(2014) 05 CAL CK 0032

In the Calcutta High Court

Case No : W.P. No. 281 of 2014.

Zigma Commodities P. Ltd. APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 12AA, 143(1), 147, 148, 14A

Citation : (2014) 365 ITR 276

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : R. Bharadwaj and Bhaskar Sengupta, Advocate for the Appellant; Prithu Dudhoria, Advocate for the Respondent

Judgement

Harish Tandon, J.—Assailing the show-cause notice dated February 3, 2014, passed by the Commissioner of income tax u/s 263 of the income tax Act, 1961, the petitioner has filed the instant writ petition. The challenge to the said notice is basically founded on the ground that the Commissioner has not recorded his satisfaction relating to the error in the order passed u/s 148 of the said Act affecting the interests of the Revenue. The undisputed facts are that the petitioner filed a return u/s 143(1) of the said Act declaring a loss of Rs. 19,428. Subsequently, a notice for reassessment u/s 148 of the said Act was issued on April 7, 2011, on the premise that the petitioner being a non-industrial company has written off preliminary expenses in excess of Rs. 9,000 and, therefore, is not eligible to write off the expenses for increase in the authorized capital. By an assessment order dated April 29, 2011, the authority assessed the loss at Rs. 7,429 after disallowing the excess preliminary expenses of Rs. 9,000 as well as a sum of Rs. 3,000 u/s 14A of the said Act and computed the tax at rupees nil. The Commissioner of income tax issued the purported show-cause notice u/s 263 intending to revise the order of reassessment made u/s 147 and section 148 of the said Act raising doubt over the subscription of shares on premium in the absence of any business activities and non-conducting of proper inquiry regarding the identity and worthiness of the shareholders. The authority thought that in the absence of any proper inquiry, the order is erroneous and prejudicial to the interests of the Revenue. Subsequently, the petitioner disclosed before this court that the Commissioner has passed the order u/s 263 of the said Act on March 18, 2014, which was communicated after the filing of the instant writ petition. The challenge is further made to the said order dated March 18, 2014, on the ground of violation of the principles of natural justice. It is stated that despite the specific prayer having made for supply of the relied on documents, the authorities have not provided such documents to the petitioner and such order is, therefore, liable to be quashed on the flagrant violation of the principles of natural justice.

2. The learned advocate appearing for the petitioner submits that there is no recording of satisfaction by the Commissioner before issuing the show-cause notice u/s 263 of the said Act for arriving at the conclusion that the order of reassessment is erroneous and prejudicial to the interests of the Revenue. By relying upon a judgment of this court rendered in the case of Commissioner of Income Tax Vs. Karam Chand Thapar and Sons Ltd., the petitioner says that the word "considers" postulate the careful examination, study and examination of the documents upon due application of mind. He further submits that the conditions laid down u/s 263 of the said Act is sine qua non to invocation of power and in the absence of any of such conditions shall render the notice to be defective improper and liable to be quashed and set aside. He audaciously submits that the Commissioner should himself examine the records and the materials available, before arriving at the conclusion that the order is erroneous as held in the case of Commissioner of Income Tax Vs. Gabriel India Ltd., By relying upon a judgment of the apex court in the case of Commissioner of Income Tax Vs. G.M. Mittal Stainless Steel (P) Ltd., the petitioner says that the Commissioner is statutorily bound to record reasons before coming to the conclusion that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Lastly, he submits that if the show-cause notice suffers from incurable infirmity and lacks material particulars, the High Court in exercise of power of judicial review can it set aside as held in B.P. Agarwalla and Sons Ltd. Vs. Commissioner of Income Tax and Others,

3. The Department, in turn, says that prior to the issuance of show-cause notice u/s 263 of the Act, the records were placed before the Commissioner who after careful examination instructed the Deputy Commissioner of income tax to draft the said notice which after approval was issued upon the petitioner. He further submits that an opportunity of hearing was given to the petitioner before passing the order dated March 18, 2014, and, therefore, the said order cannot be said to have been passed in violation of the principles of natural justice. He, lastly, submits that the order passed u/s 263 of the said Act is appealable u/s 253(1)(c) of the said Act before the Appellate Tribunal.

4. Before proceeding to deal with the points canvassed by the respective parties,

it would be profitable to quote the relevant provisions as under:

"253. (1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-- ...

"(c) an order passed by a Commissioner u/s 12AA or under clause (vi) of sub-section (5) of section 80G or u/s 263 or u/s 271 or u/s 272A or an order passed by him u/s 154 amending his order u/s 263 or an order passed by a Chief Commissioner or a Director General or a Director u/s 272A;"

263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

5. On a meaningful reading of the aforesaid provisions, it is explicit that the Commissioner can exercise the jurisdiction u/s 263 of the said Act suo motu. The pre-requisite condition for exercise of such jurisdiction is that the order of the income tax Officer is erroneous and prejudicial to the interests of the Revenue. The twin conditions enshrined under the aforesaid provisions is composite and non-segreable. Merely because the order of the Assessing Officer appears to be erroneous, which is not prejudicial to the interests of the Revenue or the order is otherwise valid but prejudicial to the interests of the Revenue, does not invite the invocation of such power by the Commissioner.

6. There is a distinction between an order being erroneous and mistake or error committed by the Assessing Officer. An incorrect assumption of facts and/or improper application of law would justify and/or satisfy the requirement of the order being erroneous. The order cannot be branded as erroneous as the Commissioner is not satisfied with the conclusion arrived by the Assessing Officer. The order can be brought within the purview of erroneous order if it involves an error by deviating from law or upon erroneous application of the legal principle as held by the Bombay High Court in case of Gabriel India Ltd. (supra) in these words (page 114 of 203 ITR):

"We find that the expressions ''erroneous'', ''erroneous assessment'' and ''erroneous judgment'' have been defined in Black''s Law Dictionary. According to the definition, ''erroneous'' means ''involving error; deviating from the law''. ''Erroneous assessment'' refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, ''erroneous judgment'' means ''one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles''.

Form the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an income tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the income tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the income tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself."

7. The assumption of incorrect facts or incorrect application of law may be brought within the purview of erroneous order which should be manifest from the materials available with the Commissioner. Branding the order to be erroneous by the Commissioner because he thought that another view is possible when the view taken by the Assessing Officer is otherwise valid, is clearly impermissible. The Legislature have taken care of abuse of such power and used the conjunctive word that mere order being erroneous does not attract the invocation of suo motu power of revision by the Commissioner unless it acts prejudicial to the interests of the Revenue. The expression "prejudicial to the interests of the Revenue" is not an expression of art and is of wide import. The aforesaid phrase should be understood in the context that because of the erroneous order passed by the income tax Officer, the Revenue is deprived of the tax payable by the assessee under the law. The scheme of the Act is to levy and collect the tax in accordance with the provisions contained under the income tax Act and the Revenue has been entrusted with such task.

8. It admits no quarrel to the proposition that wrong assumption of fact or law makes the order erroneous but the violation of the principles of natural justice and/or adherence to the provision shall also render the said order erroneous.

9. In the show-cause notice, the Commissioner recorded that the proper inquiry was not conducted regarding the identity and worthiness of the shareholders who subscribed the shares at a high premium in a closely held company having no business activities. The Commissioner further proceeded to record that a proper inquiry in this regard should have been conducted by the Assessing Officer.

10. In the case of Karam Chand Thapar and Sons Ltd. (supra), the court noticed the judgment of the Supreme Court delivered in case of The Barium Chemicals Ltd. and Another Vs. Sh. A.J. Rana and Others, on an issue wherein the word "considers" implies the authorities to deliberate upon the matter with careful thinking and due application of mind. If the circumstances indicated in the show-cause notice manifest the examining of the documents and existence of the ingredients to brand the order to be erroneous and prejudicial to the interest of the authority, it shall constitute the sufficient compliance with the requirement of the statute.

11. The notice is the foundation of the invocation of jurisdiction u/s 263 of the Act and is the source of the power of the Commissioner to invoke its jurisdiction. The High Court can certainly interfere with the show-cause notice under article 226 of the Constitution, if the show-cause notice is brought within the purview of any of the contingencies laid down in case of B.P. Agarwalla and Sons Ltd. (supra). The following passage can be aptly quoted in this regard (page 868 of 208 ITR):

"There could be no quarrel with the proposition that the court exercising jurisdiction under article 226 will interfere with the issuance of a notice u/s 263 when there is an initial lack of jurisdiction. But in neither of the cases cited by the respondents did the courts hold that the ambit of the court''s power is limited to scrutinizing whether the jurisdiction was properly assumed or not by the Commissioner.

In the case of Indian Cardboard Industries Ltd. Vs. Collector of Central Excise, after considering the decision cited, I had held that the court in exercising the jurisdiction under article 226 of the Constitution will interfere with the show-cause notice in the following circumstances:

''(1) When the show-cause notice ex facie or on the basis of admitted facts does not disclose the offence alleged to be committed.

(2) When the show-cause notice is otherwise without jurisdiction.

(3) When the show-cause notice suffers from an incurable infirmity.

(4) When the show-cause notice is contrary to the judicial decision or decision of the Tribunal.

(5) When there is no material justifying the issuance of the show-cause notice.''

The same principles will apply to notices u/s 263 of the Act.

In my view, in this case, the notice u/s 263 suffers from an incurable infirmity and can be set aside by this court under article 226".

12. The decision founded on the show-cause notice would fall, in the event, the show-cause notice is found to have been issued without disclosing the offence alleged to have been committed or otherwise without jurisdiction or suffers from incurable infirmity or lacks material particulars justifying the issuance thereof.

13. The Commissioner received the records prior to the issuance of the show-cause notice and opined that the Assessing Officer failed to apply his mind objectively and failed to conduct an inquiry over the subscription of the shares to various subscribers at a high premium. Section 263 of the Act never envisages the separate recording of the satisfaction before issuance of the show-cause notice but if it is clearly discernible from the facts narrated in the show-cause notice that the order of the Assessing Officer appears to be erroneous and a prejudice is caused to the Revenue, it would render the said show-cause notice

legal and valid.

14. The Commissioner has indicated the same sufficiently in the show-cause notice and afforded the opportunity to the petitioner to file reply thereto which, in fact, have been done. Whether the order can sustain on the legal parameters or not, can be tested by a higher authority who have been bestowed with the power of appeal. Section 253 of the Act provides a remedy of appeal against an order passed u/s 263 of the Act by the Commissioner and, therefore, such remedy is required to be resorted to by the petitioner.

15. This court, therefore, does not find any merit in the writ petition.

16. The writ petition is thus dismissed.

17. However, there shall be no order as to costs. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.