

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.09.2017

Date of Decision : 14.06.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

W.A.No.1091 of 2017
&
C.M.P.No.15223 of 2017

M/s.Indira Industries
Plot No.6, Sipcot Industrial Complex
Sipcot, Ranipet, Vellore-632 403
Represented by Partner
Mr.R.Manikandan .. Appellant

Vs.

Principal Commissioner of Income Tax, Chennai-8
BSNL Building
Tower-II, C-Wing
No.6, Greams Road
Chennai - 600 006 .. Respondent

Writ Appeal is preferred under clause 15 of the Letters Patent to set aside the order dated 28.08.2017 passed in W.P.No.22977 of 2017.

Prayer in WP.No.22977/2017:Writ petition filed under Article 226 of the Constitution of India praying to issue a writ of prohibition, prohibiting the respondent from proceeding under section 263 of the Income-tax Act 1961 against the petitioner under C.No.852(4)/PCIT-8/2017-18 dated 10.08.2017.

For Appellant : Mr.R.Vijaya Narayan
Senior Counsel
for Mr.M.V.Swaroop

For Respondent : Mr.J.Narayana Swamy

JUDGMENT

M.SUNDAR.J.,

In this intra-court appeal, dismissal of a writ petition by a learned single Judge is called in question. To be noted, in the writ petition before the learned single Judge, a notice dated 10.08.2017 under Section 263 of the Income Tax Act, 1961

issued by the Commissioner of Income Tax to the writ petitioner was assailed.

2. Bare minimum facts that are essential for appreciating and understanding this order are set out infra under the caption 'Facts in a nutshell'.

FACTS IN A NUTSHELL

2(i) A Partnership firm which goes by the name M/s.Indira Industries is the appellant before us. For the sake of clarity and convenience, the appellant is referred to as 'Assessee'. Principal Commissioner of Income Tax, Chennai-8 is the sole respondent in the writ appeal before us and the sole respondent is hereinafter referred to as 'Revenue' for the sake of convenience and clarity. Wherever the reference is not specifically to the sole respondent, the expression / term 'IT Department' is used for the purpose of enhanced clarity. Subject matter of this writ appeal pertains to Assessment year 2011-12 and the same is hereinafter referred to as 'said Assessment year' for the sake of convenience.

2(ii) This writ appeal i.e, W.A.No.1091 of 2017 is directed against an order dated 28.08.2017 made by a learned single Judge in W.P.No.22977 of 2017 wherein and whereby the said writ petition was dismissed.

2(iii) To be noted, the order of the learned single Judge is a common order made in W.P.Nos.22977 and 22978 of 2017 and this writ appeal deals with only the order of dismissal of W.P.No.22977 of 2017.

2(iv) Assessee filed return of income on 29.09.2011 for the said Assessment year. We are informed that the assessment was processed under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as 'IT Act' for the sake of brevity). Subsequently, the assessment was reopened by issue of a notice dated 30.03.2016 under Section 148 of the IT Act.

2(v) We are informed that reopening of assessment by issue of aforesaid notice under Section 148 of the IT Act was pertaining to only one issue and that the lone issue is, the assessee firm had availed bank loans and had paid interest on the same, in the returns filed by the Assessee, the interest so paid had been deducted, the interest payment was shown as expenditure from income, but the bank loans were diverted for the benefit of the partners of the assessee firm.

2(vi) In other words we are informed that reopening as aforesaid by the IT Department was on the ground that such deduction of interest paid to the Bank by the assessee as expenditure from its income deserves to be disallowed as the assessee firm had diverted the funds taken as loan from the Bank to its partners.

2(vii) Post aforesaid 30.03.2016 notice, assessee sent a letter dated 19.04.2016 to the IT Department stating that original return can be treated as return for the purpose of reopening of assessment. Thereafter IT Department sent a communication dated 25.11.2016 giving reasons for reopening of assessment. This was followed by objections dated 06.12.2016 for reopening of assessment and the objections were disposed of by the IT Department on 23.12.2016. Post disposal of objections, IT Department issued a notice under Section 143 (2) of IT Act dated 23.12.2016 requesting assessee to produce various information and the same were furnished by assessee on 28.12.2016.

2(viii) Thereafter, on 30.12.2016, a re-assessment order was passed by the IT Department under Section 143(3) read with Section 147 of the IT Act inter alia disallowing the interest so deducted from the income of the Assessee showing the same as expenditure.

2(ix) It is not in dispute that the Assessee has paid the entire tax due, thereafter, on 04.01.2017. To be noted, IT Department/Revenue does not dispute this position.

2(x) When things stood as above, Revenue issued notice dated 10.08.2017 bearing reference C.No.852(4)/PCIT-8/2017-18, which is hereinafter referred to as 'Impugned notice' for the sake of convenience and clarity. There is no dispute that this impugned notice has been issued by the Revenue under Section 263 of the IT Act.

2(xi) Assessee filed the aforesaid writ petition i.e., W.P.No.22977 of 2017 assailing the impugned notice primarily on the ground that it has been issued beyond the period of limitation prescribed by Sub-section (2) of Section 263 of the IT Act.

2(xii) As would be evident from our narrative supra, the writ petition was dismissed by a learned single Judge and therefore the instant writ appeal before us.

3. We now proceed to examine the rival submissions under the caption "Discussion" infra.

3.DISCUSSION

3(i) By consent of both the counsel, the main writ appeal itself was heard out and again by consent of both counsel, we are disposing of the main writ appeal itself by the instant judgment.

3(ii) As stated supra, writ petition was filed by the Assessee on the pivotal ground that the impugned notice has been issued beyond the period of two years from the end of the financial year in which the order sought to be revised was passed. In other words, it is the sheet anchor submission/contention of the writ petitioner that the impugned order is hit by Sub-Section (2) of Section 263 of the IT Act

and therefore, there is a jurisdictional error in the Revenue issuing the impugned order. For appreciating the above said submission, we deem it appropriate to extract Sub-Section (2) of Section 263 of the IT Act. The same reads as follows:

"263.Revision of orders prejudicial to Revenue_

(1).....

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed."

3(iii) Before us, the Assessee contended that the reckoning date for computing the two years period set out in Section 263 (2) is the date on which the intimation under Section 143(1) of IT Act was issued.

3(iv) In support of their contention, Assessee pressed into service a judgment of the Hon'ble Supreme Court of India in Commissioner of Income Tax, Chennai Vs. Alagendran Finance Ltd., reported in [2007] 162 Taxman 465(SC). Learned senior counsel for Assessee took us through Paragraph 15 of the said Judgment and contended that the Supreme Court has clearly laid down that the period of limitation provided in Sub-Section (2) of Section 263 of the IT Act would begin to run from the date of order of assessment. According to the Assessee, the proceedings under Section 143(1) of IT Act is also an order and is not a mere intimation. To support this contention, learned counsel for Assessee pressed into service a Division Bench judgment of the Panaji Bench of the Bombay High Court in Commissioner of Income Tax Vs. Anderson Marine & Sons (P) Ltd., reported in [2004] 139 Taxman 16 (BOM.) wherein the question as to whether an intimation sent for the purpose of Section 143(1) is an assessment and therefore in the nature of an order was dealt with.

3(v) The Division Bench in Anderson Marine supra held that an intimation under Section 143 of the IT Act is also revisable under Section 263 of the IT Act. It can be deduced from this ratio that an intimation sent under Section 143(1) of the IT Act was held to be an assessment and therefore in the nature of an order.

3(vi) The contra contention of Revenue that Alagendran Finance ratio will not apply to assessee in the instant case as there was only an intimation under Section 143(1) in the instant case, does not take the Revenue very far owing to all that we have opined /expressed supra. One more aspect to be noted is, in Alagendran Finance Ltd case supra, the Authority exercising jurisdiction under Section 263 did so and reopened the order of assessment with regard to one aspect of the matter, namely Lease Equalization Fund, which was not the subject matter of the re-assessment proceedings. In the instant case, reassessment was on agreed basis whereas the impugned notice has raised several issues not raised in the reassessment order. To appreciate this aspect of our order we deem it pertinent to reproduce paragraph 15 of Alagendran

Finance Judgment. We do so infra:

"15.We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income-tax exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-section (2) of Section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction having, thus, been invoked by the Commissioner of Income-tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceedings a nullity."

3(vii) As stated supra, the Assessment Order in the instant case pertains to 2011-12 i.e., said assessment year and the Assessee filed return of income on 29.09.2011 itself. Therefore, issuing the impugned notice on 10.08.2017 is clearly beyond two years stipulated under Section 263(2) of the IT Act. We have also noticed that the Assessee has admittedly paid the entire tax on 04.01.2017. If the impugned notice is hit by Section 263(2), it is clearly a jurisdictional error.

3(viii) We find that learned single Judge has dismissed the writ petition of the Assessee at the admission stage, mainly on two grounds.

3(ix) One ground is that it is within two years from the reckoning date, i.e., it is within two years from 30.12.2016. The other ground on which the learned single Judge has dismissed the writ petition is that it is merely in the nature of a show-cause notice.

3(x) Owing to all that have been stated supra, we hold that impugned notice is hit by Section 263(2) of the IT Act, being beyond the period of limitation prescribed therein. The moment the notice is hit by limitation, it makes little difference as to whether it is a show-cause notice or a substantial notice. It is beyond any pale of doubt that even a show-cause notice if issued beyond the period of limitation, suffers from the vice of jurisdictional error and is therefore, liable to be set aside. Therefore we are of the considered view that both the grounds on which the learned single Judge dismissed the writ petition are liable to be set aside.

3(xi) Learned Senior Standing Counsel for Revenue pressed into service MAK Data P. Ltd. Vs. Commissioner of Income Tax [(2013) 358 ITR 593 (SC)] to say that even agreed basis orders can be revisited and Malabar Industrial Co. Ltd. Vs.

Commissioner of Income Tax [(2000) 243 ITR 83 (SC)] to say that Revenue in exercise of powers under Section 263 of IT Act can travel beyond the assessing officer in cases of non-application of mind. MAK Data Systems case deals with penalty under Section 271 (1) (c) of the IT Act which operates in a different realm and Malabar Industrial Co. Ltd., does not rescue the Revenue as impugned notice is hit by the vice of lack of jurisdiction on account of being time barred.

3(xii) We are, therefore, inclined to accept the submission of the Assessee and hold that the impugned notice is bad in law.

4.CONCLUSION :

As stated supra, the impugned notice, being notice dated 10.08.2017 bearing reference C.No.852(4)/PCIT-8/2017-18 is clearly hit by sub-section (2) of Section 263, notwithstanding the fact that it is in the nature of a show-cause notice.

5.DECISION:

This writ appeal is allowed setting aside the order of the learned single Judge dated 28.08.2017 and made in W.P.No.22977 of 2017 and consequently quashing the impugned notice dated 10.08.2017 bearing Reference C.No.852(4)/PCIT-8/2017-18. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

To
The Principal Commissioner of Income Tax, Chennai-8
BSNL Building
Tower-II, C-Wing
No.6, Greaves Road
Chennai - 600 006.

+1cc to Mr.M.V.Swaroop, Advocate Sr.No.37825 dt.21.6.2018
+1cc to Mr.Raj Kumar Jhababh, Advocate Sr.No.38013
dt.26.7.2018

NRL(CO)
GSP:19.6.2018

Judgement in
W.A.No.1091 of 2017 &
C.M.P.No.15223 of 2017