

**THE HON'BLE SRI JUSTICE DILIP B.BHOSALE
AND
THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO**

I.T.T.A.No.299 OF 2003

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% 17.03.2015

Sri Damodarlal Badruka .. Appellant

And

\$ The Income Tax Officer, Ward I
(4), Hyderabad .. Respondent

! Counsel for the Appellant : Sri A. Sanjay Kishore

Counsel for Respondent : Sri J.V. Prasad
Standing Counsel for Income Tax

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

This Appeal under Section 260 (A) of the Income Tax Act, 1961 (for short, 'the Act'), preferred by the appellant – assessee, is directed against the order dated 13.06.2001 passed by the Income Tax Appellate Tribunal (for short, 'the Tribunal'), Hyderabad Bench 'B' in I.T.A.No.1398/Hyd/1995 for the assessment year 1985-86. By this order, the Tribunal dismissed the appeal filed by the assessee against the order dated 10.05.1995 passed by the Deputy Commissioner of Income Tax (Appeals) (DCIT).

The substantial question that falls for consideration in the instant appeal reads thus:

“Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that prior approval of Deputy Commissioner for issue of notice under Section 143 (2) was not required?”

The facts leading to this appeal, to the extent they are necessary, are as under:

The assessee-HUF sold the property situated at Parbhani for a total consideration of Rs.1,35,500/-. He incurred an expenditure of Rs.3,380/- for selling the property and arrived at a net taxable capital gains of Rs.26,620/-, after deducting Rs.1,05,500/- as the value of the property on 01.01.1964 exercising his option under Section 49 (1) (i)

read with Section 55 of the Act. The assessment was accordingly completed under Section 143(1) of the Act accepting the returned income. Subsequently, an order under Section 263 of the Act was passed by the Commissioner on 28.09.1987 having found the order of Assessing Officer prejudicial to the Revenue. The Commissioner accordingly set aside the order dated 22.07.1985 of assessment made under Section 143 (1) of the Act, and directed the Assessing Officer to conduct local enquiries into the correct value of the property as on 01.01.1964 and determine the correct amount of taxable capital gains, and to recompute the income for the assessment year 1985-86 taking into consideration the correct amount of capital gain. Thus, the revisional authority cancelled the assessment made vide order dated 22.07.1985. In pursuance thereof, the Assessing Officer reopened the assessment under Section 143 (3) by issuing a notice under Section 143 (2) of the Act. During the fresh assessment under Section 143 (3), the property was referred to Valuation Cell of the Department under Section 55-A and thus the correct market value was arrived at on 01.01.1964 and it was accordingly adopted as cost of the land and capital gain was thus computed on the basis thereof. On appeal, the DCIT (A) upheld the order of assessment. The Tribunal dismissed the appeal preferred by the assessee by order dated 13.06.2001.

In this backdrop, the aforementioned question has been raised by the appellant based on the provisions of Section 143 of the Act, as it stood at the relevant time. It is not in dispute that after setting aside the assessment made under Section 143 (1) of the Act, by the Commissioner in exercise of his powers under Section 263 of the Act, the Assessing Officer made fresh assessment under Section 143 (3) of the Act. The Assessing Officer had, accordingly, issued a notice under sub-section (2) of Section 143 of the Act to the assessee. Further, it is not in dispute that while issuing the notice, previous approval of the

Inspecting Assistant Commissioner was not sought. Therefore, the question raised is, whether the assessment under Section 143 (3) of the Act, would vitiate for want of previous approval of the Inspecting Assistant Commissioner.

We are concerned with the provisions of Section 143 of the Act, as it stood at the relevant time. Section 143, to the extent it is relevant for our purpose, reads thus:

“S. 143. Assessment._ (1)(a) Where a return has been made under section 139, the Assessing Officer may, without requiring the presence of the assessee or the production by him of any evidence in support of the return, make an assessment of the total income or loss of the assessee after making such adjustments to the income or loss declared in the return as are required to be made under clause (b), with reference to the return and the accounts and documents, if any, accompanying it, and for the purposes of the adjustments referred to in sub-clause (iv) of clause (b), also with reference to the record of the assessments, if any, of past years, and determine the sum payable by the assessee or refundable to him on the basis of such assessment.

(b)

(i)

(ii)

(iii)

(iv)

(2) Where a return has been made under section 139, and-

(a) an assessment having been made under sub-section (1), the assessee makes within one month from the date of service of the notice of demand issued in consequence of such assessment, an application to the Assessing Officer objecting to the assessment, or

(b) whether or not an assessment has been made under sub-section (1), the Assessing Officer considers it necessary or expedient to verify the correctness and completeness of the return by

requiring the presence of the assessee or the production of evidence in this behalf,

the Assessing Officer shall serve on the assessee a notice requiring him, on the date to be therein specified, either to attend at the Assessing Officer's office or to produce, or to cause to be there produced, any evidence on which the assessee may rely in support of the return:

Provided that, in a case where an assessment has been made under sub-section (1), the notice under this sub-section except where such notice is in pursuance of an application by the assessee under clause (a) shall not be issued by the Assessing Officer unless the previous approval of the Deputy Commissioner has been obtained to the issue of such notice:

Provided further ...

- (3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered."

Sub-section (2) of Section 143 of the Act provides for issue of notice by the Assessing Officer, requiring the assessee, on the date to be therein specified, either to attend at the Assessing Officer's office or to produce or to cause to be there produced any evidence on which the assessee may rely in support of the return. The first proviso to sub-section (2) provides that, in a case where an assessment has been made under sub-section (1), the notice under this sub-section, except where such notice is in pursuance of an application of the assessee under clause (a), shall not be issued by the Assessing Officer unless the previous approval of the Deputy Commissioner has been obtained to the issue of such notice. Thus, this provision would show that where the Assessing Officer has made the assessment under sub-section (1) of Section 143, he has power to make assessment under

Section 143 (3) and for that, the issue of notice under sub-section (2) is a pre-condition. Opening words of the first proviso to sub-section (2) are “in a case where the assessment has been made under sub-section (1)”.

A bare reading of this expression would show that where the Assessing Officer has made assessment under sub-section (1) and he chooses to make reassessment under sub-section (3), he has no powers to issue notice, unless the previous approval of the Inspecting Assistant Commissioner is obtained. The words “Inspecting Assistant Commissioner” in the first proviso were substituted by “Deputy Commissioner” by Act 4 of 1988, Section 2, w.e.f. 01.04.1988. The question is, where the assessment made under sub-section (1) of Section 143 of the Act is set aside by the revisional authority under Section 263 of the Act, whether the previous approval contemplated by sub-section (2) of Section 143 of the Act is necessary. In our opinion this question must be answered in the negative, since the original order under Section 143(1), having been quashed and set aside, it ceases to operate.

At this stage, we would also like to have a glance at Section 263(1) of the Act. The relevant portion of Section 263(1) reads thus:

“The Commissioner may call for and examine the record of any proceedings under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar 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 canceling the assessment and directing a fresh assessment”.

The revisional power, as per the provisions of this Section, is

supervisory in nature and not like that of an appellate authority. For exercising this power, the only condition is that the order of the Assessing Officer should be erroneous insofar as it is prejudicial to the interests of the revenue. The provisions contained in this Section would also show that the Commissioner can call for and examine the order of any proceeding under the Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue, he may, pass such order thereon as the circumstances of the case justify, including an order “enhancing or modifying the assessment”, or “canceling the assessment and directing a fresh assessment”. Thus, he has options, viz., to pass “such order as the circumstances of the case justify” or “an order enhancing the assessment” or “modifying the assessment or canceling the assessment” and in the event of canceling the assessment, he has power to issue a direction for fresh assessment. In the present case, the Commissioner cancelled the assessment and directed fresh assessment.

It is well settled that once an assessment is re-opened by virtue of the order passed by CIT under Section 263 of the Act, the initial order of assessment ceases to be operative. The effect of re-opening of assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made of re-assessment. Thus, in the present case, in our opinion, after the previous assessment, which was set aside by the CIT in exercise of his power under Section 263 of the Act, the whole proceedings started afresh.

Moreover, in the present case, the assessment under Section 143 (1) of the Act was set aside by the Commissioner, the higher authority, in exercise of his powers under Section 263 of the Act, and

therefore, it ceased to operate or in other words the Assessing Officer had to pass order under Section 143 (3) as if there was no assessment under Section 143 (1). In view thereof, it was open to the Assessing Officer to make assessment under sub-section (3) of Section 143 without seeking prior approval as contemplated by sub-section (2) thereof. In other words, this is not a case where the Assessing Officer chose to make reassessment under Section 143 (3) of the Act of his own. This being so, in our opinion, it was not necessary to seek previous approval of the Inspecting Assistant Commissioner before issuing notice under sub-section (2) of Section 143. The question framed, therefore, is answered in favour of the Revenue and against the assessee.

In the result, the Appeal is dismissed with no order as to costs.

Consequently, miscellaneous petitions, if any, also stand disposed of.

DILIP B.BHOSALE, J

A.RAMALINGESWARA RAO, J

17.03.2015

Note:- L.R. Copy to be marked: Y

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