

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

MONDAY, THE 9TH DAY OF MARCH 2015/18TH PHALGUNA, 1936

WP(C).No. 29193 of 2008 (A)

PETITIONER(S):

DR.R.P.PATEL, HAHNEMAN HOUSE
COLLEGE ROAD, KOTTAYAM.

BY ADV. SRI.RAMESH CHERIAN JOHN

RESPONDENT(S):

THE ASSISTANT COMMISSIONER OF INCOME
TAX, CIRCLE - 1, KOTTAYAM.

R,R BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
09-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 29193/2008

PETITIONER'S EXTS:

EXT.P1: TRUE PHOTOCOPY ASSESSMENT ORDER DT.13.3.2000
EXT.P2: -DO- OF THE APPELLATE ORDER DT.17.11.04
EXT.P3: -DO- ABRIDGED GROUNDS OF APPEAL FILED BEFORE THE TRIBUNAL
EXT.P4: -DO- OF THE LETTER DT.20.8.2007
EXT.P5: -DO- TRIBUNAL ORDER DT.24.1.2007
EXT.P6: -DO- LETTER DT.3.3.07
EXT.P7: -DO- DT.27.4.07
EXT.P8: -DO- DT. 24.8.07
EXT.P9: -DO- DT. 4.9.07
EXT.P10: -DO- NOTICE DT.21.11.07
EXT.P11; -DO- LETTER DT.23.11.2007
EXT.P12: -DO- NOTICE DT.11.12.2007
EXT.P13: -DO- OF THE REPRESENTATION DT.27.12.2007
EXT.P14: -DO- LETTER DT.18.3.2008
EXT.P15: -DO- REPRESENTATION
EXT.P16: -DO- LETTER DT27.5.2008

JJ

/TRUE COPY/

P.S.TO JUDGE

C.R.

K. SURENDRA MOHAN,J.

W.P(C) NO.29193 OF 2008

Dated this the 9th March, 2015.

JUDGMENT

The petitioner has filed this writ petition challenging Ext.P16 order of the respondent by which, an application for refund of tax paid for the assessment year 1996-97 has been rejected. The issue relates to the assessment year 1996-97.

2. The petitioner was a homeopathy practitioner. It is stated that he has stopped practice at present and is aged 87 years. A search was conducted at the petitioner's clinic and residence on 30.12.1994 and 24.1.1995. Based on the search, assessments were completed on the petitioner. Various discrepancies were found. The discrepancies were found in the stock of medicines in his pharmacy. Therefore, additions were made and the assessment was completed.

3. Aggrieved by the action of the respondent, the

petitioner had filed an appeal to the Commissioner of Income Tax (Appeals), Cochin. The Appellate Authority granted a limited relief in the matter. Not satisfied with the relief granted, the petitioner approached the Income Tax Appellate Tribunal. Aggrieved by the relief granted to the petitioner, the Revenue also preferred cross objections to the Tribunal, challenging the findings of the Appellate Authority. Ext.P3 is a copy of the grounds of appeal preferred by the petitioner. The appeal was disposed of by Ext.P5 order of the Tribunal. The Tribunal found that the contention of the petitioner regarding the discrepancy in the manner of assessing the stock had not been examined by the authorities. Therefore, the Assessing Officer was directed to reconsider the issue and to recompute the same.

4. According to the petitioner, though Ext.P5 order was passed on 24.1.2007 no order pursuant to the direction issued by the Tribunal was passed. Section 153(2A) of the Income Act, 1961 (the 'Act' for short) stipulates a time limit for issuing

a fresh order in compliance with the direction of the Tribunal. Since the time limit was over, the petitioner submitted an application for refund of the excess tax paid by him. Thereupon, Ext.P16 order was passed rejecting the petitioner's application.

5. According to Adv.Ramesh Cherian John who appears for the petitioner, Section 153(2A) of the Act stipulates that the consequential order pursuant to the direction of the Tribunal ought to be passed within a period of nine months thereof. In the present case, no such consequential order was passed. It is pointed out with reference to Exts.P8 and P11 communications that the petitioner had co-operated with the proceedings and that no attempt to protract the same was made by the petitioner. Since no consequential order was passed within the time limit stipulated by the provision of law, it is contended that, further action in the matter is barred. Therefore, the petitioner seeks a declaration to the said effect and also a direction that he is entitled to refund of the excess

tax paid. The counsel places reliance on a number of decisions in support of his contentions.

6. Adv.Jose Joseph appears for the respondent. According to the learned counsel, this is not a case in which sub section 2A of Section 153 of the Act applies. The said provision applies only in a case where an assessment is set aside and a fresh assessment is directed to be made. In the present case, according to the learned counsel in the first place the assessment order has not been set aside. Secondly, no fresh assessment has been directed to be made. What has been directed is only to consider one issue in the assessment order. It is pointed out by the counsel that there were a number of issues in the assessment order. All of them have been sustained. The Revenue also had objections to the manner in which the Appellate Authority had granted relief to the petitioner with respect to the same issue. It was for the said reason that, the issue was directed to be reconsidered. According to the counsel, what is required in the present case

is only to issue a modified order and not to conduct a reassessment. In such cases, it is sub section 3 of Section 153 that applies. For passing an order under the said provision it is pointed out that no time limit is prescribed. Therefore, according to the counsel for the respondent the petitioner is not entitled to any of the reliefs sought for.

7. The counsel for the petitioner replies to the above contention of the counsel for the respondent by pointing out that it is not necessary for the entire assessment order to be set aside, for attracting the time limit stipulated by Section 153(2A). It is sufficient that one issue is directed to be considered afresh according to the counsel. The assessment has been set aside in respect of the said issue and a fresh assessment has to be made in respect thereof. Therefore, it does not matter that the Tribunal has not set aside the order of assessment. The effect of the direction issued is to set aside the assessment order and to direct a reassessment. The said reassessment not having been done within the period

stipulated by Section 153(2A) the issue has become time barred. With respect to all other issues, the assessment order would be valid but with respect to the issue that was remanded, the time bar applies.

8. Heard. The facts are not in dispute. The assessment proceedings were initiated against the petitioner pursuant to a search conducted at his clinic and residence. It has been detected that there was discrepancy in the stock of medicines. Therefore additions were made. The said action was under challenge, initially before the Appellate Authority and thereafter before the Income Tax Appellate Tribunal. The Tribunal in Ext.P5 order has remitted the issue back to the Assessing Officer in the following words:-

“In our considered opinion this is a fit case to restore back to the Assessing Officer looking all the aspects of the mistakes in the stock of inventories and then to decide the issue afresh, according to law. The Assessing Officer shall re-work the stock of medicines and may arrive at the excess stock if any, after giving effective

opportunity of being heard to the assessee and also after considering the contention of the assessee that there had been some mistakes in the inventory listed at the time of search.”

It has been found by the Tribunal that the contentions of the assessee were brushed aside by the Commissioner of Income Tax (Appeals) for the only reason that the same was prepared with the assistance of the assessee's employees. Therefore, the matter was directed to be decided afresh, after giving an effective opportunity of being heard to the assessee and also after considering his contentions. The words “to decide the issue afresh” clearly shows that, the matter was remitted to the Assessing Authority for fresh consideration. The assessee was directed to be given a fresh opportunity of being heard and his contentions were directed to be considered. In the next paragraph the Appellate Authority has made the following observations:–

“Since this issue is restored to the Assessing Officer, the Assessing Officer can take care of the grounds raised by the revenue before the Tribunal

in the Cross Objection. Thus, the issue in the Cross Objection in this regard is also restored to the Assessing Officer.”

Thus, the grounds raised by the Revenue before the Tribunal was also restored to the Assessing Officer. It is true that Ext.P5 does not say in so many words that the assessment order was set aside. In fact even the petitioner has no case that the assessment order was set aside entirely. His case is only that, the assessment order in so far as the issue that was directed to be reconsidered was set aside and a fresh consideration was ordered. Therefore, in the present case, the effect of the direction contained in Ext.P5 is that with respect to a single issue, the contentions of the assessee as well as the Revenue were directed to be considered afresh by the Assessing Officer. It was necessary for the Assessing Officer to have considered the issue and passed fresh orders in accordance with the directions contained in Ext.P5. No such order has admittedly been passed in the present case. The question therefore is whether the omission to pass such a

consequential order would attract Section 153(2A) of the Act.

9. Section 153(2A) is extracted hereunder for convenience:–

“Notwithstanding anything contained in sub-sections (1) (1A), (1B) and 2, in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under Section 250 or Section 254 or Section 263 or Section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under Section 250 or Section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under Section 263 or Section 264 is passed by the Chief Commissioner or Commissioner:

Provided that where the order under section 250 or section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or

Commissioner, on or after the 1st day of April, 1999, but before the 1st day of April, 2000, such an order of fresh assessment may be made at any time up to the 31st day of March, 2002:]

[Provided further that where the order under section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Commissioner on or after the 1st day of April, 2005 [but before the 1st day of April, 2011], the provisions of this sub-section shall have effect as if for the words “one year”, the words “nine months” had been substituted:]”

It is clear from the second proviso to the above provision that the time limit within which the consequential order ought to have been passed is nine months from the date of receipt of a copy of the order. Ext.P5 order is dated 24.1.2007. The respondent has in Ext.P4 stated that Ext.P5 order was received by the said authority on 22.2.2007. Therefore, as per sub section (2A) of Section 153 of the Act the order had to be passed before 22.11.2007. As already noticed above, in the

present case no such order was passed by the respondent.

10. According to the counsel for the petitioner, even where an Appellate Order has not stated that the assessment order has been set aside the time limit stipulated would apply. The counsel places reliance on the decision in *Instruments and Control Co. v. Chief Commissioner of Income Tax and others* [(2012)349 ITR 571 (Guj) (DB)]. In the said case, the petitioner had prayed for the refund of an amount that he had paid as tax, in similar circumstances. In the said case also the order of assessment had not been set aside in express terms. Considering the question, the Gujarat High Court has concluded the issue in the following words:-

“To our mind, the case on hand would fall under sub-section (2A) of Section 153 of the Act. The Tribunal may not have used the words of “setting aside the assessment”, nevertheless, when it remitted the matter back to the Assessing Officer for summoning two witnesses again for cross-examination by the assessee and permitted further probe to the Assessing Officer, necessarily

it must be understood to have set aside the assessment under challenge. The Tribunal, otherwise in law, could not have remitted the proceedings to the Assessing Officer for fresh consideration after summoning the two witnesses and carrying out such probe as may be necessary.”

11. A similar question had arisen before the Court of Punjab and Haryana in the case of Bharti Engineering Corporation v. Union of India and others [(2008)298 ITR 400 (P&H)]. The effect of sub Section 2A of Section 153 has been considered by the Bench in the following words:-

“A bare perusal of the provisions of Section 153(2A) of the Act reveals that notwithstanding anything contained in sub-sections (1), (1A) (1B) and (2) of Section 153 of the Act an order of fresh assessment in pursuance of an order under Section 250 of the Act can be made at any time before the expiry of two year from the end of the financial year in which the order under Section 250 of the Act was passed. In the present case, the order was passed by the Commissioner of

Income Tax (Appeals) on October 10, 2000, setting aside the order of the Assessing Officer and directing him to pass a fresh order. In conformity with the provisions of Section 153 (2A) of the Act, the fresh order could be passed by the Assessing Officer by March 31, 2002, since the Commissioner of Income Tax (Appeals) passing the order in the financial year 2000-01 and one year thereafter would have expired on March 31, 2002. Though the proceedings were initiated in the case for fresh order, but admittedly no order was passed within the permitted period under Section 153(2A) of the Act and even till date. The net result of the same is that now no order can possibly be passed because of the bar of limitation prescribed under Section 153(2A) of the Act.”

Similarly a Division Bench of the Delhi High Court also took above view in Commissioner of Income Tax v. Bhan Textile P.Ltd. [(2008)300 ITR 176 (Delhi)]. The reasoning of the Court is contained in the following passages:-

“It was contended by learned counsel for the Revenue that the order passed by the

Commissioner of Income Tax (Appeals) did not set aside the assessment order and, therefore, the provisions of Section 153(2A) would not be applicable. We are not at all in agreement with learned counsel for the Revenue.

The operative words in Section 153(2A) of the Act are “an order setting aside or cancelling an assessment”. We have reproduced the operative portion of the order passed by the Commissioner of Income-tax (Appeals) and although that portion does not specifically say that the order of the Assessing Officer has been set aside or cancelled, but since ground No:2 of the appeal filed by the assessee was allowed, by necessary implication, the assessment order was set aside to that extent.

The Commissioner of Income -tax (Appeals) had made it clear in his order that the Assessing Officer “should have granted one more opportunity to the appellant on proposed additions” and in view thereof, it was held that it would be in the interest of justice to restore the matter to the file of the Assessing Officer so that one more opportunity could be given to the

assessee to file its evidence and state its case in respect of the show cause notice issued to it. The Commissioner of Income-tax (Appeals) also directed the Assessing Officer to pass an order under Section 144 of the Act after taking the explanation of the assessee into account. This, in our opinion, clearly means that the assessment order to the extent that it did not give an opportunity to the assessee to place its evidence on record was set aside or cancelled by the Commissioner of Income-tax (Appeals) although these specific words were not used in the appellate order.

This being the position, in our opinion, Section 153(2A) of the Act is clearly applicable.

In so far as the applicability of Section 153(3)(ii) of the Act is concerned, that relates to giving effect to a finding or direction, inter alia, by the Commissioner of Income-tax (Appeals). What this means is that the Assessing Officer must comply with the finding or direction given by the appellate authority without necessarily disturbing the assessment order. In so far as the present case is concerned, that is not the position because the

Assessing Officer was directed by the Commissioner of Income-tax (Appeals) to pass a fresh order under Section 144 of the Act meaning thereby that the assessment order to the extent that it is covered by ground No:2 of the appeal filed by the assessee was set aside or cancelled. There was no independent finding or direction which the Assessing Officer was required to comply with on the basis that the core of the assessment order has been sustained by the Commissioner of Income-tax (Appeals)."

12. The resultant position therefore is that, even in a case where only one issue has been directed to be considered afresh, the limitation under Section 153(2A) would apply. It is clear from the passage in [(2008)300 ITR 176 (Delhi)] (supra) extracted above that, sub section (3) of Section 153 applies to a different situation where only a consequential order has to be passed in implementation of a direction issued by the appellate forum. In the present case, as already found above the direction was to consider the issue afresh. Therefore, Section 153(2A) of the Act is attracted. In view of the above,

this is a case in which the Assessing Officer ought to have passed a consequential order within the time limit stipulated. Since no such order was passed the petitioner is entitled to succeed.

In view of the above findings the writ petition is allowed. It is held that in so far as the issue that was remitted to the respondent Assessing Officer for fresh consideration, the time bar contained in Section 153(2A) of the Act operates. The petitioner shall therefore be entitled to the refund sought for, in accordance with law. It is made clear that on all other aspects the assessment order is final and binding on the assessee. Such refund shall be made as expeditiously as possible and at any rate within a period of three months of the date of receipt of a copy of this judgment.

Sd/-
K. SURENDRA MOHAN
Judge

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