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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 128/2016

PR. COMMISSIONER OF INCOME TAX-06 ..... Appellant
Through : Sh. Rahul Chaudhary, Sr. Standing Counsel and Sh. Anurag Vijay, Advocate.

versus

MEGA CORPORATION LTD. ..... Respondent
Through : Sh. Salil Aggarwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

<u>O R D E R</u>
% 23.02.2017

Admit.

1. Following question of law arises for consideration:

"Did the Income Tax Appellate Tribunal (ITAT) fall into error in interpretation of provisions of Section 124(3)(a) and holding that the ACIT could not have completed the assessment by virtue of Section 120(4)(b)?"

2. The facts necessary for deciding the appeal are that the assessee filed return on 30.11.2006. On 01.08.2007, a notification was issued under Section 120(2), conferring powers upon the Additional Commissioner of Income Tax (hereafter "ACIT"). The Deputy Commissioner of Income Tax (hereafter "DCIT"), who was concededly the Assessing Officer (AO) at that stage, i.e. till 01.08.2007, issued notice under Section 143(2) of the Income Tax

Act, 1961 on 15.10.2007. While so, some time in August 2008, the ACIT assumed jurisdiction and went to complete the assessment after hearing the parties, by order dated 29.12.2008. During assessment, the objection as to the ACIT's jurisdiction was not articulated. It was also not articulated before the CIT(A). For the first time, the assessee voiced the submission that the ACIT who completed the assessment did not possess jurisdiction to do so, before the ITAT. Since this ground was raised for the first time, the ITAT remitted the matter to the CIT(A) for decision on merits. This was round two; the assessee could not succeed since the CIT(A) turned down the submission with regard to the lack of jurisdiction, on the basis of the assessee's interpretation of Section 120(4)(b). The ITAT, however, considered the materials on record, including the notification dated 01.08.2007, under Section 120(2) and proceeded to hold that in the absence of specific notification under Section 120(4)(b), the ACIT could not have acted as an AO. It, however, did not deal with the second or rather the alternative argument made by the assessee, i.e. that even the notice issued under Section 143(2) was by an incompetent officer since the DCIT did not possess jurisdiction at that stage.

3. Learned counsel for the Revenue relied upon the decision of the Allahabad High Court in *CIT v. British India Corporation Limited* 337 ITR 64 as well as the judgment of this Court in *CIT v. S.S. Ahluwalia* [ITA Nos. 255/2002 and connected cases, decided on 14.03.2014] 2014 (46) taxmann.com 169 (Del). He drew our attention to Section 2(7A) and argued that the DCIT always possessed

jurisdiction under Section 120(1) and 120(2) and that in the circumstances of the case, the notification dated 01.08.07 merely conferred additional jurisdiction upon the ACIT and did not denude the DCIT. This was in support of the submission that notice under Section 143(2) was followed. As far as the assessment itself goes, learned counsel highlighted that the ACIT's jurisdiction could have been challenged, if at all, within the one month of his assuming it, i.e. within one month of August 2008. Since the assessee in this case failed to do so and did not even urge this in the first instance before the CIT(A), it was precluded from doing so.

4. Sh. Salil Kapoor, learned counsel for the assessee urged that this Court should not interfere with the order of the ITAT. He relied upon the ruling in *Valvoline Cummins Ltd. v. DCIT* 307 ITR 103. Emphasising that even according to the Revenue, upon the ACIT being conferred with jurisdiction, the authority to complete the assessment was with him. It was submitted that when notice was issued under Section 143(2) on 15.10.2007, the DCIT had no authority to do so. It was further elaborated that having regard to the text of Section 120(4)(b), a specific authorisation under that Section alone was sufficient for the ACIT to act as an AO. In the circumstances, the Revenue could not have fallen back upon the notification under Section 120(2), which can be issued only in the case of specified authorities mentioned in that provision and that does not include AOs who are defined in a particular manner - the ACIT, DCIT, Deputy Director, Joint Director etc.

5. This Court has considered the submissions of the parties. The theme song of the assessee, as it were is that in the absence of a specific notification under Section 120(4)(b), the ACIT could not have possessed jurisdiction. This undermines the assessment order made on 29.12.2008. Proceeding further, but backwards, it is urged that because of the notification (which, it is urged, is erroneous and invalid in the first instance), due to lack of statutory authorisation, the notice issued earlier on 15.10.2007 is illegal and invalid as it was issued by an incompetent officer, i.e. DCIT. To this Court's mind, the assessee's logic appears to be circular. First, to deal with the issue of jurisdiction under Section 120 by virtue of Section 2(7A), it is not in dispute that the AO includes a DCIT. If so, the notice issued on 15.10.2007, was by a competent officer who always had jurisdiction to do so. The question then arises with respect to the validity of the assessment which was completed on 29.12.2008. The assessee urges here that the notification dated 01.08.2007 is under Section 120(2) rather than 120(4)(b).

6. This, to the Court's mind, again has two answers. The first is that the absence of reference to an incorrect provision *per se* cannot invalidate the authority conferred in the present case under Section 120(2) instead of Section 120(4)(b). Applying that principle, the assessee's argument that the ACIT did not possess jurisdiction cannot be countenanced. It appears that the second reason is more weighty. Section 124(3)(a) enacts a statutory bar as it were to the question of jurisdiction. It reads as follows:

"Jurisdiction of Assessing Officers.

124. *XXXXXX XXXXXX XXXXXX*

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer—

(a) where he has made a return under sub-section (1) of section 115WD or under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or sub-section (2) of section 115WE or sub- section (2) of section 143 or after the completion of the assessment, whichever is earlier;"

7. In this case, the assessee's submission with respect to this provision is that it cannot be operated having regard to the circumstances of the case. Learned counsel urged that on 15.10.2007, it was not open to the DCIT to issue notice. If so, at that first instance, the assessee could have raised the objection within a month having regard to the notification which existed on 01.08.2007. Secondly, even if for some reason, the assessee were unaware of the notification, it became aware that the ACIT was exercising jurisdiction when it received notice from that official in August 2008. Since that was in continuation of the proceeding by the DCIT it could well have been urged by the assessee within the stipulated time that the said officer, ACIT did not possess jurisdiction. Its failure to do so within the stipulated time, i.e. one month after receipt of notice which was in fact a condition of Section 143(2) proceeding and was treated

as such by the assessee precluded it from urging lack of jurisdiction. The assessee, however, contended its omission by not urging this ground before the CIT(A) in the first ground but urging belatedly before the ITAT; precisely the situation which the provision seeks to eliminate.

8. As far as the issue of Section 127 goes, we are of the opinion that having regard to the findings rendered, that question does not arise.

9. The parties are directed to appear before the ITAT for further hearing on the merits on 27.03.2017.

10. In view of the above discussion that the question of law framed has to be answered in favour of the Revenue and against the assessee. The appeal is accordingly allowed.

S. RAVINDRA BHAT, J

SANJEEV SACHDEVA, J

FEBRUARY 23, 2017/AJK