(2014) 08 CAL CK 0002

In the Calcutta High Court

Case No : GA No. 1911 of 2014, APO No. 212 of 2014 and WP No. 281 of 2014.

Zigma Commodities Pvt. Ltd. and Others — APPELLANT

Vs

Income Tax Officer and Others — RESPONDENT

Date of Decision : 19-08-2014

Acts Referred:

Income Tax Act, 1961 — Section 253, 263

Citation : (2015) 370 ITR 318

Hon'ble Judges : Soumitra Pal, J;Arindam Sinha, J

Bench : Division Bench

Advocate : R. Bharadwaj, Advocates for the Appellant; P. Dhuduria, Advocates for the Respondent

Judgement

1. This appeal has been filed against the judgment and order dated May 8, 2014, passed by the learned single judge in the writ petition, being W.P. No. 281 of 2014 Zigma Commodities P. Ltd. Vs. Income Tax Officer, whereby the same was dismissed. The petitioner had prayed for cancellation of the show-cause notice dated February 3, 2014, issued under section 263 of the Income-tax Act 1961 (for short "the 1961 Act") and also, inter alia, prayed for a writ in the nature of mandamus commanding respondent No. 2 to supply the satisfaction recorded before issuance of the said show-cause notice.

2. It appears the learned single judge had granted liberty to the writ petitioner to file supplementary affidavit containing the records disclosed by the Department. Such records revealed, on January 29, 2014, 29 files were received by the Commissioner of Income-tax, Kolkata-II (hereinafter referred to as "the said Commissioner") which contained the record of the assessment proceedings of the writ petitioner. It was also revealed from such records on February 3, 2014, a draft notice under section 263 of the 1961 Act in the petitioner''s case was put up for approval of the said Commissioner if found deem fit, perusal, and signature, if approved. It also appears on the same day, i.e., February 3, 2014, the said Commissioner had put his signature thereon as evident from page 100

of the application for stay.

3. The learned single judge, after hearing the parties, had dismissed the writ petition by observing, inter alia, as follows (page 283 of 365 ITR) :

"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.

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 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 under section 263 of the Act by the Commissioner and, therefore, such remedy is required to be resorted to by the petitioner.

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

4. Mr. Bharadwaj, learned advocate appearing for the writ petitioner, submitted the said Commissioner had neither called for, examined nor considered the assessment proceedings before putting his signature in approval of the draft notice which notice was then issued to the petitioner also under his signature. He submitted the Commissioner, under section 263 of the 1961 Act, assumes jurisdiction only after having called for, examined and considered the records and since, in the instant case, it did not appear he had done so, the entire exercise was without jurisdiction as not in compliance with the statutory provision.

5. In order to appreciate the issue, it is appropriate to set out the relevant portion of section 263 of the 1961 Act which is as under :

"263. 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."

6. Mr. Bharadwaj submitted further that as it is evident from the records the said Commissioner did not call for or examine the assessment records of the assessee, it could not be said he had considered whether the Assessing Officer

had erred in making the assessment in so far as the same is prejudicial to the interests of the Revenue and, hence, the said show-cause notice should be set aside and quashed. According to the appellant, though the records were called for and brought to the office of the said Commissioner, it was apparent all steps were taken by the Deputy Commissioner of Income-tax and not by the said Commissioner as postulated under section 263. He submitted under the statutory provision there has to be some communication between the Commissioner and the Assessing Officer which was absent in the instant case. He, however, fairly submitted all assessment orders are subject to audit scrutiny which throws up those cases which might require the attention of the Commissioner in the matter of issuance of notices under section 263 of the 1961 Act.

7. During the hearing of this matter we had called upon the Revenue to once again produce the records of the case. Mr. Dhuduria, learned advocate for the respondent, had produced the records, inspection whereof was given to Mr. Bharadwaj.

8. It appears from the records produced, during August, 2013, the DCIT, HQRS-2, Kolkata, writing on behalf of the said Commissioner to the Joint Commissioner of Income-tax, Range 4, 5 and 6, Kolkata, had requested that office to submit the list of cases in which review under section 263 of the 1961 Act had to be completed on or before March 31, 2014. It is, thereafter, 29 files, one of which relates to the appellant-petitioner, were received by the office of said Commissioner on January 29, 2014. Then a draft notice under section 263 of the 1961 Act was put up for signature of the said Commissioner the record of which in the order-sheet is set out below :

"Name of assessee : Zigma Commodities Pvt. Ltd.

PAN : AAACZ3447P A.Y. : 2009-10, Ward-5(3), Kolkata.

A draft notice under section 263 of the Income-tax Act, 1961, in the above case having PAN : is put up for your kind approval if found deem fit.

Put up for kind perusal and signature, if approved?

(Sd.)....... 3-2-2014 CIT, KOL-II, Kolkata

(Sd.)........ Hqrs.-2, Kolkata"

9. We find the said Commissioner had put his signature on the order sheet for putting up the draft notice under section 263 of the 1961 Act as well as issued the said show-cause notice as evident from annexure P2 to the writ petition appended to the application for stay.

10. We hold that having put his signature in approval of the draft notice put up with the file and having issued the said show-cause notice dated February 3, 2014, the same is sufficient compliance by the said Commissioner in the facts and circumstances, discussed above. The Commissioner had complied with the provisions contained in section 263 of the 1961 Act in the matter of calling for,

examining the records of the assessment proceedings to consider the necessity of issuing such show-cause notice.

11. It is to be noted Mr. Bharadwaj, in the course of his argument, had relied on the following judgements :

"1. Commissioner of Income Tax Vs. G.M. Mittal Stainless Steel (P) Ltd., ;

2. Commissioner of Income Tax Vs. Karam Chand Thapar and Sons Ltd., ;

3. Chhugamal Rajpal Vs. S.P. Chaliha and Others, ;

4. Galileo India (P.) Ltd. v. CCE Tax Pub (DT) 0733 (Del-Trib) : [2011] 040 (1) ITCL 0067;

5. Sahara India Mutual Benefit Co. Ltd. v. Asst. CTT GJX 386 TALL."

12. So far as the judgment in CTT v. G.M. Mittal Stainless Steel P. Ltd. (supra) is concerned, we find the challenge before the Supreme Court arose out of orders made by the Commissioner under section 263 of the 1961 Act proceedings. In dealing with the matter, the Supreme Court had held as under (page 257 of 263 ITR) :

"Section 263 of the Income-tax Act requires that the Commissioner can call for and examine the record of any proceeding under the Income-tax Act only on the basis of his being satisfied, (1) that the Assessing Officer was erroneous in passing the assessment orders, and (2) that the decision of the Assessing Officer was prejudicial to the interest of the Revenue. Needless to say the satisfaction must be one which is objectively justifiable and cannot be the mere ipse dixit of the Commissioner."

13. It appears the Supreme Court had found the satisfaction of the Commissioner must be objectively justifiable in considering an order passed by him under the said section. In this matter there is no challenge to the order made by the said Commissioner. The judgment in Chhugamal Rajpal (supra) is also distinguishable as the provision contained in section 151(2) of the old Act does not find place in section 263 of the 1961 Act and, thus, is not applicable to the present case.

14. So far as the judgment in CTT v. Karam Chand Thapar and Sons Ltd. (supra) is concerned, it would; be appropriate to set out the relevant portion of the said judgment, which is as under (page 372 of 186 ITR) :

"The words ''considers it necessary'' postulate that the authority concerned has thought over the matter deliberately and with care and it has been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word ''consider'' is ''to view attentively, top survey, examine, inspect (arch.), to look attentively, to contemplate mentally, to think over, mediate on, given heed to, take note of, to think deliberately, bethink oneself to reflect'' (vide Shorter Oxford Dictionary). According to Words and Phrases (Permanent Edn., Volume 8A) to ''consider'' means to think with care. It is also mentioned that no ''consider'' is to fix the mind upon with a view to careful examination; to ponder, study, meditate upon, think or reflect with care. It is, therefore, manifest that careful thinking or due application of the mind regarding the necessity to obtain and examine the documents in question is a sine qua non for the making of the order. If the impugned order were to show that there has been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the essential requisite to the making of the order would be held to be non-existent."

15. We find from the above judgment consideration of the documents is sine qua non for ''making of the order''. In our view, under section 263 of the 1961 Act, the Commissioner may call for and examine the records and if he considers any assessment order is erroneous and is prejudicial to the interests of the Revenue he may, after giving the assessee an opportunity of being heard and after causing such enquiry, pass such order thereon. In the case in hand, we find the petitioner had challenged the issuance of the show-cause notice itself before "making of the order". It is only upon "making of the order" the appellant/ petitioner might, from the face of it, show whether there was consideration or not, particularly in the facts we have found and the view taken above.

16. We have also considered the judgment in Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of Income Tax and Others, , though not cited by the parties but their notice drawn to the same, wherein it has been held as under (page 241) :

"It is true that exercise of power is dependent upon the consideration by the Commissioner but consideration by the Commissioner must be based on objective conditions laid down in section 263 of the Act Where powers are conferred on statutory authorities to exercise the same when ''they are satisfied'' or when ''it appears to them'' or when ''in their opinion'' or if they consider that ''certain state of affairs exists'' or when powers enable the statutory authorities to take such action as they think fit in relation to a subject-matter, the court would not readily defer to the conclusiveness of an executive authority''s opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated. Where reasonable conduct is required, the criterion of reasonableness is not subjective but objective."

17. Such finding in that judgment supports the view we have taken as aforesaid.

18. Since we have considered the judgments of the Supreme Court and of this jurisdictional court, it is not necessary for us to deal with the judgments of the Tribunal cited on behalf of the appellant-petitioner.

19. For the reasons as above, we do not find any merit in this appeal. Therefore, the appeal and the application are dismissed.

20. Let the records be returned to Mr. Dhudhoria, learned advocate for the

appellant-Revenue.

21. No order as to costs. Urgent certified copy of this order, if applied for, be given to the appearing parties on priority basis.

