
(2012) 09 BOM CK 0192
In the Bombay High Court
Case No : Writ Petition No. 783 of 2012

Sanchit Software and Solutions (P.) Ltd. APPELLANT
Vs
Commissioner of Income Tax-8 RESPONDENT

Date of Decision : 07-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 10, 10(34), 10(38), 112(1)(b), 115(J)(B)

Citation : (2012) 349 ITR 404 : (2012) 210 TAXMAN 539

Hon'ble Judges : S.J. Vazifdar, J; M.S. Sanklecha, J

Bench : Division Bench

Advocate : S.M. Shah, for the Appellant; Tejveer Singh, for the Respondent

Final Decision : Allowed

Judgement

M.S. Sanklecha, J.—By this petition under Article 226 of the Constitution of India, the petitioner challenges the order dated 07.02.2011 passed by the Commissioner of Income Tax u/s 264 of the Income Tax Act, 1961 ("the Act") dismissing the petitioner's revision application. The challenge is to the failure of the Commissioner of Income Tax to exercise jurisdiction vested in her u/s 264 of the Act. Brief facts leading to this petition are as under:

(a) The Petitioner is a Private Limited Company. On 25.10.2007, the Petitioner electronically filed its return of income for the assessment year 2007-2008. In its return of income, the petitioner declared a total income of Rs. 7,91,565/-. This total income of Rs. 7,91,565/- inter alia consisted of dividend income of Rs. 1,10,651/- and long term capital gains of Rs. 6,80,914/- on sale of shares. Both the aforesaid sources of income namely dividend income and long term capital gains were not to be included in the total income under the provision of Section 10(34) and 10(38) of the Act respectively. In view of there being no profit the petitioner computed its book profit u/s 115(J)(B) of the Act at Rs. 5.84 lacs in its return of income.

(b) The return of income was processed on 16.10.2008 u/s 143(1) of the Act. Consequent to the above, on 11.01.2010 an intimation u/s 143 (1) of the Act dated 16.10.2008 raising a demand of tax of Rs. 2,44,160/- was served on the petitioner.

(c) The Petitioner states that it was only on 11.01.2010 when it received the intimation dated 16.10.2008 that it realized a mistake had been committed while filing its return of income electronically. On inquiry, the petitioner learnt that its Chartered Accountant's office had erred in not having claimed the exemption of dividend income and long term capital gains u/s 10(34) and 10(38) of the Act respectively while computing the return of income. It appeared that at page 11 of the return of income as filed where the computation of total income was worked out by mistake income in the form of dividend and long term capital gains were included in the total income though in law had to be excluded from total income u/s 10 of the Act. That this was an inadvertent error is obvious from the fact that in the return of income itself at page No. 24, the petitioner had claimed the dividend income and long term capital gains as being exempt, as income not to be included in total Income.

(d) Immediately on realization of the above mistake in view of the intimation dated 16.10.2008 u/s 143(1) of the act, the petitioner on 01.02.2010 filed a revised return of income electronically with the respondent. In the revised return of income, the petitioner at page 11 in the column titled computation of total income, did not include dividend income and long term capital gains. This correctly reflected the absence of profit by the petitioner for assessment year 2007-08 under the Act. Consequently, the petitioner's liability to pay tax was correctly reflected on the basis of its book profit u/s 115(J)(B) of the Act as was in fact declared in the return of income as originally electronically lodged on 25.10.2007. However, the revised return of income was not taken cognizance of/ processed by the respondent's electronic system, as the same was filed beyond the period of limitation as provided u/s 139(5) of the Act.

(e) Therefore, on 08.02.2010 the Petitioner filed an application seeking rectification u/s 154 of the Act of the intimation dated 16.10.2008. The rectification was sought of the intimation u/s 143(1) of the Act as the income on account of dividend and long term capital gains which were not be included in total income by virtue of section 10 of the Act were taken into account in the intimation dated 16.10.2008. No order has yet been passed on the aforesaid rectification application.

(f) On 08.02.2010 itself the petitioner also filed a revision application u/s 264 of the Act with the Commissioner of Income Tax. By the revision application the petitioner sought a revision of the order in the form of intimation dated 16.10.2008 u/s 143(1) of the Act. In the revision application dated 08.02.2010, the petitioner besides pointing out the circumstances which led to a mistake in the original return of income sought revision of the intimation u/s 143(1) dated 16.10.2008 as the same overlooked/ignored the exemption from tax to dividend

income and long term capital against u/s 10(34) and 10(38) of the Act respectively. This mistake in the intimation u/s 143(1) of the Act had its genesis in the inadvertent mistake by the petitioner's Chartered Accountants not having claimed the exemption while computing the income at page 11 of the return of income. This genuine mistake on the part of the Chartered Accountant's office resulted in the petitioner being liable to pay tax of Rs. 2.44 lacs when in fact the tax payable in terms of the book profit was only Rs. 59,128/-.

(g) The Commissioner of Income Tax by her order dated 07.02.2011 disposed of the petitioner's Revision Application dated 08.02.2010. The relevant operative portion of the order dated 07.02.2011 of the Commissioner of Income Tax reads as under:

2.....On consideration of the assessee's petition, it is seen that:-

(i) The original return was filed on 25.10.2007 and processed on 16.10.2008. As per section 139(5) of the Act, the assessee could have furnished the revised return at anytime before the expiry of one year from the end of the relevant assessment year or before completion of the assessment, whichever is earlier. Thus, the assessee could have furnished a revised return by 31.03.2009 whereas admittedly, the revised return has been filed on 01.02.2010 and hence is not a valid return in terms of 139(5) of the Act. Therefore, no cognizance can be taken of the said return.

(ii) As per Section 264 of the Act, the C.I.T. may pass an order in respect of any order under the Act not being an order prejudicial to the assessee. It is seen that the intimation u/s. 143(1) is based on the return of the assessee in which the claims u/s. 10(34) and u/s. 10(38) were admittedly not made by the assessee. Hence, it cannot be said that the intimation u/s. 143(1) is erroneous since the same is squarely based on the return filed by the assessee u/s. 139(1) of the Act. As stated above, the second return filed by the assessee is non-est as it is not a valid return u/s. 139(5) of the Act. Further consideration of the various documents, ledger accounts etc. furnished by the assessee during the proceedings u/s. 264 of the Act is outside the scope of section 143(1) of the Act. Hence, no such direction can be given to the A.O. to consider the various claims of the assessee for the purpose of section 143(1) of the Act.

3. In view of foregoing, it is held that no error has occurred in processing the assessee's return u/s. 143(1) of the Act which may be required to be directed to be corrected to allow the assessee the exemptions u/s. 10(34) and u/s. 10(38) of the Act and compute the assessee's income u/s. 115JB of the Act. On perusal of the original return, it is seen that the assessee has shown long term capital gains of Rs. 6,80,194/- in Column 3(c) thereof. However, while processing the return u/s. 143(1) of the Act, it appears that tax has been charged at the rate applicable to business income. Since, there are no details of the nature of assets. In the return, the long term capital gains to show by the assessee is to be charged at the rate applicable to long term capital gains in respect of non

specified assets as prescribed in section 112(1)(b) of the Act.

4. The A.O. is directed to rectify the intimation u/s. 143(1) of the Act accordingly.

5. In the result, the assessee's petition is partly allowed.

Emphasis supplied]

It is the aforesaid order dated 7.02.2011 of Commissioner of Income Tax which is challenged in this petition.

2. Mr. S.M. Shah, the learned counsel for the Petitioner in support of the petition submits as under:

(a) The Commissioner of Income Tax failed to exercise jurisdiction vested in her u/s 264 of the Act by having refused to consider the evidence which would establish a mistake on the part of the assessee while electronically filing its return of income. This failure to exercise her jurisdiction u/s 264 of the Act is on account of having misdirected herself in law by proceeding on the basis that revisional jurisdiction is akin to an appeal and her jurisdiction is limited to that which could be exercised by the Assessing Officer u/s 143(1) of the Act;

(b) The Commissioner of Income Tax acted without jurisdiction in rejecting the revision application as it was in the face of a binding Circular of Central Board of Direct Tax dated 11.04.1985 which directs the Assessing Officer not to take advantage of assessee's ignorance and mistakes. This is particularly so in view of the fact that State is expected to act fairly with regard to its dealing with its citizens;

(c) The jurisdiction u/s 264 of the Act is to be exercised by the Commissioner of Income Tax so as to do real justice between the parties and the exercise of such jurisdiction should not be curtailed by technicalities;

(d) Though the application for rectification made on 8.02.2010, u/s 154 of the Act has not been disposed of as yet, the same will not serve any purpose. This was in view of the fact that the Assessing Officer would consider himself bound by the order dated 7th April, 2011, u/s 264 of the Act. Consequently, no relief can be expected from the assessing officer on the pending rectification application.

In view of the above submissions, it was prayed that the order dated 07.04.2011 of the Commissioner of Income tax be quashed and he be directed to pass a fresh order directing the Assessing officer to recompute the income in accordance with law.

3. As against the above, Mr. Tejveer Singh learned Counsel for the Respondent in support of the impugned order submits as under:

(a) The order dated 07.02.2011 passed by the Commissioner of Income Tax u/s 264 of the Act calls for no interference in the exercise of power u/s 264 as the intimation dated 16.10.2008 is based on the return of income filed by the

petitioner itself;

(b) The power u/s 264 is circumscribed by the scope of power available u/s 143(1) of the Act. In the circumstances, what could not be done by the Assessing Officer while exercising powers u/s 143(1) cannot be done by the Commissioner of Income Tax in Revision u/s 264 of the Act;

(c) The power of the Commissioner u/s 264 is only restricted to the record available before the Assessing Officer which can be examined by the Commissioner either on her own motion or on application by the assessee. In the circumstances, the other evidence sought to be brought on record to establish the mistake by the assessee cannot be considered by the Commissioner u/s 264 of the Act;

(d) Prior to 1999, Section 143 provided an explanation to the effect that an intimation u/s 143(1) of the Act would be considered to be an order for the purposes of Section 264 of the Act. The aforesaid explanation has been omitted w.e.f. 1999 and remedy against erroneous intimation is provided u/s 154(1)(b) of the Act. This would be one more reason to support the submission that the intimation u/s 143(1) of the Act not being an order is not amenable to revisional jurisdiction u/s 264 of the Act. The appropriate remedy for the petitioner in the present circumstances would be to pursue their application for rectification u/s 154 of the Act pending before the Assessing Officer.

4. In any civilized system, the assessee is bound to pay the tax which he liable under the law to the Government. The Government on the other hand is obliged to collect only that amount of tax which is legally payable by an assessee. The entire object of administration of tax is to secure the revenue for the development of the Country and not to charge assessee more tax than that which is due and payable by the assessee. It is in aforesaid circumstances that as far back as in 11/04/1955 the Central Board of Direct Tax had issued a circular directing Assessing Officer not to take advantage of assessee's ignorance and/or mistake. The relevant portion of the above Circular is as under:

3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from the Department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should:-

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them so to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.

Therefore the above Circular should always be borne in mind by the officers of the respondent-revenue while administering the said Act.

5. There is a fundamental error in the impugned order dated 7.04.2011, as it proceeds on the erroneous basis that the petitioner had admittedly not claimed the benefit of Section 10(34) and 10(38) of the Act in respect of it's dividend income and long term capital gains on sale of shares respectively in its return of income. In fact, in the return of income, the petitioner had admittedly sought to exclude it's dividend income and long term capital gains from sale of shares u/s 10 of the Act as is evident from page 24 of the return of income. However, at page 11 of the return of income as filed originally on 25.10.2005, the petitioner, by mistake, omitted to exclude the dividend income and income from long term capital gains from the total income being declared by it. We reproduce herein below, the relevant extracts:

Extract at Page 11 of the Return of Income

6. Therefore, in view of the above it is clear that the Commissioner of income tax in the order dated 7.04.2011 committed a fundamental error in proceeding on the basis that no deduction on account of dividend income and income from capital gains u/s 10 of the Act was claimed. Therefore there is an error on the face of the order dated 7.04.2011 and the same is not sustainable.

7. In view of the above, we are not considering the other submissions made and authorities cited by Mr. Shah with regard to the scope of revisional jurisdiction and the objection of the respondent with regard to the maintainability of a revisional application before the Commissioner of income tax. At this stage, we deem it appropriate to set aside the order dated 7.04.2001 of the Commissioner of income tax and remand the matter to her for fresh consideration keeping all the contentions open on both sides, including the maintainability of a revision application.

8. At the same time, it must be pointed out that the petitioner's application for rectification filed on 8.02.2010, has not yet been disposed of. The apprehension of the petitioner that the Assessing Officer would consider himself bound by the findings in the order dated 7.04.2011, of the Commissioner of income tax, is not well founded. The impugned order was not based on the merits of the matter and has no relevance to the application u/s 154. In any event, now that the order dated 7.04.2011, of the Commissioner of income tax u/s 264 of the Act has been set aside for fresh consideration, the Assessing Officer would be bound to and is directed to consider the rectification application filed by the petitioner on its own merits, without being influenced by the impugned order or awaiting the result of the revisional proceedings before the Commissioner of income tax on remand.

9. We are conscious of the fact that in terms of sub-section (8) of Section 154 of

the Act, a Rectification application has to be disposed of within six months from the date of the application for rectification. Therefore we direct the Assessing Officer to treat the application dated 8.02.2010 as a fresh application received on the date a copy of his order is served upon his office. We would appreciate if the Assessing Officer disposes of the rectification application dated 8.02.2010, filed u/s 154 of the said Act at the earliest, preferably within six weeks from the receipt of this order. The Writ Petition is allowed in the above terms. There shall, however, be no order as to costs.