of the Revenue that actual service of the notice of attachment is not necessary cannot be accepted since the use of the word "shall" in Section 226(3)(iii) mandates that such notice has to be served before action is taken. If recourse is not taken by the Revenue to the mode postulated under the Act it is bound to take the Assessee off guard. Precisely for that reason service of notice prior to attachment is mandatory as evident from the language of Section 226(3)(iii).

10. Moreover, it is evident that the Petitioner filed the application for stay on February 11, 2010 wherein it was indicated that an appeal had been filed against the assessment order for the assessment year in question. In my view, once on February 11, 2010 the factum of filing of appeal was made known to the said Respondent, the said Respondent ought to have disposed of the stay application without proceeding further with the attachment notices. It is to be noted that Section 220(6) of the Act postulates that where an appeal u/s 246 or 246A is pending, the Assessing Officer has the discretion, subject to such conditions as he may think fit to impose in the circumstances of the case, to treat the

Assessee as not being in default in respect of the amount in dispute in the appeal as long as such appeal remains pending, even though the time for payment has expired. Thus, when the Assessing Officer was informed about the pendency of the appeal and prayer for stay was made, it was incumbent upon the said Respondent to dispose of the stay application first before proceeding further. That apart, once the Assessing Officer had chosen to exercise his discretion, in my view, he should have proceeded judiciously. From a review of the action, as stated in the petition as well as in the affidavits, I find that the said Respondent did not exercise his discretion judiciously; rather there was total non-application of mind.

11. It is also to be noted, as evident from the affidavit filed by Respondent No. 4 bank, that the attachment notice issued was withdrawn on March 22, 2010 pursuant to the notice dated March 17, 2010 issued by the Income Tax authority. It has been stated in paragraph 27 of the affidavit-in-opposition filed by the said Respondent that it was withdrawn pursuant to the orders of the hon''ble court. Records have been perused by the learned advocates for the parties. I have gone through the orders passed on February 25, 2010, March 7, 2010, April 9, 2010 and May 11, 2010. I find no such order was passed by the court. Therefore, I hold that the said Respondent had acted suo motu and had withdrawn the attachment orders dated February 10, 2010. Thus, the submission of the learned advocate for the Revenue that the said attachment orders were withdrawn on an understanding of the order passed on February 25, 2010 in the writ proceeding cannot be accepted. Hence, as evident, the said attachment notices withdrawn by the said Respondent were without any cause. Thus, the four attachment notices u/s 226(3) though withdrawn by order dated March 17, 2010 by the said Respondent, as a sum of Rs. 1,66,000 was debited illegally on February 12, 2010 without disposing of the stay application and without serving notice as postulated u/s 226(3)(iii), the action in debiting the sum cannot be sustained and is, thus, set aside and quashed. The said Respondent is directed to credit the said sum of Rs. 1,66,000 with the account of the pro forma Respondent No. 8 maintained with Respondent No. 4 within a fortnight from the date of furnishing the certified copy of this order.

12. The writ petition is allowed.

13. In the facts and circumstances, the Petitioner is entitled to costs which is assessed at Rs. 1,700 to be paid by Respondent No. 2.

14. Let urgent photostat certified copy of this order, if applied for, be furnished to the appearing parties on priority basis.

