(2014) 11 MP CK 0071

In the Madhya Pradesh High Court

Case No : Writ Petition No. 13444 of 2008

Rajkumar Jain APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 19-11-2014

Acts Referred:
Income Tax Act, 1961 — Section 143, 143(3), 144, 171, 25A

Citation : (2014) 11 MP CK 0071

Hon'ble Judges : Rajendra Menon, J;C.V. Sirpurkar, J

Bench : Division Bench

Advocate : G.N. Purohit, Senior Advocate and Uma Parashar, Advocate for the Appellant; Sanjay Lal, Advocate for the Respondent

Judgement

1. The grievance of the petitioner in this writ petition is that while passing an order, vide Annexure-P/8 on 28.12.2006, the Assessing Officer has passed the order of assessment under section 143(3) without conducting any inquiry and deciding the application under section 171 filed by the assessee.

2. Facts in brief indicate that the petitioner was subjected to assessment for the year 1969-1970 to 1972-1973 and finally assessment orders were passed as indicated hereinabove without deciding the application under section 171 as per law and when an application under section 264 was filed before the Commissioner the same was also dismissed on 27.03.2008 holding that no case for revision was made out. However, the facts necessary for deciding this petition go to show that when the matter was pending before the Assessing Officer the petitioner moved an application under section 171 and claimed that there has been partial partition of the family property and taking note of the same, assessment proceedings be held. Even though an order of assessment was passed, but when the matter went to the Appellate Tribunal, the Appellate Tribunal after setting aside the assessment order remanded the matter back to Assessing Officer for considering the matter afresh, thereafter when again the impugned assessment order was passed the petitioner approached the

Commissioner under section 264, the same was also dismissed, therefore, this writ petition.

3. Shri G.N.Purohit, learned Senior Counsel inviting our attention to the judgment of the Supreme Court in the case of Kapurchand Shrimal Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad, argued that when an application is filed under section 171, the said provision mandates the Assessing Officer to conduct a detailed inquiry into the fact as to whether the partition of the family property has been affected and it is only after conducting a proper inquiry into the matter that the assessment order passed. Shri Purohit pointed out that when the matter was considered in the case of Kapurchand (supra) the unamended provision under section 25-A which is in pari materia with section 171 was taken note of. It is said that the application under section 171 has not been considered in accordance to the requirement of law, no inquiry into the matter of family partition has been conducted before the assessment order was passed. In absence of such an inquiry it is said that there is error apparent on the face of record.

4. Even though Shri Sanjay Lal refuted the aforesaid contentions, we find that the Supreme Court in the case of Kapurchand (supra) has clearly laid down the principles that when an application under section 25A is filed, the Assessing Officer is required to conduct a detailed inquiry into the matter and record a finding and thereafter proceed to make assessment. A detailed proceeding has been laid down under section 171 subsection (2). The provisions of section 25-A which has been considered by the Supreme Court in this case which is in pari materia with Sub- section (2) of section 171 and the same reads as under :-

"(2) Where, at the time of making an assessment under section 143 or section 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition whether total or partial, has taken place among the members of such family, the Assessing Officer shall make an inquiry there into after giving notice of the inquiry to all the members of the family."

(Emphasis supplied)

5. A perusal of this provision clearly goes to show that at the time of making an assessment under section 143 or section 144, if it is claimed on behalf of the assessee that the property is a joint family property subject to partial or total partition, the Assessing Officer shall make an inquiry thereto after giving notice of the inquiry to the members of the family.

6. It is clear from the proviso as contemplated under sub- section (2) of section 171 that notice was required to be issued to the members of the family before the inquiry is conducted. In the backdrop of the aforesaid requirement of law, if the facts of this case are analyzed, it is seen that in the assessment order Annexure- P/8 dated 28.12.2006, the Assessing Officer in para 4 discloses the fact of family partition, filing of the application under section 171 thereafter he takes note of the material available on record and then records a finding with

regard to the partition, to say that assessee has not adduced any evidence in this regard and proceed to decide the matter but did not conduct any inquiry as contemplated under sub-section (2) of section 171 inasmuch as no notices to other members of the family were issued nor a detailed inquiry has been conducted. Supreme Court in the case of Kapurchand(supra) has clearly laid down the principles that in a assessment proceeding if an application under section 25A is filed, the Assessing Officer is duty bound to conduct an inquiry into the question of partition and then pass an order under section 25A before proceeding to make an assessment. In this case, the Assessing officer has failed to comply with the statutory provision inasmuch as a detailed inquiry as contemplated under sub-section (2) of section 171 after notice to the family members has not been done.

7. In view of the aforesaid, we have no other option but to remand the matter back to Assessing Officer for re-consideration. We may observe that when the matter was before the Commissioner under section 264, the Commissioner also in the order dated 27.03.2008 did not advert to consider all these aspects.

8. Keeping in view the aforesaid, this petition is allowed. The order of assessment dated 28.12.2006 (Annexure-P/8) and order dated 27.03.2008 (Annexure-P/12) passed by the Commissioner are quashed and the matter is remanded back to the Assessing Officer to proceed with the matter in accordance to the provisions of sub-section(2) of section 171 of the Income Tax Act,1961 and after conducting an inquiry as contemplated under law proceed with the assessment as may be required under law.

With the aforesaid observations, the petition stands allowed and disposed of.

