IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.355 of 2006

==

1. Commissioner of Income Tax (Central), Patna
2. Asstt. Commissioner of Income Tax, Circle-6, Patna
3. Income Tax Officer (Technical), Patna

.... Appellants

Versus

Satish Kumar Keshri, Proprietor, M/s. Hira Panna Jewellers, 07 Hira Place, Dak Bunglow Road, Patna

.... Respondent

==

Appearance :

For the Appellant/s : Mr. Rishi Raj Sinha, Sr.S.C. with Ms. Archana Prasad, Jr. S.C.

For the Respondent/s : Mr. A.K.Rastogi, Advocate

==

CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 06-04-2016

Heard learned counsel for the appellant-Revenue and learned counsel for the respondent-Assessee.

2. The appeal has been filed under Section 260A of the Income Tax Act, 1961 against the order dated 28.4.2006 passed by the Income Tax Appellate Tribunal, Patna in ITA No. 488/Pat/04 with respect to assessment year 2002-03 by which the order of the Commissioner of Income Tax under Section 263 of the Act directing the Assessing Officer to make a fresh assessment taking into account properly the stock and cash found at the time of survey and also by the proper appreciation of facts has been quashed.

3. The short facts of the case are that a survey under Section

133A was conducted in the business premises of the assessee on 1.11.2001 and during the course of survey it was found that closing stock of the gold as per the records of the assessee was 52,475.026 gms. as on 31.10.2001, whereas the survey team found the same to be 70,548.620 gms. and accordingly 18,073.59 gms. of gold was found to be excess stock than that recorded by the assessee. The assessee had after the survey filed a petition before the CIT on 7.11.2001 stating that the inventory prepared at the time of survey suffered from various defects and lack of credibility in view of the fact that item wise weightment was not undertaken. The Additional Director of Income Tax (Investigation), Patna ordered for accurate weightment to be made by the registered valuer M/s. Devi Lal Baijnath Prasad Zaveri, Boring Road, Patna who has given his valuation report on 9.11.2001. The assessee subsequently filed its return of income tax on 31.10.2002 for the assessment year 2002-03 showing total income of Rs. 7,77,350/-. The assessment order under Section 143(3) was framed on 16.6.2003 holding that the valuer's report disproved the report of the survey team that excess stock of gold weighing 18,073.59 gms. was found in the course of survey and assessment was accordingly made on total income of Rs.7,77,350/-. The CIT thereafter exercising his power under Section 260 of the Income Tax Act got a notice issued under the signature of the Income Tax Officer

(Technical), which merely stated that the assessment order dated 16.6.2003 was erroneous and prejudicial to the interest of revenue; the petitioner was informed that opportunity was being given to it to appear before the Commissioner of Income Tax. The assessee's authorized representative appeared and filed a time petition on 27.10.2004 and he was asked to show cause as to why the assessment should not be cancelled for a fresh assessment, under Section 263 of the Income Tax Act. The assessee appeared and filed his written statement in the matter. The Commissioner, however, by his order dated 24.11.2004 set aside the assessment order holding it to be erroneous and prejudicial to the interest of revenue and directed the A.O. to make a fresh assessment taking into account properly the stock and cash found at the time of survey and also by proper appreciation of facts.

4. Aggrieved by the aforesaid order the assessee filed an appeal before the Income Tax Appellate Tribunal being ITA No. 488(Pat) of 2004, which was allowed by the impugned order dated 28.4.2006 holding that the CIT was not justified in treating the order of the Assessing Officer as erroneous and prejudicial to the interest of the revenue and further, on merit also, the order of the CIT was not sustainable and the same was quashed. Aggrieved by the same the Revenue has filed the present appeal.

5. The appeal was admitted on the following two substantial questions of law :-

> "(i) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal should have held that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue for lack of proper enquiry and investigation before completion of assessment ?
>
> (ii) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal has erred in holding the order of Commissioner of Income Tax is invalid and illegal only on the ground that the show cause notice dated 19.10.2004 was not signed by him but was signed by ITO (Technical) under direction of Commissioner of Income Tax ?"

6. We may consider the second question first. Learned counsel for the appellant submits that the Tribunal was not justified in holding that since the show cause notice was not under the seal and signature of the C.I.T. and was signed by the ITO (Technical) under the direction of the Commissioner of Income Tax, therefore the assumption of jurisdiction was illegal and invalid. In paragraph-13 of the order of the Tribunal it is stated as follows :-

> "On perusal of show cause notice through which Ld. CIT has assumed jurisdiction u/s. 263 in this case is not under his seal and signature and the notice suffers from want of details on the basis of which Ld. CIT came to the conclusion that the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. On this ground itself, the assumption of jurisdiction by the Ld. CIT u/s. 263 is invalid, illegal, hence the same is quashed."

7. It is evident that the Tribunal finding the assumption of jurisdiction by the CIT under Section 263 as invalid and illegal, quashed the same not only on the ground that it was not under his seal and signature but also on the ground that the notice suffered from details on the basis of which he came to the conclusion that the order of assessment was erroneous and prejudicial to the interest of revenue. We, accordingly, reframe the second substantial question of law as follows :-

> "Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal has erred in holding the order of Commissioner of Income Tax as invalid and illegal on the grounds that the show cause notice under Section 263 of the Act was not under his seal and signature and the notice suffered from want of details on

> the basis of which the CIT came to the conclusion that the order of the Assessing Officer was erroneous and prejudicial to the interest of revenue."

8. On the aforesaid reframed substantial question of law learned counsel for the Revenue submits that in view of catena of decisions, including that of the Apex Court in the case of Commissioner of Income Tax, West Bengal II vs. Electro House : (1971) 82 ITR 824, no notice is required to be issued and what is required is only a reasonable opportunity to be heard. Therein it was held: "In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under section 33B. Therefore the question what that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under section 33B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under section 33B."

9. Learned counsel for the assessee does not seriously contest the above proposition that no formal notice of proceeding under Section 263 is required to be issued but it is submitted by him that the Tribunal has correctly held that the notice suffers from want of details on the basis of which the CIT came to the conclusion that

the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue. In support of the same learned counsel for the assessee refers to the decision of the Gujarat High Court in the case of Garden Silk Mills Ltd. vs. CIT : 221 ITR 861 and in the case of CIT vs. Sattandas Mohandas Sidhi : 230 ITR 591 (MP), which have been cited in paragraphs 11 and 12 of the Tribunal's order.

10. Learned counsel for the Revenue in response submits that no notice is required to be issued and therefore the contents of the notice are irrelevant and thus on that ground the Tribunal could not have set aside the order of the CIT.

11. In our view, the law is well settled by the Apex Court that for exercising jurisdiction under Section 263 of the Income Tax Act the Commissioner is not required to issue any notice at all and therefore the contents of notice per se are immaterial. Thus on that ground alone the notice dated 19.10.2004 issued by the Income Tax Officer (Technical) cannot be held to be invalid. However, the fact remains that Section 263 of the Act makes it mandatory before passing any order under the said Section to give the assessee an opportunity of being heard. Such opportunity of being heard would lose all its significance unless the assessee is made to understand the case that he has to meet. It is true that the assessee has filed his reply upon the issuance of the notice but nothing has been brought on the record

that at any point of time it was made clear to the assessee as to the points that he had to meet. Thus it cannot be said that a reasonable opportunity was granted to the assessee by the Commissioner during the course of proceedings under Section 263 of the Act. However, the conclusion of the Tribunal that assumption of jurisdiction by the CIT under Section 263 was illegal and invalid and fit to be quashed cannot be supported although, it can be said that an opportunity as required under Section 263 of the Act was not given to the assessee in the matter.

12. The said question, however, loses much of its significance in view of the fact that the Tribunal has proceeded to dispose of the appeal on merits and found that the order of the CIT was not legally and factually sustainable and quashed the same. The Tribunal has considered the fact that the Assessing Officer before passing his order has taken into account two vital documents, namely, survey report and valuer's report, and after discussing the two documents he has passed the order which showed the application of mind by him. Thus the Tribunal held that there was consideration of the evidence, fact and correct appreciation of law by the Assessing Officer and there was nothing therein so as to make the order erroneous.

13. It is also noted by the Tribunal that the Assessing

Officer had taken note of the inherent defect in the method of valuation adopted in an improper manner by the survey team in contrast with the scientific and authentic method adopted by the Government Valuer. It also noted that the Assessing Officer had taken the weightment and the value specified by the latter authority as the basis for framing the assessment order and on that basis the Assessing Officer had refrained from making any addition in the goods account or on account of unexplained investment in the acquisition of those assets. It also noted that when the documentary evidence under reference had been obtained by no less an authority than the Additional Director of Income Tax (Investigation), Patna and when such a report had been passed on to the Assessing Officer he was bound to adopt the same and such action of the Assessing Officer could not be said to be erroneous even if the order may be prejudicial to the interest of the revenue and, thus, the two criteria under Section 263 were not satisfied in the present matter so as to invoke the jurisdiction under Section 263 of the Act.

14. The Tribunal has also found that the Assessing Officer had made necessary enquiries and had also confronted the assessee on the alleged excess stock and on being satisfied with the evidences adduced had not drawn any adverse inference. The Tribunal had also come to the conclusion that the alleged excess stock was fully

adjudicated upon. It has also referred to the petition filed by the assessee before the CIT on 7.11.2001 and considered that the inventory nowhere mentions the total number of pieces weighed together and further nothing incriminating was found during the course of the survey indicating suppression of gross profit. In the aforesaid circumstances, it has been found that reliance could not have been placed upon such inventory and weightment made by the survey team.

15. The Tribunal has also considered the fact that the books and accounts of the assessee have been accepted and perused in the course of survey and nothing incriminating was found including suppression of gross profit or undertaking purchase and sale beyond those recorded in books.

16. It has also noted that the A.O. has recorded a categorical finding that nothing incriminating relating to purchase and sale of ornaments outside the books of accounts have been found in course of survey under section 133A nor any defect has been detected, hence the trading result has been accepted. For the said reasons the Tribunal was of the view that the assumption of the CIT regarding possession of excess stock was based on mere suspicion and surmises and further noted that the CIT has restrained from giving any specific direction while exercising extraordinary power under section 263 of the Act.

17. Learned counsel for the Revenue has sought to rely upon various decisions of the Calcutta High Court, Supreme Court and Gauhati High Court for the proposition that the valuation report is an opinion under section 75 of the Act and could not have been relied upon without any other material. The decisions relied upon by learned counsel are that of the Supreme Court in the case of Assistant Commissioner of Income Tax vs. Dhariya Construction Co. : [2010] 328 ITR 515 (SC), which is a short judgment in the following terms :

> "Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the District Valuation Officer (DVO). The opinion of the DVO per se is not an information for the purposes of reopening assessment under section 147 of the Income-tax Act, 1961. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment.
>
> Civil appeal is, accordingly, dismissed. No order as to costs."

18. It is evident that the aforesaid decision does not at all support the stand of the Revenue, rather the only proposition laid down therein is that the opinion given by the District Valuation

Officer in his report cannot be considered as an information for the purpose of reopening assessment under section 147 of the Income Tax Act, rather the Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon.

19. Learned counsel for the appellant revenue also relies upon a decision of Calcutta High Court in the case of Hotel Mount View vs. Commissioner of Income-tax and others : [2006] 280 ITR 51 (Cal). In the said decision the second question of law framed was as to whether the report of the Valuation Officer in any event is merely an opinion and can be relied upon as a material or evidence on the basis of which the sum of Rs. 12,32,954 can be treated as the undisclosed income of the assessee when the said amount of Rs. 12,32,954 as undisclosed income of the assessee is without any material or evidence ?

20. From a perusal of the judgment it appears that the Court had answered question No.1 in negative stating that the second question becomes academic and thereafter went on to hold relying upon a decision of the Calcutta High Court and another decision of this Court that such an evidence is an admissible evidence within the meaning of Section 45 of the Evidence Act but then it has to be supported by sufficient material and even though such piece of evidence is obtained through a manner which is not supported by law,

it is only the value of such evidence which is to be considered, nothing more nothing less. The said decision does not at all support the case of the Revenue in the present matter and the reliance placed by the Assessing Officer upon the valuation report given on the direction of the Additional Director (Investigation), Income Tax, Patna cannot be considered as improper.

21. So far as the second substantial question of law is concerned, it is answered partly in the negative with the rider that a reasonable opportunity of being heard has to be given to the assessee in a proceeding under section 263 of the Income Tax Act, which has not been done in the present case and therefore ultimately in favour of the assessee and against the revenue. So far as the first substantial question of law is concerned, it is answered in the negative against the Revenue and in favour of the assessee.

22. In view of the aforesaid findings, the appeal is dismissed.

(Ramesh Kumar Datta, J)

(Sudhir Singh, J)

spal/-

U			