

(1992) 12 DEL CK 0005
In the Delhi High Court
Case No : IT Ref. No. 10 of 1982

Sarbjit Singh

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 16-12-1992

Acts Referred:

Citation : (1993) 49 DLT 705

Hon'ble Judges : Mahinder Narain, J; B.N. Kirpal, J

Bench : Division Bench

Advocate : M.S. Syali, for the Appellant; B. Gupta, for the Respondent

Judgement

B.N. Kirpal, J.—In respect of the asst. yr. 1976-77 the Tribunal, under s. 256(1) of the Act, has referred the following question of law to this Court :

"On the facts and in the circumstances of the case, whether the Tribunal was correct in upholding the order of the CIT(A) setting aside the assessment with the directions to the ITO to make the assessment afresh by complying with the provisions of s. 144B ?"

2. Briefly stated, the facts are that the assessed had returned a total income of Rs. 47,798. The ITO made the assessment on a total income of Rs. 1,49,710. The difference between the income returned and the income assessed being more than Rs. 1 lakh the provisions of s. 144B were attracted and the ITO was required to send a draft assessment order to the assessed and on receipt of the objections, to refer the matter to the Dy. CIT. The ITO failed to do so and made the assessment on 30th March, 1979.

3. The assessed came in appeal before the CIT(A) and contended that the assessment order was bad in law as approval of the Dy. CIT had not been obtained under s. 144B. The CIT(A) held that this was only 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 it to be made afresh in accordance with law.

4. The assessed filed a second appeal before the Tribunal and contended that the assessment made by the ITO was without any jurisdiction and, Therefore, the CIT(A) should have annulled the same instead of setting it aside. The Tribunal however, did not accept this contention and upheld the order of the CIT(A). It is, thereafter that the aforesaid question of law was referred, at the instance of the assessed.

5. The main contention urged by Mr. Syali, the learned counsel for the assessed, was that s. 144B contained a substantive provision, viz., that if the addition sought to be made was more than Rs. 1 lakh, then the ITO was obliged to send a draft assessment order to the assessed and on receipt of the objections he was required to refer the matter to the Dy. CIT. The submission was that by not adopting this course and by ordering assessment without reference to the Dy. CIT, the order of assessment was a nullity and, Therefore, the CIT(A) was wrong in merely setting it aside with a direction that fresh assessment order be passed. Sec. 144B of the IT Act, as it existed at the relevant point of time, reads as follows :

"(i) Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-s. (3) of s. 143, the Assessing Officer proposes to make, before the 1st 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-s. (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 assessed.

(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 Dy. Commissioner and the Dy. Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records 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 Dy. Commissioner under sub-s. (4) shall be

binding on the Assessing Officer.

(6) For the purposes of sub-s. (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix, from time to time, such amount as it deems fit :

Provided that different amounts may be fixed for different areas :

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty five thousand rupees.

(7) Nothing in this section shall apply to a case where a Dy. Commissioner exercises the powers or performs the function of an Assessing Officer in pursuance of an order made under s. 125 or s. 125A."

6. During the relevant assessment year it is the ITO who could make the assessment either under sub-s. (1) or sub-s. (3) of s. 143. Before making an assessment under s. 143(3) the Assessing Officer was required to serve a notice on the assessed requiring him to produce or cause to be produced such evidence on which the assessed wished to rely upon. If during the course of the assessment proceedings the Assessing Officer proposed to make a variation in the income or loss to the extent that such variation exceeded the amount fixed by the Board under s. 144B(6), then the provisions of the said s. 144B came into play. It is not disputed that the variation which was specified by the Board under sub-s. (6) of s. 144B was of Rs. 1 lakh. The procedure which the Assessing Officer was required to follow was that in the first instance a draft of the proposed assessment order was to be framed and sent to the assessed. The assessed could within the time provided by sub-s. (2) of s. 144B file his objections. Sub-s. (3) provided that if no objections were received or if the assessed intimated to the Assessing Officer about his accepting the variation then the Assessing Officer had to complete the assessment on the basis of the draft order. It is only if objections were filed that sub-s. (4) of s. 144B required the forwarding of those objections along with a draft order to the Dy. CIT. The Dy. CIT was entitled to give directions to the Assessing Officer for guidance to enable him to complete the assessment. Proviso to the said sub-s. (4) contained a provision, in conformity with the principles of natural justice, that the assessed was to be heard before any directions prejudicial to the assessed could be issued. Sub-s. (5) of s. 144B made every direction issued by the Dy. CIT binding on the Assessing Officer.

7. Even where the provisions of s. 144B are attracted the jurisdiction to pass an assessment order is always with the Assessing Officer. Under no circumstances is the right of the Assessing Officer to pass an assessment order taken away. When the reference is required to be made under sub-s. (4) of s. 144B to the Dy. CIT it is only the Assessing Officer who can pass the assessment order. The jurisdiction of the Dy. CIT is only to give directions, which directions are no doubt binding on the Assessing Officer.

8. Sec. 144B was, probably, inserted with a view that there should not be a substantial variation in the income or loss returned by the assessed without a senior officer applying his mind. The provisions of sub-s. (4) of s. 144B were nothing more than the incorporation of principles of natural justice which were required to be followed during the proceedings for the completion of assessment of income. The Assessing Officer was never divested of the jurisdiction to pass an assessment order and any direction issued by the Dy. CIT under s. 144B had no effect till after an assessment order was passed. To give an example, even if a direction was issued under s. 144B which was prejudicial to the interest of the assessed, the assessed could have no grievance if the assessment was not made within the time prescribed by law. The direction issued under s. 144B(4) could not itself fasten any tax liability on the assessed.

9. This provision, viz., s. 144B was purely procedural and this has been so held by a number of High Courts. The first such decision is that of the Calcutta High Court in the case of J. P. Aggarwal vs. CIT where in a Division Bench of the Calcutta High Court held that an assessment made without reference to the IAC under s. 144B was not null and void because the provisions of s. 144B were procedural in nature and the assessed was not prejudicially affected by the non compliance of such procedure. It was observed that if an assessed was aggrieved by non-compliance with s. 144B(4) then it was at liberty to agitate the grievance before the appellate authority. To the same effect, viz., that s. 144B is procedural are the following decisions : Banarsidas Bhanot and Sons Vs. Commissioner of Income Tax, ; H.H. Maharaja Raja Pawan Dewas Vs. Commissioner of Income Tax, ; Kimtee 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, .

10. This Court also had an occasion to consider the provisions of s. 144B in Smt. Mohinder Jaspal Singh Vs. Commissioner of Income Tax, . It was held that the provisions of s. 144B were procedural in nature. To the same effect is the decisions of this Court in the case of R. Dalmia and Others (A.O.P.) Vs. Commissioner of Income Tax (and Vice Versa), . As far as this Court is concerned, Therefore, the point in dispute really stands concluded because of the aforesaid two decisions of the Division Bench of this Court.

11. Mr. Syali, the learned counsel for the assessed, however, submitted that the decisions referred to hereinabove do not lay down the correct law. Referring to the decision of the Gujrat High Court in the case of P. DOSHI Vs. COMMISSIONER OF Income Tax, GUJARAT, it was submitted that the mandatory provisions could not be waived and, Therefore, any order which is passed in violation of the mandatory provisions is a nullity. In our opinion the said decision can be of little assistance to the assessed. The Gujrat High Court was dealing with the question of fulfilling of the conditions precedent to the initiation of the reassessment proceedings under ss. 147 and 148 of the IT Act. It was in this context that it

was observed that fulfillment of the said conditions is mandatory and there can be no waiver or acquiescence in respect thereto. In arriving at this conclusion the Court referred to a decision of the Supreme Court in the case of Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, and it observed as follows :

The settled distinction between invalidity and nullity is now well brought out in the decision in Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , where their Lordships had gone into this material question as to whether the act in breach of the mandatory provision is per force a nullity. The passage in Macnamara on Nullities and Irregularities, referred to in Ashutosh Sikdar vs. Bihari Lal Kirtania (1907) 35 Cal 61 was in terms relied upon as under :

".. no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated."

Thereafter, their Lordships pointed out that whether a provision fell under one category or the other was not easy of discernment, as in the ultimate analysis, it depended upon the nature scope and object of the particular provision. Their Lordships in terms approved a workable test laid down by Justice Coleridge in Holmes vs. Russel (1841) 9 Dowl 487 as under :

"It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

Thereafter it was pointed out that a waiver is an intentional relinquishment of a known right, but obviously an objection to jurisdiction could not be waived, for consent could not give a court jurisdiction where there was none. Even if there was inherent jurisdiction, certain provisions could not be waived. What can be waived would be only those provisions which are for the private benefit and protection of an individual in private capacity, which might be dispensed with without infringing any public right or public policy."

12. Applying the aforesaid principles it is evident that s. 144B is procedural in nature. When a draft of the assessment order is served on the assessed it is not obligatory on the assessed to file objections. The right to file objections can be waived. This being so the only conclusion which must follow is that the said section is procedural.

13. Reliance was also placed by Mr. Syali on a single bench decision of this Court in the case of Sudhir Sareen Vs. Income Tax Officer, Central Circle XVII, New

Delhi and another, . In that case the variation of income returned exceeded by an amount of Rs. 1 lakh and a draft assessment order was forwarded to the assessed for his objections. After the objections were received the same were sent to the Dy. CIT. The objections were heard but the ITO sent a draft order enhancing the amount proposed even further. It was an admitted fact that this enhancement was as a result of the order issued by the Dy. CIT and he had not given an opportunity to the assessed to be heard before issuing directions in this respect. It was in this respect that a single Judge of this Court came to the conclusion that more than one draft order could not be issued. Having come to this conclusion, viz., that more than one draft order could not be issued, this Court set aside the impugned order but observed that the Department was free to re-start the proceedings at the stage of IAC under that the provisions of s. 144B. This decision also seems to indicate that the provisions of s. 144B were merely procedural and infraction of the same did not result in the passing of an order which could be regarded as a nullity, otherwise this Court would not have allowed the proceedings to proceed from the stage when the Dy. CIT was required to decide the objections to the first draft assessment order.

14. Strong reliance has been placed by Shri Syali on the decision of the Gauhati High Court in the case of Sonai River Tea Co. Ltd. Vs. Commissioner of Income Tax, . In that case the provisions of s. 144B were not complied with even though the ITO had added more than Rs. 1 lakh to the returned income. While the appellate authority had merely set aside the order of the assessment, the Gauhati High Court came to the conclusion that the omission and transgression by the ITO was not a mere irregularity and that the assessment order was required to be annulled. The Court did observe that "there are numerous cases where High Courts have held that deviation from s. 144B leads only to procedural irregularity, but no case has been cited to hold that deviation from the procedure under s. 144B warrants annulment of the order". Having observed as above the Gauhati High Court chose not to explain as to why it did not agree with the decision of various High Courts which had held a contrary view. In arriving at the conclusion which it did the Gauhati High Court referred to the powers of the CIT(A) under s. 251 and in considering them it proceeded on the basis that "all orders under s. 144B are appealable under cl. (d) of s. 246." As I read s. 144B there is no order which is passed by the Dy. CIT under that provision. Under sub-s. (4) s. 144B it is a direction which is issued and ultimately the order of assessment which is passed is only under s. 143(3). The direction issued under s. 144B is not appealable and infact s. 246, as it stood at the relevant point of time specifically provided for filing of an appeal under cl. (f) of s. 246(1) against "an order of assessment under sub-s. (3) of s. 143 or s. 144 made on the basis of directions issued by the Dy. CIT under s. 144B."

15. With respect I am unable to agree with the conclusion of the Gauhati High Court that an assessment order which is made without complying with the provisions of s. 144B is a nullity.

16. Placing strong reliance on the decision of the Privy Council in the case of Nazir Ahmed vs. King Emperor, 1936 PC 253 it was contended by Mr. Syali that where provisions of s. 144B require the ITO to act in a certain manner then he must act in that manner alone and not in any other manner. Other methods of performance are necessarily forbidden. There can be no quarrel with this proposition and it is precisely for this reason that an order of assessment which is passed without complying with the provisions of s. 144B cannot be regarded as a valid order but it would not follow, from the aforesaid proposition, that the order which is passed without complying with the procedural requirement must necessarily be regarded as a nullity. Reference in this connection may usefully be made to three decisions where similar procedural requirement had not been complied with but the Courts still came to the conclusion that the orders passed were not a nullity. The first such case is that of GUDUTHUR BROS. Vs. Income Tax OFFICER, SPECIAL CIRCLE, BANGALORE., . In that case a notice for levy of penalty was issued under s. 28(1)(a) of the IT Act, 1922 requiring the assessed to show cause why penalty should not be imposed. A written reply was filed but without affording to the assessed an opportunity of being heard the ITO proceeded to levy the penalty. In appeal the order was set aside by the AAC and the ITO was directed to refund the penalty recovered. The ITO, on receipt of the order of the AAC, issued a further notice calling upon the assessed to appear before him so that he might be given an opportunity of being heard. This notice was challenged by filing a petition under Art. 226 of the constitution which was dismissed by the High Court and an appeal was filed to the Supreme Court. It was held by the Supreme Court that as the AAC had pointed out to an illegality of not hearing the assessed which had vitiated the proceedings after they were lawfully initiated, the notice which was initially issued under s. 28(1)(a) by the ITO, did not cease to be operative and it was open to him (the ITO) to take up the matter at the point at which the illegality supervened and to correct his proceedings. The ITO had jurisdiction to continue the proceedings from the stage at which the illegality had occurred. Similar is the position in the present case. The illegality occurred draft assessment order under s. 144B was not issued to the assessed and once the assessment order was set aside because of the said illegality having been committed, the case must relate back to the stage prior to the commission of the illegality viz., to the stage when the ITO was already seized of the jurisdiction to assess the assessed. The ITO was required to issue a draft order and comply with the provisions of s. 144B.

17. The second case, which is similar in nature, is that of Sant Baba Mohan Singh Vs. Commissioner of Income Tax, where the AAC had set aside the assessment made by the ITO for the reason that the assessment order was completed under s. 23(3) of the Indian IT Act, 1922 without the issue of a notice under s. 23(2) and the ITO was directed to make a fresh assessment after issuing notice under s. 23(2) of the 1922 Act. It was contended before the High Court that the direction to make a fresh assessment was without jurisdiction. This contention was repelled and R. S. Pathak, J. (as he then was) observed in this connection as

follows :

"It seems to us that the contention that the AAC should have made an order under s. 31(3)(a) must be negated. Sec. 31(3)(a) speaks of the power of the AAC to annul an assessment. That is a power to be exercised where the assessment proceeding is a nullity in the sense that the ITO had no jurisdiction ab initio to take the proceeding. A proceeding is a nullity when the 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. The omission of the ITO to issue a notice under s. 23(2) does not affect the ab initio jurisdiction enjoyed by the ITO in respect of the proceeding. The ITO had seisin over the case, he had overall jurisdiction over the case and in that sense had power to initiate the proceeding. The omission to issue a notice under s. 23(2) merely prevents the ITO from making an assessment order under s. 23(3), and after he rectifies the omission by issuing that notice he can proceed further to the next stage, that is, to exercise the power of completing the assessment under s. 23(3). All these are steps within the overall jurisdiction vested in the ITO over the entire assessment proceeding. We are of definite opinion that the failure of the ITO to issue a notice under s. 23(2) does not call for an order by the AAC annulling the assessment. The AAC was right in merely setting aside the assessment."

18. The aforesaid observations, with which I respectfully agree, would also apply to the present case. Just as non-issuance of notice under s. 23(2), prior to the completion of the assessment, was regarded as a procedural irregularity, similarly non-compliance with the provisions of s. 144B will only result in a procedural irregularity being committed. The jurisdiction of the ITO to pass the assessment order never ceased, irrespective of the fact whether s. 144B was complied with or not.

19. The third case in which similar view has been taken is that of *Prabhudayal Amichand Vs. Commissioner of Income Tax*, wherein it was observed by the Madhya Pradesh High Court that the Tribunal rightly directed the ITO to pass a fresh order of penalty when the order levying penalty had been set aside on the ground that the ITO had not obtained the approval of the IAC prior to the levy of the penalty. The present case is analogous to *Prabhudayal's* case and the only conclusion which can follow is that non-compliance with the provisions of s. 144B only results in a procedural irregularity and the order which is passed, while ignoring the said provisions of s. 144B cannot be regarded as a nullity.

20. For the aforesaid reasons I will answer the question of law which is referred in the affirmative and in favor of the Revenue. There will be no order as to costs.