

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 67 OF 2006

The Commissioner of Income Tax, ...Appellant
having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa.

v/s.

Alcon Resort Holding Limited
Velho Building,
Panaji- Goa. ...Respondent

Ms. Suzan Linhares, Standing Counsel *for the Appellant.*

Mr. D. Pangam, Advocate with Mr. P. Sawant, Advocate *for the Respondent.*

CORAM	:	A. K. MENON & R. N. LADDHA, JJ
RESERVED ON	:	24 th March, 2022
PRONOUNCED ON :		13 th April, 2022.

JUDGMENT : (Per R.N. LADDHA,J.)

This appeal under Section 260A of the Income Tax Act, 1961 (“the Act” for short) assails the order dated 20/10/2005 passed by the Income Tax Appellate Tribunal, Mumbai Bench B, Mumbai. The

impugned order relates to the assessment years 1991-92, 1992-93, 1993-94, 1994-95, 1997-98 and 1998-99.

2. On 05/02/2007, this appeal was admitted on the following substantial questions of law:

(A) Whether on the facts and in the circumstances of the case the ITAT was justified in law in holding that the notice under Section 21 of the E.T. Act, issued by the Commissioner of IT, in defective being not signed by him and the said defect is incurable?

(B) Whether the ITAT ought to have held that the said notice dated 01/10/2002, was duly served on the assessee and was heard before passing the said order and as such no prejudice is caused to the assessee?

(C) That in the facts and in the circumstances of the case, ITAT ought to have held that the signing of the notice dated 01/10/2002, issued under Section 21, of the E.T. Act, by the Assistant Commissioner of IT, in an administrative act and it does not vitiate the entire proceedings, unless it is shown that the grave prejudice has been caused to the assessee or that the order passed by the Commissioner is without jurisdiction?

(D) That in the facts and in the circumstances of the case, the ITAT, ought to have held that non-signing of notice dated 01/10/2002, by the Commissioner, does not affect the jurisdiction of the Commissioner under Section 21 of the E.T. Act, to initiate the proceedings and it does not violate the provisions of Section 21 of the E.T. Act?

3. It would be noticed and admitted by the learned Counsel for the appellant that question (B) and question (C) herein above are the mere facet of / submission urged in support of question (A) and question (D), respectively. Therefore, both the questions (A) and (B) are subsumed in question (A). Similarly, question (C) and (D) are subsumed in question (D). In view of this, our consideration of question (A) and question (D) would include the submissions urged as question (C) and question (D) .

4. Briefly, the facts leading this appeal, are as under :

a. Respondent is a company engaged in the hotel business. On 6/12/1990 the respondent company has set up a tourist resort in the State of Goa. The respondent company, however, did not file returns required under Section 8 of the Expenditure Tax Act, 1987 (for short "E.T.Act") contending that it was exempt from filing returns under Section 5(1) of the E.T.Act. Notices, however, were issued by the Assessing Authority, requiring the assessee to file expenditure tax returns. In response to that, respondent company / the assessee had filed Nil liability returns for all these assessment years.

b. It is stated that the respondent company obtained a letter of exemption from the DG (IT) (Exemption), Calcutta vide order

dated 31/07/2001, wherein, DG(IT) (Exemption) exempted the respondent company under Section 80 IA (4)(iii) of the Income Tax Act, from expenditure tax w.e.f. 06/12/1990. Based on the said exemption letter, the respondent company claimed that its hotel / resort was exempted from the provisions of the Expenditure Tax Act and as such it was not liable to file Return under Section 8 of the E.T. Act.

c. Based on the said explanation and letter dated 31/07/2001, the Assessing Officer by his Order dated 28/03/2002 dropped the proceedings under Section 11 of the E.T. Act, initiated against the respondent company / assessee. As the said order dated 28/03/2002 passed by the Assessing Officer was prejudicial to the interest of the Revenue, on behalf of the Commissioner of Income Tax, notice under Section 21 of the E.T. Act was issued to the respondent company. After giving opportunity of hearing to the respondent company, the Commissioner by his order dated 26/03/2004, set aside the orders passed by the Assessing Officer for all these assessment years and further directed the Assessing Officer to frame the assessment order afresh in accordance with law.

d. Being aggrieved, the respondent company challenged the order dated 26/03/2004 of the Commissioner before the Income Tax Appellate Tribunal, Mumbai Bench (for short, "Tribunal"). The Tribunal heard the said appeal along with other assessment years and passed a common order on 20/10/2005, holding the notice dated 01/10/2002, as defective, being not signed by the Commissioner of Income Tax.

e. Being aggrieved, the Revenue- appellant herein is in appeal before us.

5. Ms. S. Linhares, learned Standing Counsel for the Revenue /appellant states that there is no difference of facts in all the six tax appeals and the impugned order is a consolidated order pertaining to all Six appeals. As such, consolidated appeal is filed against the impugned order for all these Six appeals. Ms. Linhares states that the revision order passed by the Commissioner of Income Tax would not become invalid only for the reason that the notices under Section 21 of the E.T. Act were issued by an Officer other than the Commissioner of the Income Tax. It is submitted that on 26/03/2004 the revision orders have been passed by the Commissioner of Income Tax himself and therefore, the orders having been passed by the competent statutory authority

cannot be said to be illegal only because notices under Section 21 of the E.T. Act were issued by an Officer other than the Commissioner. It has been submitted that as the respondent company/assessee had participated in the proceedings consequent to notice issued under Section 21 of the E.T. Act by the Officer other than the Commissioner of Income Tax, it amounted to waiver. The respondent company cannot now challenge the jurisdiction of the Assistant Commissioner who issued the notices in question.

6. Mr. D. Pangam, learned Counsel for the respondent company states that the notices have been issued by the Assistant Commissioner of Income Tax and not by the Commissioner of Income Tax. It is submitted that the Commissioner of Income Tax cannot pass the order on the basis of the notice issued by his subordinate. According to him, there can be no question of waiver by mere participation in the proceedings before the Commissioner of Income Tax specially when there is inherent lack of jurisdiction. Therefore, in his view, no fault can be found on this count with the order of the Tribunal.

7. Mr. Pangam also relied upon the decision in the case of **Sahni Silk Mills (P) Ltd. & anr. vs. Employees' State Insurance Corporation**¹ in

¹ (1994) 5 SCC 346

support of his contention that the power granted to the Commissioner could not have been exercised by the Assistant Commissioner absent any specific delegation of such power. Mr. Pangam also relied on the Order of this Court in **The Commissioner of Income Tax-I vs. Lalitkumar Bardia**²

8. In order to appreciate the aforesaid submissions in its proper perspective, it may be advantageous to reproduce Section 21 of the E.T. Act which reads as under:

“Revision of orders by the Commissioner– (1) The Commissioner may, either of his own motion or on application by the assessee for revision, call for the record of a proceeding under this Act which has been taken by the Income Tax Officer subordinate to him and may make such enquiry of cause such enquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) ----

(3) ----

(4) ----

(6)----

(7)----

.”

9. It is an undisputed position that the notice under Section 21 of the E.T. Act dated 01/10/2002 was issued and signed by the Assistant Commissioner of Income Tax (HQ) wherein it was stated that –

“on examination of the record of assessment proceedings in your case under the Expenditure Tax Act for the Assessment Year 1991-92, it is considered that the order passed by the Assessing Officer on 28/03/2002 is erroneous insofar as it is prejudicial to the interest of Revenue. You are requested to produce and furnish evidence in connection with the following.....”.

10. Thus, it is apparent that the record was examined by the Assistant Commissioner and not by the Commissioner of Income Tax. Section 21 of the E.T. Act mandates the examination of records by the Commissioner of Income Tax and for issuance of notice under Section 21 of the E.T. Act Commissioner of Income Tax himself is required to apply his mind. The Commissioner of Income Tax cannot pass an order in revision order on the basis of a notice issued by his subordinate officer. The Assistant Commissioner of Income Tax in his notice dated 01/10/2002 nowhere stated that the said notice was issued on the instructions or direction of the Commissioner of Income Tax.

11. Insofar as principle of waiver is concerned, it is settled position of law that the same cannot be invoked so as to confer jurisdiction. In this case, the Assistant Commissioner Income Tax had issued notice under

Section 21 of the E.T. Act who admittedly had no jurisdiction. In terms of Section 21 of the E.T. Act, the Commissioner of Income Tax is the competent authority vested with that power. Therefore, the notice under Section 21 of the E.T. Act has necessarily to be issued by the Commissioner of Income Tax and not by the Assistant Commissioner. As a consequence, the notice being without jurisdiction, all the proceedings subsequent thereto are without authority of law.

12. In **Sahni Silk Mills (P) Ltd.** (supra), the Supreme Court was considering the legality of resolution empowering the Director General to authorize any other Officer to exercise his powers. The Court found that in the absence of enabling provision, such delegation would not be permissible and that the legislature can permit any statutory authority to delegate its power to any other authority after such a policy is indicated in the statute itself and when parliament has specifically appointed an authority to discharge a function, it cannot be readily presumed that it had intended that its delegate should be free to empower another person to act in his place. The Court cited with approval the case of **Barium Chemicals Ltd. vs. Company Law Board**³, and quoted the following paragraph :

³ AIR 1967 SC 295

“Bearing in mind that the maxim delegatus non protest delegare sets out what is merely a rule of construction, sub-delegation can be sustained if permitted by express provision or by necessary implication.”

13. In the instant case, nothing has been shown to us whereby the Assistant Commissioner was empowered to act in place of the Commissioner under Section 21 of the ET Act.

14. **Lalitkumar Bardia** (supra) considered Section 2(7A) of the Income Tax Act and the meaning of the expression “Assessing Officer” and found that the DCIT, Nagpur, did not have jurisdiction over the Respondent-Assessee by virtue of Section 120 of the Act and it is the Assessing Officer alone who was to serve notice calling upon the assessee to furnish a return in terms of Section 158 BC. The notice issued by the DCIT was bad since on the date the notice was issued, he was not the Assessing Officer. The Division Bench held that as a consequence the notice issued by the DCIT and all proceedings subsequent thereto were without authority of law.

15. **Lalitkumar Bardia** (supra), also made reference to **A.C.I.T. vs. Hotel Blue Moon**⁴, that the notice under Section 158 BC was mandatory and the very foundation of jurisdiction and had necessarily to be issued by the Assessing Officer and not by any Officer of the Income Tax

⁴ (2010) 321 I.T.R. 362 (SC)

Department. As we can see from the aforesaid decisions, an Officer superior in rank to the Assessing Officer was found to have no jurisdiction to issue the notice in question. Applying these principles at the case at hand, we have no hesitation in concluding that the Assistant Commissioner could not have issued the notice in the instant case.

16. In the above view, the substantial question of law as framed herein above at (A) is answered in the affirmative and the substantial question of law at (D) is answered in negative i.e. in favour of the respondent/assessee and against the Revenue.

17. The appeal is disposed of in the above terms. There shall be no order as to costs.

R.N. LADDHA,J.

A. K. MENON, J.

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