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INDIRA INUDSTRIES vs. PRINCIPAL COMMISSIONER OF INCOME TAX

HIGH COURT OF MADRAS

INDIRA BANERJEE, CJ & M. SUNDAR, JJ.

WA No. 1092 of 2017 & CMP No. 15224 of 2017

Jun 14, 2018

(2018) 102 CCH 0078 ChenHC

Legislation Referred to

Section 263, 139, 143(3)

Case pertains to

Asst. Year 2012-2013

Decision in favour of:

Assessee

Revision—Order prejudicial to Interest of Revenue—Validity thereof— Assessee was partnership firm and Assessee filed its return of income u/s. 139 —Assessment order u/s.143(3) was made by Department accepting return of income filed by assessee — Assessment was reopened u/s. 148 on ground that certain sums of monies paid by Assessee as interest to Bank, claimed as expenditure, were to be disallowed — Assessee had diverted loan taken from Bank to its partners and therefore, interest paid on such loan could not be treated as expenditure by Assessee in its returns —CIT u/s. 263 issued notice for revision of assessment holding that assessment order passed by AO was prejudicial to interest of Revenue — Assessee's case was that original re-assessment was done on basis of assessee accepting position, same issue could not be reopened u/s. 263 as it tantamounted to Change of Opinion —Held, perusal of re-assessment order u/s. 143(3) revealed that only point qua reassessment was dis-allowance of interest paid to Bank by Assessee in light of loans on which interest was paid being diverted to partners of Assessee firm — Perusal of order revealed that it raised other issues such as bad debts written off and administrative, selling and distribution expenses claimed by Assessee — Principle of law was that it could be construed to be Change of Opinion only when same issue dealt with in reassessment was raised again in proceedings u/s. 263 — Reassessment proceedings, invocation of jurisdiction by CIT u/s. 263 were on same set of grounds, thus notice issued u/s. 263 quashed —Assessee's ground allowed.

Held

Perusal of the re-assessment order dated 30.12.2016 under Section 143(3) of the IT Act reveals that the only point qua reassessment is dis-allowance of interest paid to the Bank by the Assessee in the light of the loans on which the interest was paid being diverted to partners of the Assessee firm. To be noted, this is the lone point on which the reassessment was done or in other words, this is the lone point on which the entire re-assessment exercise was carried out.

(Para 3 VI)

However, a perusal of the impugned order now reveals that it raises other issues such as bad debts written off to the tune of Rs. 33.06 lakhs and administrative, selling and distribution expenses claimed by the Assessee to the tune of Rs. 3.23 crores.

(Para 3 VII)

The Principle of law is, it can be construed to be 'Change of Opinion' only when the same issue dealt with in reassessment is raised again in proceedings under Section 263. This is clearly articulated in Sat Pal Aggarwal's case itself. On facts, it would be seen that in Sat Pal Aggarwal's case, reassessment proceedings and thereafter invocation of jurisdiction by Commissioner under Section 263 of the IT Act were on the same set of grounds.

(Para 3 IX)

Conclusion

When same issue dealt with in reassessment is raised again in proceedings u/s. 263 , it tantamounts to change of opinion .

In favour of

Assessee

Revision — Order prejudicial to interest of revenue —Issuance of Notice—Bar by Limitation—Validity thereof—AO passed assessment order against assessee—AO u/s.148 issued notice for reassessment—Later CIT u/s.263 issued notice for revision of assessment holding that assessment order was prejudicial to interest of revenue— Single Judge held that impugned notice was issued within two years from date of reassessment —Assessee's case was that notice issued u/s. 263 lacked jurisdiction as it was hit by limitation as prescribed by sub-section (2) of Section 263 —Assessee claimed that notice ought to have been issued within two years from end of the financial year in which order sought to be revised was passed —Held, while original issue (in reassessment proceedings) was with regard to disallowance of interest paid by Assessee, as loan amount had been diverted to partners, issue now raised in impugned notice u/s. 263 was not restricted to disallowance of interest on loan alone — Impugned notice dealt with several issues other than one raised earlier, limitation period in instant case had to necessarily run from 31.3.2015 being end of the financial year as 25.02.2015 was date on which scrutiny assessment was admittedly made for Assessee u/s. 143 (3) — Impugned notice was clearly beyond two years when reckoned from 25.02.2015 —Impugned notice was hit by vice of lack of jurisdiction —Assessee's ground allowed.

Held

In the instant case, we have already noticed that while the original issue (in the reassessment proceedings) was with regard to disallowance of interest paid by the Assessee, as the loan amount has been diverted to the partners, the issue now raised in the impugned notice under Section 263 is not restricted to the disallowance of interest on loan alone. It deals with other aspects such as claims of the assessee regarding administrative, selling and distribution expenses made by the Assessee to the tune of Rs.3.23 crores and claim of bad debts written off to the tune of Rs.33.06 lakhs etc.,

(Para 3 (xvi))

Therefore, as the impugned notice deals with several issues other than the one raised earlier, the limitation period in the instant case has to necessarily run from 31.3.2015 being the end of the financial year as 25.02.2015 is the date on which the scrutiny assessment was admittedly made for the Assessee under Section 143 (3) of the IT Act.

(Para 3 (xvii))

As would be evident from the narration of facts and discussion supra, the impugned notice is dated 16.08.2017 and is therefore, clearly beyond two years when reckoned from 25.02.2015.

(Para 3 Xix)

The principles and the grounds available for assailing a show-cause notice are now well settled. If the authority issuing the show-cause notice lacks jurisdiction and if it is clearly barred by law, it certainly renders the show-cause notice invalid in law. In the instant case, owing to all that have been stated supra, as the impugned notice, though is a show-cause notice as noticed by the learned single Judge, is invalid, as it has been issued beyond two years from the reckoning date and is clearly hit by Sub-section (2) of Section 263. In other words, the impugned notice is hit by the vice of lack of jurisdiction. Therefore, the assessee is entitled to succeed in its challenge to the impugned notice.

(Para 3 xxiii)

Conclusion

If the authority issuing the show-cause notice lacks jurisdiction and if it is clearly barred by law, it certainly renders the show-cause notice invalid in law.

In favour of

Assessee

Cases Referred to

Commissioner of Income-Tax Vs. Sat Pal Aggarwal case reported in [2007] 293 ITR 90 (P&H)
Commissioner of Income Tax, Chennai Vs. Alagendran Finance Ltd., case reported in [2007] 162 Taxman 465 (SC)
MAK Data P. Ltd. Vs. Commissioner of Income Tax [(2013) 358 ITR 593 (SC)]
Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax [(2000) 243 ITR 83 (SC)]

Counsel appeared:

R. Vijaya Narayan Senior Counsel M.V. Swaroop for the Appellant.: J. Narayana Swamy for the Respondent

M. SUNDAR, J.

1. This intra-court appeal is directed against an order dated 28.08.2017, wherein and whereby a learned single Judge of this Court had dismissed a writ petition in which a notice dated 16.08.2017, issued by the Commissioner of Income Tax, under Section 263 of Income Tax Act, 1961, was assailed. To be noted, order of the learned single Judge is a common order in two writ petitions, but this judgment deals with the order in W.P.No.22978 of 2017 alone.

2. A thumbnail sketch of facts essential for effective understanding of this order are set out infra under the caption “Factual Matrix”.

FACTUAL MATRIX

2(i) Subject matter of the instant intra-court appeal arises under the Income Tax Act, 1961 ('IT Act' for brevity).

2(ii) The appellant before us, a partnership firm, which goes by the name M/s.Indira Industries, is hereinafter referred to as 'Assessee' and the sole respondent before us, namely the Principal Commissioner of Income Tax, Chennai, is hereinafter referred to as 'Revenue', both for the sake of convenience and clarity. Other authorities of Income Tax Department i.e., other than the sole respondent are referred to as 'IT Department' for the sake of convenience and enhanced clarity.

2(iii) A notice dated 16.08.2017, issued by the Revenue to the Assessee, bearing Reference C.No.852 (5)/PCIT-8/2017-18 (hereinafter referred to as 'Impugned Notice'), was called in question and assailed by the Assessee in a writ petition being W.P.No.22978 of 2017 as narrated by us supra in the opening paragraph of this judgment.

2(iv) Assessee filed its return of income on 30.09.2012 (within time) for the Assessment Year 2012-2013 (hereinafter referred to as 'said Assessment year' for the sake of convenience and clarity) under Section 139 of the IT Act.

2(v) A scrutiny assessment order under Section 143(3) of the IT Act was made by the IT Department on 25.02.2015, accepting the return of income filed by the assessee after verifying the books of accounts and details filed. To be noted, before passing the scrutiny assessment order, a notice under Section 142(1) of the IT Act was issued calling for details and the Chartered Accountant of the assessee appeared and furnished the details sought for and the same were examined.

2(vi) Thereafter, vide notice dated 30.03.2016, the assessment was reopened under Section 148 of the IT Act.

2(vii) We are informed that the sole ground for reopening the assessment was that certain sums of monies paid by the Assessee as interest to Bank, claimed as expenditure, were to be disallowed. IT Department contended that interest so paid by the Assessee to the Bank was on loan taken by the Assessee from the Bank. It is the further contention of the IT Department that Assessee had diverted the loan taken from the Bank to its partners and therefore, the interest paid on such loan cannot be treated as expenditure by the Assessee in its returns.

2(viii) Most importantly, Assessee accepted the above position. On Assessee accepting the above position, a re-assessment order came to be passed on 30.12.2016 and such re-assessment order was passed under Section 143(3) read with Section 147 of the IT Act.

2(ix) In and by the aforesaid re-assessment order, the interest component paid by the Assessee to the Bank was disallowed. Most importantly, Assessee paid the entire tax post such re-assessment on 04.01.2017 and this position is not disputed by the Revenue.

2(x) When things stood as above, Revenue issued the impugned notice.

2(xi) Pleading that the Assessee is aggrieved by the impugned notice, the above said writ petition being W.P.No.22978 of 2017 was filed by the Assessee.

2(xii) At the admission stage itself, the Revenue was present before the Court and after hearing the Revenue, a learned single Judge of this Court dismissed the writ petition negativing the grounds urged by the Assessee.

2(xiii) Aggrieved, Assessee has preferred the instant intra-court appeal before us.

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) Assessee assailed the impugned notice before the learned single Judge on two main grounds. The two main grounds, in simple terms, can be crystallized and set out as follows:

a) As the original re-assessment was done on the basis of Assessee accepting the position, the same issue cannot be reopened under Section 263 of the IT Act as it tantamounts to 'Change of Opinion'; and

b) The impugned notice lacks jurisdiction as it is hit by limitation prescribed by sub-section (2) of Section 263. It was contended by the Assessee that under Section 263(2), the impugned notice ought to have been issued within two years from the end of the financial year in which the order sought to be revised was passed.

3(iii) In support of this first point i.e., 'Change of Opinion', Assessee pressed into service Commissioner of Income-Tax Vs. Sat Pal Aggarwal case reported in [2007] 293 ITR 90 (P&H). To be noted, this is a judgment of a Division Bench of the Punjab and Haryana High Court. To buttress the second point pertaining to Limitation under Section 263(2) of the IT Act, the Assessee pressed into service Commissioner of Income Tax, Chennai Vs. Alagendran Finance Ltd., case reported in [2007] 162 Taxman 465 (SC).

3(iv) We have heard Mr.R.Vijay Narayanan, learned senior counsel appearing for the counsel on record for the appellant/assessee and Mr.J.Narayanaswamy, learned senior standing counsel appearing for Income Tax Department on behalf of the Revenue.

3(v) With regard to the first point raised by the Assessee i.e., 'Change of Opinion', learned single Judge has noticed Sat Pal Aggarwal's case. Learned single Judge has also noticed that Sat Pal Aggarwal's case pertains to 'Change of Opinion', but has held that this cannot come in the way of or denude the powers of the Commissioner under Section 263 of the IT Act on the assumption that Section 263 is a provision which empowers the Commissioners to give their opinion that an order of Authority below him is erroneous.

3(vi) In the instant case, a perusal of the re-assessment order dated 30.12.2016 under Section 143(3) of the IT Act reveals that the only point qua reassessment is dis-allowance of interest paid to the Bank by the Assessee in the light of the loans on which the interest was paid being diverted to partners of the Assessee firm. To be noted, this is the lone point on which the reassessment was done or in other words, this is the lone point on which the entire re-assessment exercise was carried out.

3(vii) However, a perusal of the impugned order now reveals that it raises other issues such as bad debts written off to the tune of Rs. 33.06 lakhs and administrative, selling and distribution expenses claimed by the Assessee to the tune of Rs. 3.23 crores.

3(viii) Some other issues have also been raised in the impugned notice under Section 263.

3(ix)The Principle of law is, it can be construed to be 'Change of Opinion' only when the same issue dealt with in reassessment is raised again in proceedings under Section 263. This is clearly articulated in Sat Pal Aggarwal's case itself. On facts, it would be seen that in Sat Pal Aggarwal's case, reassessment proceedings and thereafter invocation of jurisdiction by Commissioner under Section 263 of the IT Act were on the same set of grounds.

3(x) Therefore, while we agree with the conclusion of the learned single Judge that this is not a case of change of opinion qua Section 263 of the IT Act, we do not agree with ultimate conclusion for reasons which are elaborated in this judgment.

3(xi)This takes us to the next point urged by the Assessee. As would be evident from the narration of facts and discussion supra, the second point raised by the Assessee is that the impugned notice is barred by limitation, to be precise, it is barred by Section 263(2) of the IT Act is the plea of the Assessee. In support of the second point, as mentioned supra, Assessee pressed into service Alagendran Finance case (citation given supra elsewhere in this judgment).

3(xii) Learned single Judge has noticed Alagendran Finance case and has also extracted Paragraph 7 of Alagendran Finance case. Learned Judge has held that Alagendran Finance case does not help the Asseessee, as the impugned notice has been

issued within two years from the date of reassessment, i.e., within two years from 30.12.2016.

3(xiii) Learned senior counsel for the Assessee contended before us that the date of reassessment cannot be the reckoning date and that the date of original assessment in the instant case being 25.02.2015 alone should be the reckoning date. To buttress this submission, learned senior counsel stressed that the term occurring in sub-section (2) of Section 263 is 'order' and not 'notice'. We deem it appropriate to extract sub-section (2) of Section 263 of IT Act, which 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(xiv) Mr.J.Narayana Swamy, learned senior standing counsel appearing for the Revenue drew our attention to Alagendran Finance case and advanced a submission that two years can be computed from the date of reassessment order.

3(xv) We are unable to agree. We are unable to agree as Paragraph 15 of the Alagendran Finance case makes it clear that when a notice under Section 263 raises new issues, which are not subject matter of the re-assessment proceedings, then the two year period contemplated under Sub-section (2) of Section 263 would begin to run from the date of assessment and not from the date of re-assessment. In other words, the ratio laid down in Alagendran Finance case, particularly as elucidated in Paragraph 15 of the Alagendran Finance case, is to the effect that the two year limitation period stipulated under Section 263(2) will run from the date of assessment only and not from the date of re-assessment when the Section 263 notice does not deal with the same subject as in assessment and when it deals with other issues which are not subject matter of reassessment proceedings.

3 (xvi) In the instant case, we have already noticed that while the original issue (in the reassessment proceedings) was with regard to disallowance of interest paid by the Assessee, as the loan amount has been diverted to the partners, the issue now raised in the impugned notice under Section 263 is not restricted to the disallowance of interest on loan alone. It deals with other aspects such as claims of the assessee regarding administrative, selling and distribution expenses made by the Assessee to the tune of Rs.3.23 crores and claim of bad debts written off to the tune of Rs.33.06 lakhs etc.,

3(xvii) Therefore, as the impugned notice deals with several issues other than the one raised earlier, the limitation period in the instant case has to necessarily run from 31.3.2015 being the end of the financial year as 25.02.2015 is the date on which the scrutiny assessment was admittedly made for the Assessee under Section 143 (3) of the IT Act.

3(xviii) We therefore have no hesitation in holding that the reckoning date qua the impugned notice for the purpose of Section 263(2) of IT Act is not the date of re-assessment being 30.12.2016, but the date of scrutinizing the assessment i.e, 25.02.2015.

3(xix) As would be evident from the narration of facts and discussion supra, the impugned notice is dated 16.08.2017 and is therefore, clearly beyond two years when reckoned from 25.02.2015.

3(xx) Therefore, the Assessee before us was clearly entitled to succeed on the second point raised before the learned single Judge. To be noted, we have already negatived the first point regarding 'Change of Opinion'.

3(xxi) 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 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(xxii) One other reason given by the learned single Judge for dismissing the Assessee's writ petition is that the impugned notice is a show-cause notice and therefore, no harm would be caused to the Assessee.

3(xxiii) The principles and the grounds available for assailing a show-cause notice are now well settled. If the authority issuing the show-cause notice lacks jurisdiction and if it is clearly barred by law, it certainly renders the show-cause notice invalid in law. In the instant case, owing to all that have been stated supra, as the impugned notice, though is a show-cause notice as noticed by the learned single Judge, is invalid, as it has been issued beyond two years from the reckoning date and is clearly hit by Sub-section (2) of Section 263. In other words, the impugned notice is hit by the vice of lack of jurisdiction. Therefore, the assessee is entitled to succeed in its challenge to the impugned notice.

4. **CONCLUSION**

Owing to all that have been stated supra, impugned notice issued by the Revenue dated 16.08.2017 bearing Reference C.No.852(5)/PCIT-8/2017-18 is set aside as being hit by limitation prescribed by sub-section (2) of Section 263 of the IT Act.

5. DECISION

This writ appeal is allowed, order of the learned single Judge in W.P.No.22978 of 2017 dated 28.08.2017 is set aside and consequently, the impugned notice issued by the respondent Revenue being notice dated 16.08.2017 bearing Reference C.No.852(5)/PCIT-8/2017-18 is quashed. No costs. Consequently, connected miscellaneous petition is closed.

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