

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2024

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CORAM :

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN**

T.C.(A).No.237 of 2012

S.Krishna Kumar

.. Appellant

VS

The Assistant Commissioner of Income Tax,
Circle-III,
Tiruchirapalli-620 001.

.. Respondent

Prayer : Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai “C” Bench, dated 04.05.2012 in ITA No.837/Mds/2012.

For Appellant : Mr.Varun Ranganathan
for Mr.K.Ravi

For Respondent : Mr.J.Narayanaswamy
Senior Standing Counsel

JUDGMENT

(Delivered by Dr. ANITA SUMANTH..J)

The challenge is to an order of the Income Tax Appellate Tribunal (ITAT) dated 04.05.2012 at the instance of the Assessee/Appellant. The substantial question of law that has been admitted is as follows:



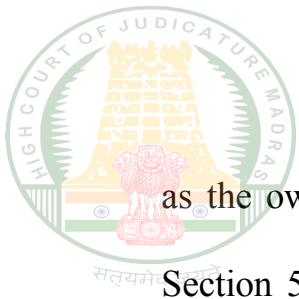
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'Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal is right in setting aside the order of the Commissioner of Income Tax passed in exercise of power under Section 263 of the Income Tax Act when the preconditions for exercise of power under Section 263, namely erroneous and prejudicial to the interest of the revenue are not on record before the Commissioner of Income tax and restoring the issue back to the file of the Commissioner?'

2. The Appellant had filed a return of income under the provisions of the Income tax Act 1961 (Act) for Assessment Year (AY) 2007-08 and an intimation had come to be issued under Section 143(1) on 31.12.2008. Thereafter, a notice under Section 148 had been issued and an order came to be passed under Section 143(3) read with Section 147 of the Act on 27.10.2009. The issues dealt with under the order of re-assessment were addition in regard to hire charges, disallowance of vehicle expenses and rent paid.

3. While so, a notice came to be issued under Section 263 of the Act containing a proposal for setting aside assessment order dated 27.10.2009 insofar as the Commissioner of Income Tax (CIT) was of the view that the assessing authority ought not to have accepted the claim of Appellant for exemption under Section 54F being the owner of two houses, one in Bangalore and the other in Trichy (referred to in common as 'Properties/Properties in question').

4. The Appellant objected to the proposal, stating that he was not the owner of the properties, overriding which the CIT proceeds to deem the assessee



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as the owner of those properties, disentitling the Appellant to exemption under Section 54F of the Act. The assessment made under Section 143(3) read with Section 147 on 27.10.2009 was revised and set aside and the Assessing Authority was directed to re-assess the income by disallowing the deduction under Section 54F.

5. At the outset, we may state that order dated 28.03.2012 under Section 263 revising order dated 27.10.2009 is itself incorrect insofar as the issue of exemption under Section 54F was not an issue that figured either in the reasons for re-assessment or in order of re-assessment dated 27.10.2009. The claim of exemption had hence attained finality even at the stage of issuance of intimation on 31.12.2008. The limitation for revision qua the claim of exemption under section 263 must hence be reckoned from the date of intimation.

6. Section 263(2) of the Act provides for a limitation of two years from the end of the financial year when the order was passed for revision of the order. The intimation u/s 143(1) was issued on 31.12.2008 and hence the period of two years expired on 31.03.2011. The order under section 263 came to be passed on 28.03.2012 beyond a period of two years and on this one ground, we find that the proceedings for re-assessment are vitiated as barred by limitation.

7. Be that as it may, since this issue has not been raised by the Appellant in appeal, we proceed to hear the matter further on the question framed for our



resolution. In the order of revision, the CIT reiterates the factual assumption in the show cause notice that the two residential houses, one at Trichy and the other at Bangalore belong to the assessee.

8. An appeal was filed by the Assessee before the Income Tax Appellate Tribunal (ITAT/Tribunal) and the matter was disposed on 04.05.2012, as allowed for statistical proposes. It is as against that order that the Assessee is in appeal before us. We have heard the submissions of Mr.Varun Ranganathan, learned counsel, for the Appellant/Assessee and Mr.J.Narayanaswamy, learned Senior Standing Counsel, for the Income-Tax Department.

9. In the return of income, the appellant had made a claim for exemption under section 54 F of the Act in respect of the properties at Trichy and Bangalore. The claims were not disturbed in re-assessment. While so, a proposal had been issued by the CIT for revision, wherein the CIT had expressed the prima facie view that the grant of exemption u/s 54F was erroneous and prejudicial to the interests of the revenue. The proposal reads thus:

It is seen from the assessment records that you have claimed exemption u/s.54F form Rs.90,85,586/- while computing long term capital gain for the assessment year 2007-08. But as per the records available you have two residential houses, one at Trichy and another at Bangalore.

During the assessment proceedings your representative filed a letter stating that these two house properties belongs to your wife and it was also stated that for one property you had lend money for the construction of the property and for another property yourself and your wife had availed loan from HDFC jointly and the



instalments were paid from your account, therefore, the income from the above property is included under sec.64(i).

However, you have admitted income under the head 'income from house property' from the above house properties, therefore, you are treated as deemed owner of the above house properties. Since ownership includes deemed ownership, you are not entitled to claim exemption u/s.54F.

10. The assessee objected to the proposal stating that stating that the properties belong to his wife. In respect of one property, he had only lent money towards construction, and in respect of the other property, both himself and his wife had jointly availed a loan from HDFC Bank. Since the instalments in repayment of the loan were from the account of the assessee, the assessee had clubbed the income from those properties and returned the same to tax in his assessment in terms of Section 64(1) of the Act.

11. The proposals were confirmed under order dated 28.03.2012. The CIT notes that the assessee had admitted income from two properties, one in Bangalore and the other in Trichy. Hence he proceeds to assume that the appellant was owner of both properties disentitling him to the claim under Section 54F. The CIT thus concludes that the assessee is not entitled to claim deduction under Section 54F of the Act. As against this order, the Appellant filed an appeal before the Income tax Appellate Tribunal (Tribunal).



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12. The Tribunal records the submission of the Appellant that he was not the owner of either of the properties. The Tribunal also observes that the CIT had not brought on record any material to establish the ownership of the house. In conclusion, the Tribunal sets aside the matter and remanded to the file of the CIT with a direction to look into the issue, conduct proper enquiry and verification as per law after affording an opportunity of hearing.

13. The question that arises for our consideration is as to whether revision in terms of Section 263 of the Act is sustainable in the absence of the CIT having brought on record any material to establish that the order of assessment is 'erroneous'. The pre-requisites for Section 263 are concurrent satisfaction of the revisional authority that an order is both erroneous and prejudicial to the interests of revenue.

14. In the absence of supporting material that the Appellant is the owner of the properties in question, it remains to be seen how the CIT has come to the dual conclusion that the assessment is both erroneous and prejudicial to the interests of revenue. As learned counsel for the Appellant rightly points out, the title deeds of both the properties in question had been produced before the CIT and there is no finding in that regard by the CIT.

15. The fact that the property documents have been produced before the CIT discharges the Appellant from the onus cast upon it to answer the question



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of ownership of the properties, at least prima facie. However, the CIT has however not brought on record any material whatsoever, nor even rendered a justification, let alone a conclusive finding, in regard to the ownership of the properties by the Appellant.

16. This aspect is also noted by the Tribunal at paragraph 12 of the impugned order, and a factual finding is rendered to the effect that '*the Commissioner of Income Tax also has brought no relevant material on record to show that both the house property were owned by the assessee*'. With this, the matter ought to have attained closure. Instead, however, the order of the CIT has been set aside and the issue restored to the file of the CIT for proper enquiry and verification in the light of the discussion of the Tribunal.

17. The discussion of the Tribunal is as follows:

'12.In the instant case, the claim of the CIT is that the assessee is the owner of house properties situated at Trichy and Bangalore and therefore, the said decision is not squarely applicable to the facts of the case. In our considered view, if the house properties situated at Trichy and Bangalore are owned by the assessee's wife then the same cannot be considered as owned by the assessee for disallowing exemption u/s 54F of the Act. We find that the assessee has brought no material before us to show that either the house property situated at Trichy or Bangalore is not owned by him. As already held herein above that the CIT also has brought no relevant material on record to show that both the house properties were owned by the assessee. The circumstances in which the income from both the house properties were shown in the return of income by the assessee is also not clear from materials available before us. We, therefore, set aside the order of the CIT and restore the issue back to the file of the CIT for proper enquiry and verification in the light of



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the discussion made herein above and thereafter to pass a speaking order as per law after allowing the assessee sufficient opportunity of hearing. Thus, the grounds of appeal of the assessee are allowed for statistical purposes.

13. In the result, the appeal of the assessee is allowed for statistical purposes.'

18. The exercise of power under Section 263 of the Act is to be by the revisional authority alone, and Section 263 states so in unequivocal terms. The provision states that *'The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

19. The term Record is defined to state *'record' shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner.*

20. The pre-conditions for the exercise of revisional jurisdiction require the concurrent satisfaction of the revisional authority that the order under revision contains an error, and prejudice is caused to the Department by virtue of that



error. The error must be based on the record of that assessment as available to the authority.

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21. In the present case, the CIT merely identifies what he believes is an error without any tangible material to base that conclusion on. According to the Assessee the record would include documents to support his case that the properties belonged to his wife. The Tribunal, the final fact finding authority, has concluded that that no material has been brought on record by the CIT to establish that the assessee was the owner of the two houses, dis-entitling him to the claim under Section 54F. In our considered view, the aforesaid position is fatal to the proceedings and to the assumption of jurisdiction by the CIT.

22. The existence of an error is a statutory pre-condition and such 'error' must be based on facts on record and not assumptions/presumptions. In *Carona Ltd. v. Parvathy Swaminathan & Sons* [(2007) 8 SCC 559], the Supreme Court had occasion to deal with the interpretation of the provisions of the Maharashtra Rent Control Act, 1999. In the course of the discussion, the Bench deliberated upon the import of jurisdictional and adjudicatory facts and adumbrates upon the distinction between the two.

23. At paragraph 27, the Court dilates on what would constitute a jurisdictional fact in the following terms:

'27.Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be

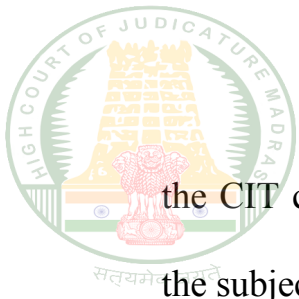


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said to be a “jurisdictional fact”. If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.'

24. The existence of a jurisdictional fact is a condition precedent for assumption of jurisdiction by an authority and for further decision on adjudicatory facts. Thus, it is only upon establishing the existence of a jurisdictional fact that the CIT could have drawn or assumed the power unto himself to invoke revisional jurisdiction. At paragraph 36, the Court says: *‘It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue.’*

25. In the present case, the CIT concludes in order dated 28.03.2012 that the assessee, being the owner of two properties, is not entitled to claim exemption under section 54F. However, the foundational facts necessary for him to have arrived at such a conclusion have not been established. Such foundational/jurisdictional fact must emanate post a detailed verification/enquiry as to the title to/ownership of the two properties. It is only upon such enquiry that



the CIT could have arrived at a satisfaction that the assessee was the owner of the subject properties.

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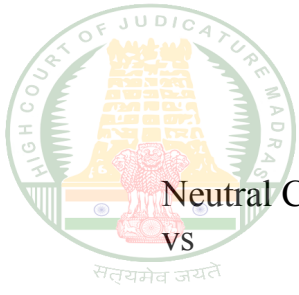
26. This exercise has not been undertaken and in the absence of the jurisdictional facts, it was premature for the authority to have arrived at an adjudicatory fact/conclusion. The Tribunal has noticed that the CIT had not brought on record any relevant material to establish that the two house properties are owned by the assessee. This has not been disproved by the Department before us. In fact, they would accede to the position that there was no material based on which the CIT could have arrived at the conclusion that he has.

27. In such circumstances, we are convinced that the conclusion of the Tribunal to set aside the matter and re-direct examination of the issue is erroneous. In fact, such a direction is unworkable in light of the admitted position that the CIT was not in any possession of any material to indicate that the Appellant was the owner of two residential properties.

28. In light of the aforesaid discussion, the substantial question of law is answered in favour of the assessee and this tax case (appeal) is allowed. No costs.

[A.S.M., J] [G.A.M., J]
22.11.2024

Index: Yes
Speaking order



Neutral Citation: Yes
vs

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To

The Assistant Commissioner of Income Tax,
Circle-III,
Tiruchirapalli-620 001.

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DR. ANITA SUMANTH.,J.
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