

(1998) 07 DEL CK 0046

In the Delhi High Court

Case No : ITR No. 10/82

Sarabjit Singh

APPELLANT

Vs

The Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-07-1998

Acts Referred:

Citation : (1998) 4 AD 513 : (1998) 74 DLT 448 : (1998) 46 DRJ 446 : (1998) 234 ITR 641

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Mr. M.S.Syali, for the Appellant; Mr. B. Gupta, Senior Standing Counsel and Mr. R.N. Verma, for the Respondent

Judgement

D.K.Jain, J.—At the instance of the assessee, the Income Tax Appellate Tribunal(hereinafter referred to as the Tribunal), Delhi Bench "E", re-ferred to this Court the following question of law pertaining to the as- sessment year 1976-77, u/s 256(1) of the Income Tax Act, 1961(for short the Act) for its opinion:

"On the facts and in the circumstances of the case, whether the Tribunal was correct in upholding the order of the Commissioner(Appeals) setting aside the assessment with the directions to the Income Tax Officer to make the assessment afresh by complying with the provisions of Section 144B?"

2. The reference was heard by a Division Bench, but the two learned Judges differed with each other. B.N.Kirpal, J(as his Lordship then was) took the view that Section 144B of the Act being procedural in nature, its non-compliance would result in procedural irregularity, which could be cured from the stage it intervened and, Therefore, the order which is passed while ignoring the said provision, could not be regarded as a nullity. Thus, his Lordship answered the question in the affirmative. However, Mahinder Narain, J held that the assessment order being contrary to the provisions of Section 144B of the Act was a nullity as having been passed without jurisdiction; the Commissioner of income

tax(Appeals) could not extend the period of limitation which had already expired and direct passing of a fresh draft assessment order and in view of the fact that Section 144B did not confer power in the CIT(Appeals) to set aside the assessment, he could not re-confer the jurisdiction on the Income Tax Officer to make a fresh assessment. His Lordship, Therefore, answered the question in the negative.

3. The two learned Judges having answered the question differently, the papers of the reference were laid before Hon"ble the Chief Justice for referring the matter to a third Judge in accordance with clause 26 of the Letters Patent of the Lahore High Court, as applicable to this Court. Hence the matter has come up before me as the third Judge.

4. Briefly stated, the material facts are that the assessed filed his return of income for the relevant assessment year declaring a total income of Rs.47,798/-. The Income Tax Officer, however, completed the assessment on a total income of Rs.1,49,710/-. Since the difference between the income returned and the income assessed was more than Rs.1 lakh, the provisions of Section 144B of the Act were attracted and the Income Tax Officer was required to send a draft assessment order to the assessed and on receipt of the objections, to refer the matter to the Dy. Commissioner. The Income Tax Officer, however, failed to do so and completed the assessment on 30 March 1979, a day prior to the last date of limitation to complete assessment for the relevant assessment year.

5. Aggrieved, the assessed took the matter in appeal before the CIT(Appeals) and contended that the assessment order was a nullity as approval of the Dy. Commissioner had not been obtained u/s 144B of the Act. However, the Commissioner(Appeals) took the view that non- compliance with Section 144B was merely a procedural irregularity, which was a curable defect and not fatal to the validity of the assessment. He accordingly set aside the assessment and directed the Income Tax Officer to make a fresh assessment in accordance with law. Not satisfied with the decision of the appellate authority, the assessed filed a second appeal before the Tribunal, inter alia, contending that the assessment made by the Income Tax Officer being without jurisdiction, the Commissioner(Appeals) should have annulled the same instead of setting it aside. Before the Tribunal also the assessed met with no success. It was thereafter that the aforementioned question of law was referred.

6. The short question for consideration is whether the assessment order passed by the Income Tax Officer without resorting to the provisions of Section 144B of the Act suffers from an irregularity or is a nullity.

7. I have heard Mr. M.S.Syali, learned counsel for the assessed and Mr. B.Gupta, Senior Standing Counsel for the Revenue at a considerable length.

8. Mr. Syali, analysing the provisions of Section 144B, has submitted that the order made in the first instance is only a draft of the order of assessment and not an order of assessment per se, which, whether the assessed objects to or

does not, has later to be transformed into an order of assessment; and that two separate situations are contemplated: one, when no objections are filed and the other when these are filed. His contention is when these are not filed, there is no question of waiver of the right to object but when filed, neither the assessed nor the ITO can waive the mandatory procedure prescribed by law. According to him: (i) the said provisions are substantive and not procedural, as Section 144B envisages change of forum which cannot be a question of procedure as having passed and forwarded the draft assessment order with objections to the Dy. Commissioner of Income Tax, the assessing officer ceases to have jurisdiction in the matter and (ii) even if Section 144B is treated to be procedural, the procedure laid down therein being mandatory, its non-compliance makes the order without or in excess of jurisdiction, which is a nullity. In support reliance is mainly placed on three decisions:

(i) by the Supreme Court in Commissioner of Income Tax, Orissa Vs. Dhadi Sahu, of the Punjab & Haryana High Court in Commissioner of Income Tax Vs. Mohinder Lal, , and (iii) of this Court in Sudhir Sareen Vs. Income Tax Officer, Central Circle XVII, New Delhi and another, .

9. Mr. Gupta, on the contrary, refuting Mr. Syali's contentions, has submitted that Section 144B, falling in Chapter XIV of the Act, only prescribes the procedure for assessment; the provisions of the said Section are not mandatory but only procedural being only stipulations for administrative guidance by the Dy. Commissioner/Inspecting Assistant Commissioner to the Assessing Officer and the directions so given cannot be said to be an assessment order and thus there is no question of change in forum for passing of the final assessment order. In support of the contention that Section 144B is procedural, he has placed reliance on a number of decisions rendered by various High Courts.

10. The prime question falling for consideration, thus, is whether Section 144B is procedural or substantive in nature.

11. Before examining the rival contentions, it will be appropriate to notice some of the relevant provisions of the Act.

12. Chapter XIV of the Act(Sections 139 to 158) bears the caption "Procedure for Assessment". Section 143, falling in the said Chapter, deals with procedure of assessment. Sub-sections(1) and (3) of the said Section, provide for computation of total income of an assessee, respectively, without and by issuing notice under sub-section(2) requiring the assessed to produce or cause to be produced any evidence on which he may rely in support of his return. It is obvious that Section 143 is procedural because it does not deal with any charge of tax, which falls in Chapter II of the Act. Section 143 is not a charging Section and thus cannot be said to be substantive. It is a procedural Section.

13. Section 144B was inserted by Taxation Laws(Amendment) Act, 1975 and was brought into force from 1 January 1976. It thus, applied to all assessments completed after 1 January 1976. The relevant portion of the Section, as it existed

at the relevant time reads:

"(1) Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-section (3) of Section 143, the Assessing Officer proposes to make, before the 1st day of October 1984, any variation in the income or loss returned which is prejudicial to the assessed and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Assessing Officer shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the Draft Order) to the assessee.

(2) On receipt of the Draft Order, the assessed may forward his objections, if any, to such variation to the Assessing Officer within seven days of the receipt by him of the Draft Order or within such further period not exceeding fifteen days as the Assessing Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessed intimates to the Assessing Officer the acceptance of the variation, the Assessing Officer shall complete the assessment on the basis of the Draft Order.

(4) If any objections are received, the Assessing Officer shall forward the Draft Order together with the objections to the Deputy Commissioner and the Deputy Commissioner shall, after considering the Draft Order and the objections and after going through (wherever necessary) the record relating to the Draft Order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment.

Provided that no directions which are prejudicial to the assessed shall be issued under this sub-section before an opportunity is given to the assessed to be heard.

(5) Every direction issued by the Deputy Commissioner under subsection (4) shall be binding on the Assessing Officer....."

14. The Section was amended by Taxation Laws (Amendment) Act, 1984, w.e.f. 1 October 1984 and for the words "The Income Tax Officer proposes to make any variation", the words "The Income Tax Officer proposes to make, before the first day of October 1984 any variation" were substituted. The Section was, thus, rendered nugatory with effect from 1 October 1984 and ceased to apply in relation to assessments made after 30 September 1984. The Section was finally omitted by the Direct Taxes Laws (Amendment) Act, 1987 w.e.f. 1 April 1989. The Section provides that where, in making an assessment u/s 143(3) of the Act, the Income Tax Officer proposes to make any variation in the income or loss returned, which is prejudicial to the assessed and the amount of such variation exceeds the amount fixed by the Board, he shall forward a draft of the proposed order of assessment to the assessed who may forward his objections, if any, to such variation to the assessing officer, who in turn shall forward the draft order

together with objections to the Dy. Commissioner and the Dy. Commissioner, after considering the draft order and the objections and going through the record in respect of the matters covered by the objections, may issue such directions as he thinks fit for the guidance of the assessing officer to enable him to complete the assessment after giving an opportunity of hearing to the assessed and the Income Tax Officer shall make his assessment accordingly.

15. It is clear from the language of Section 144B of the Act that the Section applies to an assessment to be made under sub-section (3) of Section 143 of the Act, where the Income Tax Officer proposes to make any variation adverse to an assessed in the income or loss returned and such variation exceeds the amount fixed by the Board, which for the relevant assessment year was Rs.1 lakh. Though the Section mandates the Income Tax Officer to follow the procedure laid down therein in all cases wherein an assessment is proposed to be made under sub-section (3) of Section 143 and the proposed variation exceeds the prescribed amount, like Section 143, Section 144B is also procedural in nature (See: Smt. Mohinder Jaspal Singh Vs. Commissioner of Income Tax, and R. Dalmia and Others (A.O.P.) Vs. Commissioner of Income Tax (and Vice Versa), . Section 144B has to be construed and understood in the context of the entire enactment. It must derive its colour from the setting it is placed. It merely sets out the procedure to be followed in certain situations. The rationale behind Section 144B(1) inserted in the Act on the recommendations of the Wanchoo Committee was that where the income returned by an assessee is sought to be varied by more than Rs.1 lakh, then greater precaution ought to be taken and the senior officer's guidance should be sought to prevent arbitrariness or unreasonableness on the part of the assessing authority and multiplicity of proceedings and unnecessary appeals avoided. Thus, there can be no quarrel with the proposition urged by learned counsel for the assessed that the assessing officer was bound to follow the procedure laid down in Section 144B where variation in the income/loss declared and to be assessed exceeded Rs.1 lakh.

16. However, the Dy. Commissioner could, by way of guidance, only issue directions to the assessing officer to pass the assessment order in a particular way but the jurisdiction to pass the assessment order nonetheless continued to vest in the assessing officer only. The assessment order in any case was to be passed by the assessing officer, and it could, in no sense of the term, be of the Deputy Commissioner. There is, thus, no change in the forum for assessment and by reference to the Deputy Commissioner for guidance, the assessing officer does not lose jurisdictional seisin of the case.

17. The variation of income in the instant case being more than Rs.1 lakh, it was incumbent upon the Income Tax Officer to comply with the requirements of Section 144B and after inviting objections from the assessee, forward the proposed assessment with objections to the Deputy Commissioner for guidance.

18. This was not done and the question is whether the assessment order passed without following the procedure prescribed in Section 144B renders the order

void or a nullity.

19. It is well settled that a proceeding is a nullity when an authority taking it has no jurisdiction either because of want of pecuniary jurisdiction or of territorial jurisdiction or of jurisdiction over the subject matter of the proceeding. A proceeding is a nullity when the authority taking it has no power to have seisin over the case(See: Sant Baba Mohan Singh Vs. Commissioner of Income Tax,).

20. In the present case it is not the stand of the assessed nor can it be said that the Income Tax Officer lacked pecuniary or territorial jurisdiction or was not competent to have seisin over the assessor's case. The assessor's only grievance is that the Income Tax Officer having not complied with the provisions of Section 144B, the assessment order passed by him was rendered void and, Therefore, should have been annulled by the appellate authorities. Having come to the conclusion that Section 144B is procedural in nature, I am unable to persuade myself to agree with learned counsel for the assessed that failure on the part of the Income Tax Officer to follow the procedure laid down therein renders the order passed by him as void. There is no dispute with the proposition that an assessment order passed without complying with the provisions of Section 144B cannot be regarded as a valid order but it cannot follow as a necessary corollary that such an order passed without following the procedural requirements must be regarded as a nullity. Non-compliance with the procedural law is merely procedural irregularity, which can be cured unlike the defect of inherent lack of jurisdiction in an authority to pass an order, which of course will be a nullity. Support to this view is lent by a catena of decisions of various High Courts. It would, however, suffice to refer to Banarsidas Bhanot and Sons Vs. Commissioner of Income Tax, , G.R. Steel and Alloys Pvt. Ltd. Vs. Commissioner of Income Tax, , K. Ashok Kumar and Others Vs. Commissioner of Income Tax, , Joseph Kuruvila Vs. Commissioner of Income Tax, , Des Raj Kul Bhushan Vs. Commissioner of Income Tax, and VISHWANATH PRASAD BHAGWAT PRASAD Vs. COMMISSIONER OF Income Tax., .

19. As for the decisions relied on by learned counsel for the assessee, the decision of the Supreme Court in the case of Dhadi Sahu(supra) is clearly distinguishable in that it deals with altogether a different situation and does not advance the case of the assessee. The observations of the Court that no litigant has any vested right in the matter of procedural law infact support the stand of the revenue. In that case the issue involved was whether on account of amendment in Section 274(2) of the Act, with effect from 1 April 1971, the Inspecting Assistant Commissioner was divested of the jurisdiction to levy penalty because the amount of concealed income did not exceed Rs.25,000/- as stipulated in the amended Section 274(2) as against the unamended condition of minimum imposable penalty exceeding Rs.1,000/-, which he had validly acquired on a reference made by the Income Tax Officer prior to 1 April 1971. The Apex Court observed that where the question is of change of forum, it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right

as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the Tribunal or the Court of first instance and, unless the legislature has, by express words or by necessary implication, clearly so indicated that vested right will continue in spite of the change of jurisdiction of the Tribunals or forums. It was, Therefore, held that since a valid reference had been made to the Inspecting Assistant Commissioner before the amendment took effect, he continued to have jurisdiction to impose the penalty. As noticed above, the procedure prescribed u/s 144B (forwarding of draft assessment order with objections by the assessed to the Inspecting Assistant Commissioner), does not change the forum of assessment. Jurisdiction to pass assessment order u/s 143(3) of the Act continues to vest in the Income Tax Officer. Thus, the ratio of the decision in Dhadi Sahu's case does not apply to the issue in hand. The decisions of the Punjab and Haryana High Court in Mohinder Lal's case (supra) and this Court in Sudhir Sareen's case (supra) merely say that the provisions of Section 144B are mandatory, with which proposition there is no quarrel.

20. I am, Therefore, of the considered opinion that Section 144B of the Act is only a procedural provision and the assessment order passed by ignoring the said provisions cannot be regarded as null and void.

21. For the foregoing reasons I would answer the question referred in the affirmative, i.e., in favor of the revenue and against the assessee.

22. The matter may now be listed before the Division Bench for recording a final answer in the reference in accordance with the majority opinion.