

ito Vs. Lalit Kumar Agarwalla

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Court : Guwahati

Decided On : Oct-31-2001

Appeal No. : ITA No. 27 (Gau)1999 31 October 2001 A.Y. 1994-95

Appellant : ito

Respondent : Lalit Kumar Agarwalla

Judgement :

N.R.S. Ganesan J.M.

All these three appeals are filed by the revenue against the orders of the Deputy Commissioner (Appeals). The Appeal No. 27(Gau) and 28(Gau) of 1999 relate to the assessment year 1994-95 and the appeal No. 29 (Gau) of 1999 relates to the assessment year 1995-96. As many as four grounds of appeal were taken in all the three appeals of two different assessees. However, in substance, all the 4 grounds of appeal are related to one ground regarding the validity of the order of the Deputy Commissioner (Appeals) in cancelling the assessment order on the ground that the same is null and void. In all the three appeals, the assessee did not choose to appear even after service of notice. However, a written submission was filed on behalf of the assessee. After considering the written submission and considering the argument of the learned Departmental Representative, we dispose of the three appeals by this common order for the sake of convenience.

2. The learned Departmental Representative submitted that the assessing officer selected all the three cases for scrutiny and after issuing necessary notice under sections 142(1) and 143(2) of the Act the assessing officer has made the assessment orders. On appeal, the first appellate authority cancelled the assessment orders on the ground that section 44AD of the Act could not be applicable to the assessee and hence, the selection made by the assessing officer for scrutiny is null and void. Accordingly the first appellate authority cancelled the entire assessment orders. The learned Departmental Representative submitted that in view of the Explanation contained in section 44AD the case of the assessee, i.e., supply of bamboo will come within the Explanation (b) of section 44AD, i.e., execution of any works contract. According to the learned Departmental Representative, the first appellate authority is not correct in saying that the assessees will not fall under section 44AD. It is also submitted that whether section 44AD would be applicable or not, the selection made by the assessing officer for scrutiny cannot be found fault. Since the assessing officer has a statutory right to issue notice and make necessary enquiry whenever the assessing officer has reason to make necessary enquiry on the basis of the return filed by the assessees.

3. On the contrary, the written submission filed by the assessee shows that the supply of bamboo is not a business of civil construction or supply of labour for civil construction and hence, section 44AD is not applicable in this case. The other ground taken in the written statement is that the tax effect in this case is below Rs. 25,000 and this case does not come under the exception contained in Central Board of Direct Taxes circular and hence, the departmental appeals are liable to be dismissed.

4. We have considered the argument of the learned Departmental Representative and also perused the material available before us including the written submission of the assessee. We have to decide whether the case of the assessee comes within the Explanation (b) of section 44AD of the Act. In other words, whether the supply of bamboo will be considered to be a work contract or not Work contract is not defined in the Income Tax Act, 1961. We have necessarily to go to the general law for the definition. The Hon'ble Supreme Court had an accession to deal with

works contract in the case of Hindustan Shipping Ltd : AIR 2000 SC2411 . From the above case of Hon'ble Supreme Court it is very clear that there must be some service or work to be executed on part of the assessee apart from mere delivery of goods. Mere supply of bamboo without doing any service or work will not be construed as work contract and it is only a contract for sale. By respectfully following the decision of the Hon'ble Supreme Court in the aforesaid case, we held that the supply of bamboo by the assessee will not fall within the meaning of work contract. In view of the above, section 44AD will not be applicable in the case on our hand. Now, we have to see that merely because section 44AD is not applicable whether the selection of the case for scrutiny will become null and void as stated by the Commissioner (Appeals). Section 143(2) makes it very clear that after filing of return either under section 139 or in response to a notice under section 143(2) if the assessing officer considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner, the assessing officer has every right to issue notice and make necessary enquiries in accordance with law and pass necessary order of assessment. So the selection of return for scrutiny does not depend upon the applicability of section 44AD of the Act. In view of the above discussion, there cannot be any fault on the part of the assessing officer in selecting the case for scrutiny and issuing a necessary notice under sub-sections 143(1) and 143(2) The first appellate authority is not correct in cancelling the order of assessment on the ground that the assessments became null and void. The mere selection for scrutiny cannot be declared to be illegal when the assessing officer has ample power to make necessary enquiries whenever he considers that the income is underestimated or there has been computation of excessive loss. We do not find any infirmity in selecting the case for scrutiny. Hence, we set aside the order of the Commissioner (Appeals).

5. The Commissioner (Appeals) has not considered the merit of the case. He has simply declared the assessment orders null and void and thereby cancelled the entire assessment. Since the merit was not considered by the first appellate authority and the subject-matter of appeal before this Tribunal is whether the Commissioner (Appeals) is correct in cancelling the assessment order by declaring as null and void. We are not going into the merit of the case as declared

by the Hon'ble Rajasthan High Court in the case of Prem Agencies v. CIT . In view of the above discussion, we remand back the matter to the file of the Commissioner (Appeals). The Commissioner (Appeals) shall dispose of all the three appeals on merit. In view of the above discussion, we set aside the order of the Commissioner (Appeals) and remand back the matter to the file of the Commissioner (Appeals) for fresh consideration on merit as indicated above.

6. In all the cases interpretation of sections 143(2) and 143(3) are involved and hence, it comes within the exception mentioned in the Central Board of Direct Taxes Circular No. 1903 dated 28-10-1992. Hence, the said Central Board of Direct Taxes circular is not applicable to the facts and circumstances of this case. Hence, we are disposing of the same on merit.

7. In the result, all the three appeals are allowed.

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