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ITAT No. 164 of 2023
IA NO:GA/1/2023
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX 1, KOLKATA
VS
SUKHDHAM INFRASTRUCTURES LLP

BEFORE :

THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 14th August, 2023

Appearance :
Mr. Vipul Kundalia, Adv.
Mr. Prithu Dudhoria, Adv.
... for the appellant

Mr. Abhratosh Majumder, Sr. Adv.
Mr. Avra Majumder, Adv.
Mr. Samrat Das, Adv.
Mr. Suman Bhowmick, Adv.
... for the respondent

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated February 23, 2023, passed by the Income Tax Appellate Tribunal, 'B' Bench, Kolkata (Tribunal) in ITA No.2611/Kol/2019 and ITA No.148/Kol/2020, relating to the assessment year 2015-16.

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 was justified in law in not considering the fact that the case was converted from Limited Scrutiny to Complete Scrutiny on approval of the Pr. CIT in writing and only thereafter the Assessment Order was passed ?
- b) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law in quashing the order passed under Section 143(3) of the Act merely due to the fact that the Assessing Officer had made enquiries outside the specific issues before conversion of the case into complete scrutiny ?
- c) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal was justified in law in not considering the fact that the Assessing Officer had passed the order under Section 143(3) of the Act, 1961 only upon approval of the Pr. CIT in writing to perform a complete scrutiny and the Assessing Officer had in his possession records that proved that the Unsecured Loans obtained by the assessee were bogus and should be added back to the income to the assessee ?

We have heard Mr. Vipul Kundalia, learned senior standing counsel appearing for the appellant/revenue and Mr. Abhratosh

Majumder, learned senior Advocate appearing for the respondent/assessee.

The short question involved in this appeal is whether the Assessing Officer, which had initially issued notice under Section 143(2) of the Act for a Limited Scrutiny of the return filed by the assessee on three aspects, could have expanded the scope prior to obtaining approval for a Complete Scrutiny by the appropriate authority.

It is an admitted fact that on 26th July, 2016 an order for Limited Scrutiny came to be passed. Subsequently, the Assessing Officer expanded the scope on 20th February, 2017 and commenced certain enquiries. The order granting approval for Complete Scrutiny was passed only on 14th December, 2017, that is, much after the enquiry was commenced by the Assessing Officer on 20th February, 2017. The correctness of the same was tested by the assessee by filing an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) though noted the said issue did not render a specific finding but went into the merits of the matter and granted relief to the assessee to the extent indicated in the said order. The assessee as well as the revenue carried the matter on appeal to the Tribunal. The learned Tribunal examined the jurisdictional issue alone and noted that the Assessing Officer had issued notice under Section 143(2), dated 28th July, 2016, for a Limited Scrutiny covering four issues namely, interest expenses, income from real estate business, sale

turnover mismatch and other expenses claimed in the profit and loss account. Subsequently, by notice dated 20th February, 2017, issued under Section 142(1) of the Act, the Assessing Officer called for information on secured and unsecured loan deposits and this was admittedly prior to the Limited Scrutiny being converted into a Complete Scrutiny by order dated 14th December, 2017. The learned Tribunal while holding that such action of the Assessing Officer was impermissible referred to the Circular issued by the Circular issued by the CBDT in Instruction no.5 of 2016, dated 14.7.2016. In the said Circular/Instruction, it was clarified by the CBDT that in cases under Limited Scrutiny the scrutiny assessment proceedings would initially be confined only to issues under Limited Scrutiny and questionnaires, enquiry, investigation etc. would be restricted to such issues. Further, it has been stipulated that only upon conversion of case to a Complete Scrutiny after following the procedure as outlined in the CBDT Instruction, the Assessing Officer may examine the additional issues besides the issue(s) involved in Limited Scrutiny. The learned Tribunal found that the procedure adopted by the Assessing Officer was in complete derogation to the Instruction issued by the CBDT. The learned Tribunal also took note of a decision of the co-ordinate Bench of the Delhi Tribunal in the case of Dev Milk Foods Pvt. Ltd. vs. Addl. CIT in ITA No. 6767/Del/2019, dated 12.06.2020, for the assessment year 2015-16. In the said decision, the learned Tribunal had taken note of the CBDT Instruction No.5 of 2016 and held that the

procedure adopted by the Assessing Officer was unsustainable. The learned Tribunal in the case on hand after taking note of the decision in *Dev Milk Foods Pvt. Ltd.* held that the CBDT has clarified that in Limited Scrutiny, the scrutiny assessment proceedings would initially be confined only to the issues and questionnaires, enquiry and investigation would be restricted to such issue under the Limited Scrutiny. Thus, the learned Tribunal dismissed the appeal filed by the assessee.

Mr. Kundalia, learned standing counsel appearing for the appellant, places reliance on the decision of the Hon'ble Supreme Court in *Venkataswamappa vs. Special Duty Commissioner (Revenue)*, (1997) 9 SCC 128. The said decision arose out of the case under the provisions of the Land Acquisition Act, 1894. The question was whether publication of the notification under Section 4(1) of the said Act in the local newspaper earlier to the actual publication in the Gazette was an illegality or mere irregularity. After taking note of the object behind the procedure regarding publication of the notification as mentioned in Section 4(1) of the Land Acquisition Act, the Hon'ble Supreme Court held that it is only mere irregularity and does not vitiate the validity of the notification published in the Government Gazette.

In our view, the said decision can be of no assistance to the case of the revenue, more particularly, having regard to the scheme of assessment as provided for under Section 143 of the Income Tax Act,

1961. Reliance was also placed on the decision of the Hon'ble Supreme Court in *Commissioner of Wealth Tax, Meerut vs. Sharvan Kumar Swarup & Sons*, (1994) 6 SCC 623. In the said case, the question was whether the Rule 1-BB of the Wealth Tax Rule 1957 is a provision which affects or alter the substantive rights or is merely a procedural.

While considering the said issue, the Hon'ble Supreme Court noted the distinction between the statutes affecting rights and those affecting mere procedure. The revenue cannot rely upon the said decision as the scheme of assessment as provided under Section 143 of the Act is a complete code by itself and the circumstances under which the power under sub-section (2) of Section 143 could be invoked has been clearly spelt out and on a reading of sub-section (3) of Section 143, it is evidently clear that on the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment.

Therefore, the question of part of the provision being procedural is an incorrect interpretation of the scheme provided under Section

143 of the Act. Further, as noted above, the CIT(A) has examined the merits of the matter and after taking note of the facts granted relief to the assessee to the extent indicated therein.

Thus, for the above reasons, we find that the revenue has not made out any case for interference of the order passed by the Tribunal. Accordingly, the appeal fails and is dismissed.

The substantial questions of law are answered against the revenue.

The application for stay being GA 1 of 2023 is also dismissed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)