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Court : Madhya Pradesh

Decided On : Apr-17-2001

Reported in : (2001)170CTR(MP)559

Appeal No. : MCC No. 387 of 1991 17 April 2001 A.Y. 1983-84 & 1984-85

Appellant : Nazir Singh

Respondent : Cit

Advocate for Pet/Ap. : Nazir Singh, Petitioner in person, *for the Assessee R.L. Jain, for the Revenue*

Judgement :

J.G. Chitre, J.

Shri Nazir Singh is assailing to the correctness, propriety and legality of the judgment and order passed by the Commissioner dated 12-12-1986, and the judgment and order passed by the Tribunal, Indore Bench dated 18-9-1990. His grievance happens to be that the assessing officer, D-Ward, Ujjain, by his judgment and order dated 27-2-1986, held that in Nazir Singhs case 'salary' does not include dearness allowance or dearness pay unless it enters into the computation of superannuation for retirement benefits of the concerned, etc. Keeping in view, his returns were accepted and the income of Nazir Singh was taken as taxable to the tune of Rs. 18,850 and tax was levied on him in that fashion in respect of the year 1983-84. That was carried further in the same logic to the years 1984-85. The Commissioner invoked the jurisdiction in view of the provisions of section 263 of the Income Tax Act (hereinafter referred to as the Act for convenience) and found that the dearness allowance or the dearness pay happened to be included in 'salary'. He further found the taxable income pertaining to the year 1982-83 to that tune. Nazir Singh appealed to the Tribunal, by challenging the said judgment and order, but the Tribunal Bench Indore confirmed the order passed by the Commissioner and, therefore, he came knocking at the door of High Court for getting justice.

2. Shri Nazir Singh placed reliance on some judgments for the purposes of justifying his submissions for demonstrating that the orders passed by the Commissioner and the Tribunal were improper, incorrect and illegal. He placed reliance on :

(1) Division Bench judgment of Gujarat High Court in the matter of Rajan Ramkrishna v. CWT : [1981]127ITR1(Guj) ;

(2) CIT v. Smt Prakashwati : [1994]210ITR567(All) ;

(3) Judgment of Kerala High Court in the matter of CIT v. Dr. B.A. Rajkrishnan : [1997]226ITR323(Ker) ; and

(4) The judgment of this court in the matter of Shyamsunder Gupta v. CIT : [1998]232ITR135(MP) .

3. In the matter of Rajan Ramkrishna v. CWT (supra), the Division Bench of Gujarat High Court held that it was

not open to the Commissioner to disregard the circular and proceed to exercise his revisional jurisdiction under section 25(2) of Wealth Tax Act on the footing that the shares should be valued on a different principle. In the matter of CIT v. Smt. Prakashwati (supra), the Division Bench of Allahabad High Court held that in setting aside the order of the Commissioner, the Tribunal in the first instance had held that in view of the departmental instructions contained in Boards Circular Nos. 4 dated 8-7-1966 and 176 dated 26-8-1987, which, inter alia, provided that no remedial action was necessary for summary assessments as the revenue loss, if any, was consciously suffered by the government in utilising resources for scrutiny and investigation of larger cases. The assessment completed under section 143(1) of the Income Tax Act, 1961, could not be subjected to any action under section 263 of the Act. The Tribunal had held that the circulars of the Board being benevolent in nature were binding on the tax authorities including the Commissioner. That apart, the Tribunal had also examined the impugned order of the Commissioner on the merits and found that it was not sustainable on a consideration of the material that existed on the record. In doing so, it had recorded a finding that the enquiry contemplated by the Commissioner in his order setting the assessment, had already been made by the Income Tax Officer when he completed the wealth-tax assessment for the year 1980-81. These findings of fact recorded by the Tribunal had not been questioned by the revenue in the question proposed in these two applications. It was thus evident that the order of the Tribunal rested on an appreciation of the facts and material available on record. In these cases, the tax effect was also very nominal. Hence, the question whether the cancellation of the order of revision was valid could not be referred.

4. In the matter of CIT v. Dr. Raja Krishnan (supra), the Division Bench of Kerala High Court held that an order of revision under section 263 of the Income Tax Act, 1961, necessarily presupposes statutory satisfaction that although there is some error with regard to the completed assessment, the order passed by the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. It is not every error or mistake which should induce the Commissioner to resort to exercise of the powers under section 263 of the Act. In that matter the Division Bench of Kerala High Court pointed out that in the said case the marginal loss to the revenue and, therefore, assumption of jurisdiction under section 263 was not valid.

5. The Division Bench of this court in the matter of Shyam Sunder Gupta v. CIT (supra), held that the satisfaction of the assessing officer could not be unfettered and had to rest on proper reasons. It had to be considered whether there were no reasons and if so, whether the assessing officer had requisite jurisdiction to reopen the assessments under section 143(2)(b) of the Act. In tax matters as well as in other matters, the eventual goal is to attain finality.

6. Relying on this judgment, Shri Nazir Singh submitted that when the Commissioner decided to invoke jurisdiction in view of the provisions of section 263 of the Act, he did not follow the circular issued by the department which has been quoted in Puranmal Narayan Prasad Kedia v. Assistant CIT 1994 Tax L.R. 224 . In that matter, the Division Bench of Calcutta High Court deprecated the contention raised on behalf of the department justifying the act of Commissioner in invoking the jurisdiction in view of the provisions of section 263 of the Act. In the present case, the liability of paying the tax was to the tune of Rs. 1,360 only, and therefore, there was no reason for the Commissioner to invoke the jurisdiction under section 263 of the Act. He further submitted that under section 143(1), the Commissioner had no reason to reopen it. Apart from that, submission of Shri Nazir Singh shows that the Commissioner has not given the reasons as to why he was reopening his case. He further submitted that he committed another error of taxing him in view of the provisions of section 143(2)(b). He submitted that the said judgment and order be set aside and liability of paying the tax levelled against him be quashed.

7. Shri R.L. Gupta, counsel appearing for the department submitted vehemently that by the effect of amendment brought in the year 1989, the dearness allowance, ad hoc dearness pay had been included in the 'salary' and were made liable for assessment and tax since 1962. He submitted that in view of that Shri Nazir Singh, the petitioner was liable to be assessed for taxation and was liable to pay tax. He submitted that the Commissioner has taken a right decision of reopening the case because he found that the order passed by the assessing officer was erroneous and was prejudicial to the interest of revenue. He submitted that the

application filed by Nizir Singh deserves to be dismissed and it be dismissed.

8. We do not agree with the contention raised by Shri R.L. Jain for the reasons mentioned in the incoming paragraphs.

9. Shri R.L. Jain submitted that the Commissioner decided to invoke the jurisdiction in view of the provisions of section 263 of the Act and that it was consistent with the amendment which was brought in force in the year 1989, making it retrospective since 1962 onwards. He further pointed out that the Commissioner treated it to be one falling under the purview of the provisions of section 143(2)(b) keeping in view while calculating the definition of the word Salary. Shri Jain submitted that keeping in view that aspect of the matter it was not necessary for the Commissioner to follow the circular. The circular bearing No. 176 (F. No. RA/86-87/D ITO), dated 26-8-1987, issued by the Directorate of Inspection (Audit), New Delhi, which has been quoted in *Puranmal Narayan Prasad Kedia v. Assistant Commissioner (supra)* at page No. 226-227 as well as in the matter of *Prabhudas Tulsidas & Co. v. ITO*, for the purpose of elaborating the point, [which does not find place in the judgment of this court (quoted supra)]. The said circular needs to be quoted in verbatim :

'It is, therefore, clear that the government is prepared to suffer the loss of revenue by making summary assessment under section 143(1) on the ground that the time and effort involved in unearthing the loss is not commensurate with the benefit likely to be obtained and they may be better channelised in scrutiny of cases involving larger revenue. A monetary limit of Rs. 1 lakh has, therefore, been fixed and returns showing income or loss upto that limit will be accepted under section 143(1). In view of the Circular which contains the view of the Board on the matter, the proceedings under section 263 must be held to be without jurisdiction. '

10. In the matter of *Puranmall Narayan Prasad Kedia v. Assistant Commissioner (supra)* the court pointed out the reasons of rejecting the contention of the counsel appearing for the department that 'Mr. Lahiri contended that the circular was not binding on Commissioner. We do not see how such a contention can be countenanced. The circular expressly states that the observations of the Member (R&A;) on the question of taking remedial action under section 263 against assessment made under section 143(1) reflect the views of the Board on the subject. If that is the view of the Board, surely it cannot be said that the Commissioner is not bound by the view. The Commissioner is an Income Tax Authority under section 116 of the Act bound by the orders, instructions and directions issued by the Board for the proper administration of the Act, under section 119 of the Act. This section also makes it mandatory for the Income Tax Authority to observe and follow instructions. It is, therefore, beyond question that such instructions have binding effect and the taxpayer is entitled to enforce its application in his favour. '

11. Shri R.L. Jain submitted that the Commissioner was well within its authority when it decided to touch the case of petitioner Nazir Singh and invoked the jurisdiction in view of the provisions of section 263 of the Act. He submitted that he was justified in view of the amendment Act which modified the definition of salary and made it applicable retrospectively, since 1962. Prima facie, this submission appears to be lucrative and inducive and digestible also but if a deeper probe is used it exposes its fallacious nature and demonstrates that it suffers from inherent infirmities. The act of the Commissioner touching the case of the petitioner Nazir Singh pertains to year 1986. The amendment came in force in the year 1989 in the year 1986, the circular quoted above, was in existence and in operation. Commissioner being Income Tax Authority, was bound by the said view of the Board depicted by the said circular. Secondly, when the same matter came to the notice of the Commissioner, it was obviously a matter touching the provisions of section 143(1) of the Act. When that was so, there was no reason for the Commissioner to think of invoking the provisions of section 263 of the Act, because he was to follow the instructions conveyed by the said circular making it clear that the scrutiny was to be used in such cases involving the evasion of tax of huge amounts. Nazir Singh's case involved the liability of payment of tax of Rs. 1,300 only, and therefore, there was no reason apparently available for the Commissioner to come to a conclusion to call for the record of Nazir Singh's case and to start examining the propriety, correctness and legality of the order which has been passed by the assessing officer and, therefore, though the submissions advanced by Shri R.L. Jain prima facie appear to be lucrative, inducive and even

digestible, its inherent fallacy and limping attitude gets exposed. Right from this amendment, the act of Commissioner becomes tainted with infirmity of illegality lacking of jurisdiction.

12. Shri Jain has submitted that the petitioner cannot get the advantage of ratio of the judgment of this court in Shyam Sunder Guptas case (supra) because the said case falls under the purview of section 143(2)(b). True that may appear prima facie, but the serious probe in the matter exposes the reasons assigned by the Commissioner in coming to the conclusion of reopening the case of Nazir Singh. It set exposed to the point of unreasonableness.

13. When the Commissioner dealt with that matter, it was obviously a mattersalary taxation falling under the purview of section 143(1), but by the judgment and order passed by the Commissioner, it assumed a nature of matter which was falling under section 143(2)(b) of the Act. When there was no amended definition of salary available to Commissioner and when the judgment and order of the assessing officer was well reasoned and was falling within four corners of the circular (quoted supra), there was absolutely no need of invoking the jurisdiction of provisions of section 263 of the Act.

14. Shri R.L. Jain submitted repelling the submission of Shri Nazir Singh that now the definition of Salary includes payment of dearness allowance, ad hoc dearness allowance and, therefore, the case of Nazir Singh needs to be permitted to be dealt with by the assessing officer in view of the amended definition of salary retrospectively. That cannot be permitted to be done because though the provisions of section 147 permit reopening of such cases, pertaining to the period in between 7 and 10 years, the provisions of section 147 have to be applied in fit cases only. The instructions and guidance given by the circular (quoted supra) cannot be ignored. Criteria has to be applied by taking out sample cases from the cases dealt with summarily keeping in view the grounds of revenue, involving likelihood to the interest of revenue involved. Energy and time of the department should be saved and reserved for unearthing the big cases of evasion of big amount of revenue and not to the cases which are in the form of salary flies. It is to be noted that the spirit behind the said circular which is benevolent and directed towards reserving the energy and time of department towards unearthing the cases of concealment and evasion of big tax amount has to be taken into consideration. We quote our view supported by the view taken by Allahabad High Court in the matter of Smt. Prakashwati (supra). The Division Bench of this court in the matter of Shyam Sunder Gupta v. CIT (supra) has dealt with this point, but to a limited extent only, and, therefore, we find it necessary to elaborate the point which has been touched by this court in Shyam Sunder Guptas case, but unfortunately not elaborated. This takes us to another aspect aspect of the matter which is dealing with the need of invoking the jurisdiction in view of the provisions of section 263 of the Act. The jurisdiction in view of the provisions of section 263 of the Act would not be invoked in all sundry cases that is to be done in appropriate and fit cases only. If that is not done, the benevolent spirit of circular which has depicted the view of the Board after an elaborate discussion would be frustrated. That is to be done in cases invoking concealment and evasion of tax of huge amount. We get supported in our view on this point by the view taken by the Kerala High Court in the matter of CIT v. Dr. B.A. Rajkrishnan (supra) where in the same spirit the Division Bench of the Kerala High Court held that 'an order of revision under section 263 of the Income Tax Act, 1961, necessarily presupposes statutory satisfaction that although there is some error with regard to the completed assessment, the order passed by the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. It is not every error or mistake which should induce the Commissioner to resort to exercise of the powers under section 263 of the Act.'

15. Elaborating the point further, we hereby find it necessary to point out that the taxing authority thinking of invoking the powers under the provisions of section 263 of the Act should get satisfied about certain points which can be elaborated for the purposes of giving a guiding line.

(1) The order passed by the assessing officer is grossly erroneous and at the same time prejudicial to the interest of revenue.

(2) Both the two things should be in existence together and not isolatedly and the case should be indicating

the concealment or the evasion of payment of tax of huge amount.

(3) The time-gap between the act of invoking the jurisdiction and passing of the order has to be taken into consideration.

There has to be reasons recorded justifying the exercise of power in view of the provisions of section 263 of the Act. There are the demonstrative points and not exhaustive criteria. Each and every case has to be treated independently on its facts and circumstances.

16. This discussion now takes us to another important point which has been contended by Shri Nazir Singh as well as Shri R.L. Jain, whether this court should quash the judgment and order passed by the Commissioner and the Tribunal or whether this court should direct the assessing officer to consider the liability of paying the tax in view of the amended definition of salary brought in force by the amendment Act. Section 147 indicates that the case pertained to the period ranging between 7 and 10 years can be reopened. But there is a limit to it. It is not to be applied in the cases which appear to be 'flies' before huge evasion of tax and concealment of taxable income by using the clever/deceptive tricks. In this context, the observations of the Supreme Court in the matter of Parshuram Pottery Works Co. Ltd. v. ITO : [1977]106ITR1(SC) has to be kept in view. In that judgment, after discussing the other points which were involved, the Supreme Court pointed out its view in the following paragraph :

'It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as the income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there can be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, this cannot be said in the present case.'

17. These observations are to be applied in true spirit by the parties which are well conversant with the law and remain in existence of their work of assessment of tax and fixing the liability of paying the tax. This scale is not to be applied to simple flies and innocent taxpayers who may come under the purview of either being penalised or being pulled for the errors of filing the returns mentioning the self-assessment in respect of the liability of paying the tax. There should be an honest error of calculating the liability of payment of tax. There may be an error of calculation or clerical error in quoting the income in the returns. Such case need not be opened unless there are compelling grounds to do so. Leave aside the existing need to reopen such case. In the present case, Shri Nazir Singh quoted his income earned as income from dearness allowance and ad hoc dearness allowance. However, he claimed the deduction and exemption from the liability of paying the tax. There was no case of concealment of the income or evasion of tax. In Parshuram Pottery Works case (supra), the case was not permitted to be reopened after the lapse of time of four years. In the present case, the case of petitioner Nazir Singh was being opened after a lapse of two years. That does not make any difference. The amended provision defining the Salary came in force in the year 1989 and that was not available for reopening the case which was already closed by the assessing officer by passing a well reasoned order long back. The attitude of by gone be gone should be adopted in fly appearance case.

18. Thus, the application is hereby allowed. The judgments and orders passed by the Commissioner and Tribunal stand quashed. The case of the petitioner Nazir Singh be not opened as directed by the Commissioner. It is permitted to be at rest as it has been done by the judgment and order passed by the assessing officer which was set aside by the Commissioner, Let everything be at rest. No orders as to costs.

We cannot forget to point out the strenuous efforts made by the petitioner Nazir Singh in assailing the order passed by the Commissioner and the Tribunal on the point of principle though he has paid the taxes. The tax paid in excess be refunded to him. We put a note of appreciation for the zeal shown by him and efforts taken by him. The orders passed by the assessing officer pertaining to years 1983-84 and 1984-85 are also set aside keeping in view the ratio of the judgment.

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