THE HON'BLE SRI JUSTICE DILIP B.BHOSALE

AND

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

I.T.T.A. No. 124 of 2004

JUDGMENT: (per the Hon'ble Sri Justice Dilip B.Bhosale)

This income tax appeal under Section 260A of the Income Tax Act, 1961 (for short 'the Act') is directed against the order, dated 08.06.2004, passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'B' in I.T.A.No.749/Hyd/2003 (assessment year 1996-97), whereby the Tribunal has remanded the matter to the Assessing Officer with a direction to examine Sri M.S.Muthuswamy, Proprietor of Sri Venko Jewellers, Coimbatore and providing an opportunity to the appellant/assessee to cross-examine him and dispose of the case on merits in accordance with law. The Tribunal while passing this order has also observed in paragraph '10' thereof that it did not consider the other arguments advanced on behalf of the parties. The Tribunal in sub-paragraph (1) of paragraph '9' in the order has observed that "it is well settled that when a return is processed under Section 143 (1) (a), it cannot be considered an assessment" and then proceeded to observe that it agreed with the finding of the CIT (A) that the reopening of assessment was valid in law.

Paragraphs 9 and 10 in the order of Tribunal read thus:

> "9.We have heard rival contentions. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers filed on record as well as the case laws cited, we are of the considered opinion that the issue should be set aside to the file of the AO for the following reasons:

(1) The reopening of assessment was within four years. This was based on information gathered by the AO from M/s. Sri Venco Jewellers, Coimbatore. The original return was processed under Section 143 (1) (a) and it is well settled that when a return is processed under Section 143 (1) (a), it cannot be considered an assessment. We agree with the finding of the CIT (A) that the reopening of assessment is valid in law.

(2) The assessee had along with the return of income filed on 30.05.2001, enclosed a letter dated 28.05.2001, which is reproduced by the AO at page 2 of his order. Similarly, the assessee filed a joint notarized affidavit duly sworn to on 04.03.2002 during the course of reassessment proceedings which is reproduced at paragraph 2.2 on pages 6 and 7 of the order of the AO. In the deposition recorded from the assessee, he has reiterated the stand that his daughter placed the order for purchase of jewellery with Sri Muthuswamy and that he knows Sri Muthuswamy. The contention of the assessee is that the entire transaction was done by his daughter Kumudini, whose demise unfortunately occurred, and that due to the legal proceedings initiated against his son-in-law and others, he is not in a position to produce the necessary evidence. Under these circumstances, it would have been appropriate for the assessing authority to have summoned Sri Muthuswamy of Sri Venco Jewellers, Coimbatore, and if required given opportunity to the assessee to cross-examine Sri Muthuswamy, in the interests of natural justice. When a person states certain facts on oath by way of an affidavit, the same should not be brushed aside by inferences and presumptions, when there is a possibility of investigating the issue further and arriving at the truth of the matter.

10. Thus, on the grounds of natural justice, we set aside the issue to the file of the AO with a direction to examine Sri M.S.Muthuswamy, Proprietor of M/s. Sri Venco Jewellers, Coimbatore and also provide an opportunity to the assessee for cross-examining the said Sri Muthuswamy if the assessee so desires and dispose of the case on merits in accordance with law.

As we have set aside the issue, we do not propose to go into the other arguments advanced by both the parties in this case at this stage."

Learned counsel appearing for the appellant submits that he has instructions not to press this appeal insofar as the order of remand for allowing to examine Sri M.S.Muthuswamy is concerned, and the appellant would be satisfied if his contentions based on Section 147 of the Act are kept open in view of the subsequent judgments of the Gujarat High Court in **Nitin P.Shah alias Modi Vs. Deputy Commissioner of Income Tax**[1] and **Bakulbhai Ramanlal Patel Vs. Income Tax Officer**[2]. In other words, he submits that if sub-paragraph (1) of Paragraph '9' of the impugned order is set aside, keeping all the contentions of the appellant open based on Section 147 of the Act, he has no objection for going before the Assessing Officer for hearing of the case afresh.

Learned counsel appearing for the respondent submits that he has no objection for keeping all the contentions based on Section 147 of the Act open to be raised before the Assessing Officer afresh, without expressing any opinion on merits of the case and confirming the order insofar as direction to examine Sri M.S.Muthuswamy, Proprietor of Sri Venko Jewellers as per the impugned order is concerned.

Having considered the nature of the impugned order and the submissions of the learned counsel for the parties, we are satisfied that this appeal can be conveniently disposed of by the following order:

(a) the Assessing Officer is directed to examine Sri M.S.Muthuswamy, Proprietor of Sri Venko Jewellers, Coimbatore, and providing an opportunity to the appellant/assessee to cross-examine him, as expeditiously as possible, preferably within a period of six months from the date of receipt of this order; and

(b) insofar as the finding recorded in sub-paragraph (1) of paragraph ‘9’ is concerned, is set aside, and all the contentions in respect thereof are kept open to be raised before the Assessing Officer afresh.

With these observations, the appeal is partly allowed. All the contentions of the parties are kept open on merits as well as on the questions of law. Consequently, miscellaneous petitions, if any, also stand disposed of. No costs.

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DILIP B.BHOSALE,J

A.RAMALINGESWARA RAO,J

Dt:19.01.2015

kdl

[1] 2005 ITR 411

[2] (2011) 56 DTR (Guj) 212