

OD-7

ORDER SHEET
IA NO. GA/2/2017
(Old No:GA/808/2017)
ITAT/90/2017
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA -12, KOLKATA
Vs
SRI RANGLAL BAGARIA HUF IN THE HIGH COURT AT CALCUTTA

BEFORE:

The Hon'ble JUSTICE T. S. SIVAGNANAM

And

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 29TH November, 2021

Appearance:
Mr. Debasis Choudhuri, Adv.
Mr. Madhu Jana, Adv.
...For the Appellant/Revenue

Mr. J. P. Khaitan, Sr. Adv.
Mr. D. Jain, Adv.
Mr. A. Gupta, Adv.
...For the Respondent

The Court : This appeal of the revenue filed under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the order dated 28th May, 2015 passed by the Income Tax Appellate Tribunal, B-Bench, Kolkata (the 'Tribunal') in ITA No.928/Kol/2014 for the assessment year 2009-10.

The revenue has raised the following substantial questions of law for consideration :

“(a) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, “B” Bench Kolkata erred in law in not considering the fact that the Assessing Officer had not examined the taxability of the correct amount receipt from Delhi Administration?”

(b) Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal “B” Bench, Kolkata has erred in law is not considering that erroneous appreciation of facts and incorrect application of law by Assessing Officer would make the order as erroneous and prejudicial to the interest of revenue?”

The assessee being a member of Hindu Undivided Family filed its return of the Income for the assessment year 2009-10. Subsequently, the revised return was filed showing the total income of Rs.34,80,389/-. Thereafter, the case was selected for scrutiny and notices were issued and the case was discussed with the assessee and the Assessing officer completed the assessment under Section 143(3) of the Act vide order dated 28th December, 2011. The Commissioner of Income Tax [CIT] issued show cause notice dated 24th March, 2014 under Section 263(1) of the Act on the ground that the order passed by the Assessing Officer dated 28th December, 2011 is erroneous and prejudicial to the interest of revenue. The assessee resisted the show cause notice by filing a reply and thereafter the case was heard and by an order dated 31st March, 2014 the CIT passed an adverse order against the assessee under Section 263 of the Act. The respondent/assessee challenged the said order by filing the appeals before the Tribunal along with the other co-owners of the HUF property, namely, Mr. Krishna Prasad Bagaria, Mr. Dhanraj Bagaria and Mr. Sudershan Prasaad Bagaria. The appeals were heard together by the Tribunal and partly allowed the appeal. We are informed that the revenue has not filed any appeal as against the order passed in respect of two other co-owners, namely, Krishna Prasad Bagaria and Mr. Dhanraj Bagaria and the order has attained finality. Thus, we have to

test the correctness of the order passed by the Tribunal which has interfered with the order of the CIT under Section 263 of the Act.

Before we enter into the factual aspect, we have been reminded of some of the legal positions as pointed out by the Hon'ble Supreme Court in *Malabar Industrial Company Limited Vs. Commissioner of Income Tax*, 243 ITR 83(SC) wherein the Hon'ble Supreme Court elaborated upon the prerequisite to the exercise of the jurisdiction by the Commissioner under Section 263 of the Act. It was pointed out that the Commissioner has to be satisfied on twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; (ii) is prejudicial to the interests of the revenue. If one of them is absent, that is, if the order of the Assessing Officer is erroneous but is not prejudicial to the revenue, recourse cannot be had to Section 263(1). Further, it was held that the provisions of Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. It is only when an order is erroneous that the section will be attracted.

Bearing the above legal principle in mind, we have heard Mr. Debasis Choudhuri, learned standing counsel for the appellant/revenue and Mr. J. P. Khitan, learned senior counsel for the respondent/assessee and carefully perused the materials placed on record. On a perusal of the order passed by the Tribunal in this appeal we find that the Tribunal has rightly noted the factual position and the legal position as well. It would suffice for us to refer paragraph 17 of the impugned order wherein the Tribunal has recorded as to how the exercise of jurisdiction by the CIT under Section 263 of the Act is bad in law. Paragraph 17 reads as under -

“17.The first two issues in the show-cause notice are common in all cases relate to the share of the assessee in the property at 3, Tilak Marg, New Delhi and also about the nature of the damages received by the assessee towards the wrongful compensation. These issues arises out of the order passed by the Assessing Officer under Section 143(3)/ 147, in respect of which CIT exercised jurisdiction under Section 263. This is an undisputed fact as agreed by ld. D.R. during the course of hearing that these issues have duly been examined by the Assessing Officer by raising various queries and inviting the reply of the assessee, Notices under Section 142 dated 13.06.2011, 25.08.2011, 24.10.2011 were issued and the information were sought for which were duly complied with by the assessee. It is not denied by the Revenue that the Assessing Officer completed the assessment without making any enquiry. We also noted that the revenue even on merit in the case of two co-owners namely Krishna Prasad Bagaria and Ranglal Bagaria, HUF has accepted the plea that the amount so received is a capital receipt even in the order passed under Section 143(3) in consequence of order of CIT under Section 263. On this basis itself, it can be held that the order passed by the Assessing Officer is not erroneous and prejudicial to the interest of revenue on these issues. We also noted that similar issues have arisen in the case of the assessee during assessment year 2005-06 when the co-owners has received Rs.4 crores, the assessee claimed his share i.e. Rs.1 crore to be capital receipt. The Assessing Officer did not agree with the assessee, but when the matter travelled to CIT (Appeals), the CIT (Appeals) decided in favour of the assessee and took view that the part of amount received under the award is a capital receipt. Against this order of the CIT (Appeals), which was passed prior to the invoking the provision of Section 263 by CIT, the revenue has not come in appal

before Tribunal. This fact has duly been confirmed by ld. D. R. when a query was made by the Bench. This is also a fact that there is no change of facts in the impugned assessment year as compared to assessment year 2005-06 except the quantum of the amount.”

As may be seen from the above finding, the revenue could not dispute the fact that in the assessee's own case for the same issue for the earlier assessment year 2005-06, the Assessing Officer decided the issue against the assessee. However, the assessee was successful before the Commissioner of Income Tax (Appeal) who granted relief. The Assessing Officer while completing the assessment for the subject assessment year (AY 2009-10) has followed the order passed by the CIT(A) and granted relief to the assessee. Thus, the Tribunal rightly pointed out that this can never be a case where jurisdiction under Section 263 of the Act could have been exercised. That apart, the Tribunal has also noted that in respect of two other co-owners of the HUF property, the matter has attained finality. Thus, we find that the Tribunal was right in granting relief to the assessee and the order passed by the Tribunal calls for no interference.

Accordingly the appeal fails and the same stands dismissed. The substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the stay application also stands dismissed.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)