Assistant Commissioner of Income Vs. Upper Ganges Sugar Mills Ltd.

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Aug-12-1998

Reported in : (1999)69ITD14(Kol.)

Judge : R Acharya, S Chandra

Appellant : Assistant Commissioner of Income

Respondent : Upper Ganges Sugar Mills Ltd.

Judgement :
1. This appeal is instituted by the Department against the order of the CIT(A) for the asst. yr. 1989-90 on the following effective grounds : "1. On the facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in cancelling the order passed under s. 154 of the IT Act, 1961, modifying an earlier order under s. 143(l)(a) ibid wherein deduction under s. 80G was allowed overlooking the jurisdictional High Court's specific decision on this count; 2. On the facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in holding that the rectification made under s. 154 was neither called for nor in conformity with law when notice under s. 143(2) had been issued." 2. In this case, the return of income was filed on 27th December, 1989, and was processed under s. 143(1)(a) of the IT Act, 1961, on 23rd April, 1990. The AO found that the assessee had claimed deduction under s. 80G of the said Act on donation of Rs. 17 lakhs paid to Viswamongal Trust. The deduction was allowed while processing the return under s.

143(l)(a). However, the AO found that the Hon'ble Calcutta High Court has held that donations to Viswamongal Trust were not eligible for deduction under s. 80G against which the assessee is in appeal before the Hon'ble Supreme Court. The above fact were mentioned by the assessee in the letter dt. 26th December, 1989, which accompanied the return. The AO followed the CBDT Instruction No. 1814 F. No. 244/2/89 ITA-2, dt. 4th April, 1989, and came to the conclusion that deduction under s. 80G on donations made to Viswamongal Trust became a prima facie adjustment in view of the decision of the Hon'ble Calcutta High Court. Since at the time of order under s. 143(l)(a) dt. 23rd April, 1990, the said prima facie adjustment was not made, the AO issued notice under s. 154. The assessee filed a letter dt. 14th August, 1991, objecting to the proposed rectification as, according to the assessee, it was not a prima facie adjustment and the same was not made by the AO's predecessor after due discussion. The assessee relied on the Supreme Court decision in the case of T. S. Balaram, ITO vs. Volkart Bros. (1972) 82 ITR 50 (SC). But the AO rejected the contention of the assessee on the ground that it was not a prima facie adjustment which required a long-drawn discussion and that the principles of res judiciata do not apply to the income-tax proceedings. He, therefore, relied on the Calcutta High Court decision in the issue of donation to Viswamongal Trust, the CBDT Instruction, the decisions in the cases of : (i) Travancore Ltd. vs. ITO (1977) 109 ITR 43 (Ker) and (ii) Kerala & Nilgiri Potato Growers Co-operative Society Ltd. vs. CIT (1978) 111 ITR 375 (Mad) and rectified the order passed under S. 143(1)(a) by disallowing the claim of deduction under s. 80G on donation of Rs. 17 lakhs paid to Viswamongal Trust.

3. Before the CIT(A), the assessee submitted that the assessee did not pay the taxes in order to keep the issue alive which is awaiting decision of the apex Court on the issue. It was further submitted that the action of the assessee was in no way irregular as while finalising the proceedings under s. 143(1)(a) the AO had readily accepted the assessee's stand. It was also brought to the notice of the CIT(A) that the matter had already been discussed with the concerned Dy. CIT/Asstt.

CIT to arrive at a consensus that the return, insofar as this issue was concerned should be accepted. The assessee further pointed out that there was scope for sorting out of the points in dispute as the notice under s. 143(2) stood issued to the assessee. The CIT(A) considered the submissions of the assessee and came to the conclusion that the provisions of s. 154 could not be invoked for correcting the commissions or omissions in an order passed under s. 143(l)(a).

According to him since the case had already been taken up for processing under s. 143(2), he was of the opinion that there was no need of rectification under s. 154. He, therefore, held that the rectification under s. 154 was neither called for nor was in conformity with law. Consequently, he cancelled the order passed under s. 154.

4. Being aggrieved by the aforesaid order of the CIT(A), the Revenue has preferred this appeal to the Tribunal. The learned Departmental Representative, submitted before us that the CIT(A) was not justified in cancelling the order of the AO passed under s. 154 just because a notice under s. 143(2) was issued before the action under s. 154. He invited our attention to the provisions of s. 154(l)(b) and pleaded that what is relevant is the provision envisaged in sub-s. (1)(b) of s.

154 and, therefore, notice under s. 143(2) does not take away the power of the AO to take action under s. 154. He further pointed out that on merit it is not the case of the CIT(A) that action under s. 154 does not lie. On the basis of these arguments and contentions, he supported the order passed by the AO under s. 154.

5. The learned counsel for the assessee, on the other hand, invited our attention to pp. 1 and 2 of the paper-book where notices are placed, and submitted that the notice under s. 143(2) was issued on 12th June, 1990, while the notice under s. 154 was issued on 6th August, 1991.

According to him, the notice under s. 154 was issued more than one year later. He also drew our attention to the assessee's reply to the notice under s. 154, a copy of which is placed at p. 3 of the paper-book, and contended that it was clearly explained therein that there was no mistake apparent from the record muchless a mistake in the order passed under s. 143(1)(a) and the alleged mistake sought to be rectified required long-drawn discussion and was out of purview of s. 154. It was further contended in the said reply that action under s. 154 was misuse of powers and amounted to sitting over the judgment of superior which was not permissible under the law. The learned counsel for the assessee reiterated the same arguments that it was not a prima facie adjustment as long drawn process was involved and, therefore, the CIT(A) was right in cancelling the order passed under s. 154. In order to support his arguments and contentions, the learned counsel relied on the following decisions : (1) Gujarat Poly-avx Electronics Ltd. vs. Dy. CIT (Asst.) (1996) 222 ITR 140 (Guj); (2) Lakhanpal National Ltd. vs. Dy. CIT (Asst.) (1996) 222 ITR 151 (Guj); (3) Modern Fibotex India Ltd. vs. Dy. CIT (1995) 212 ITR 496 (Cal); and (4) Order of the ITAT in ITA Nos. 2996 to 2998/Cal/1992, dt. 27th August, 1996, in the case of Bharat General & Textge Industries Ltd. "B" Bench, Calcutta for the asst. yrs. 1988-89 and 1989-90.

6. In reply, the learned Departmental Representative pleaded that if the CIT(A)'s order is accepted, the Revenue will suffer as the additional tax is not available under the remedy envisaged under s.

143(2) r/w s. 143(3) of the Act.

7. We have carefully considered the rival contentions, the relevant facts and the materials placed on record. We have also gone through the case law on which reliance is placed. On consideration of factual and legal position, we come to the conclusion that following legal issues are to be decided in this case : (i) Whether the notice issued under s. 143(2) on 12th June, 1990, after intimation under s. 143(1)(a) on 23rd April, 1990, is legally valid and should prevail and supersede the provisions of s.

143(1)(a) (ii) Whether notice issued under s. 154 on 6th August, 1991, is legally valid and survives when it is issued after the issuance of notice under s. 143(2) on 12th June, 1990 (iii) Whether the order passed under s. 154 dt. 19th September, 1991, is in accordance with law and does it survive on the facts and circumstances of the case We will deal with them one by one with reference to the facts of the case and the legal position envisaged in the scheme of the Act.

8. Coming to the first question or issue, we find that the provisions of s. 143(1)(a) are "without prejudice" to the provisions of s. 143(2) of the Act. Under the

provisions of s. 143(2) in a case where the AO wants to verify whether the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner, he may take up the case for regular assessment for scrutiny and for this purpose he is empowered to issue notice within the expiry of 12 months from the end of the month in which the return is furnished.

In the present case, the return of income is filed on 27th December, 1989, and the case was taken up for regular assessment by issuing a notice dt. 12th June, 1990, under s. 143(2) which is within the time-limit envisaged under sub-s. (2) of s. 143. This notice issued under s. 143(2) is, therefore, a valid notice and has not been disputed or questioned by the parties at any stage. The return of income was processed on 23rd April, 1990, or an order under s. 143(l)(a) was passed on 23rd April, 1990, i.e. prior to issuance of notice under s.

143(2). Reading the language of sub-cl. (i) of cl. (a) of sub-s. (1) of s. 143, it is clear that the AO is permitted to make adjustment and the same is "without prejudice" to the provisions of sub-s. (2). The right of the AO to proceed under s. 143(2) is preserved despite the intimation to the assessee under s. 143(l) of the Act. The use of the word 'shall' in sub-s. (2) of s. 143 mandates the AO to issue notice to the assessee with a view to ensuring that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner. In view of this, we are or of the opinion that notice under s. 143(2) issued after the intimation under s. 143(l)(a) was passed is justified and should prevail and supersede the provisions of s. 143(l)(a). Our view gets due support from the CBDT Circular No. 549, dt. 31st October, 1989, and the Gujarat High Court decision in the case of Gujarat Poly-Avx Electronics (supra) wherein it has been held as under : "The CBDT in its Circular No. 549 dt. 31st October, 1989, has advised the AO to issue intimation under s. 143(l) before issuance of notice under s. 143(2) of the Act. Hence, after issuance of notice under s. 143(2) of the Act, it is not open for the AO to make adjustment or to pass an order under s. 143(1) of the Act but he has to make assessment in accordance with law, i.e., under s. 143(3) of the Act." The power under s. 143(1)(a) is limited and one of the limitations on the exercise of power under s. 143(1)(a) is that once a notice under s.

143(2) has been issued, there is no scope for the IT authorities either to make a prima facie adjustment on the basis of the return as filed, or issue an intimation under s. 143(1)(a). Thus, the omission by the legislature was deliberate because of the difference in the nature of two sections. While dealing with the limitation on the exercise of power under s. 143(l)(a) the Hon'ble Calcutta High Court in the case of Modern Fibertex India Ltd. (supra), their Lordships observed at p. 514 as under : "The third limitation on the exercise of the powers under s.

143(l)(a) is that once the notice under s. 143(2) has been issued, there is no scope for the authorities either to make prima facie adjustment on the basis of the return as filled or issue an intimation under s. 143(1)(a). The omission by the legislature to make the issuance of a notice under s. 143(2) without prejudice to an intimation under s. 143(1)(a) while specifically providing that the issuance of an intimation under s. 143(1)(a) would be without prejudice to s. 143(2) was deliberate because of the difference in the nature of the two sections. The jurisdiction under s. 143(1)(a) is a summary one, whereas s. 143(2) precedes an assessment under s.

143(3)." In the above case, where notice under s. 143(2) was issued prior to intimation under s. 143(1)(a), the Hon'ble Calcutta High Court held further as under : "The notice under s. 143(2) had been issued prior to the intimation under s. 143(1)(a). The impugned adjustment and intimation in respect of the assessment year in question were ultra wires the section and were liable to be set aside." Applying the above ratio or the judgment, to the facts of the instant case, we find that notice under s. 154 was issued on 14th August, 1991, and the rectificatory order under s. 154 was passed on 19th September, 1991, wherein the order under s. 143(1)(a) was rectified after making prima facie adjustment of disallowance claimed by the assessee. This simply means that the intimation under s. 143(1)(a) existed on 19th September, 1991, even after rectification. This position emerges after the notice under s. 143(2) had already been issued. Therefore, the order of intimation under s. 143(1)(a) r/w s. 154, after impugned adjustment, is ultra wires the section and is liable to be set aside.

In this way, we come to the conclusion that the notice under s. 143(2) should prevail and supersede the provisions of s. 143(1)(a).

9. Turning to the second question, after reading the provisions of sub-cl. (i) of s. 143(1)(a), it is clear that adjustment can be made without prejudice to the provisions of s. 143(2). Thus, the right to issue notice under s. 143(2) is with the AO even after making the adjustment. Sec. 154(1)(b) refers to amendment in intimation sent by the IT authorities under s. 143(1) and powers are conferred to rectify any mistake which is apparent from record and not otherwise. Therefore, after rectifying a mistake the order would remain an order under s.

143(1)(a) and it would be open to the AO to issue notice under s.

143(2) even thereafter; and in that case, he will have to complete the assessment under s. 143(3). In view of the language and scheme of the Act, therefore, in our opinion, when an order under s. 143(1)(a) is rectified it remains an order/intimation under s. 143(1)(a) and, therefore, notice under s. 143(2) can be issued even afterwards; but once the notice under s. 143(2) is issued, as the AO has to complete the assessment under s. 143(3) no notice under s. 154(1)(b) can be issued. In our view, since in this case notice under s. 154 is issued on 6th August, 1991, after issuance of notice under s. 143(2), the notice under s. 154, issued on 6th August, 1991, is not legal and cannot survive. Our view gets support from the Gujarat High Court decision in the case of Lakhanpal National Ltd. (supra) wherein it has been held as under : "Therefore, in a case like this, after issuance of notice under s.

143(2) of the Act, there is no question of issuing notice under s.

154(1)(b) of the Act but the assessment is to be made under s.

143(3) of the Act. Therefore, the impugned notices deserve to be quashed and set aside." 10. When we turn to question number three, we find that it has become very easy for us how to solve the issue in the light of above discussions, As the notice under s. 154 is not valid and legal, it deserves to be quashed and set aside. Accordingly, the order passed on the basis of such notice is also invalid and illegal and cannot be said to be in accordance with the provisions of law.

11. Apart from the above, there is also possibility of two interpretations or constructions of the statute and, therefore, no action lies under s. 154. The AO was not competent to rectify the order passed under s. 143(1)(a), as held by the Kerala High Court in the case of Travancore Ltd. (supra) and Madras High Court in the case of Nilgiri Potato Growers Co-operative Society Ltd. (supra) as quoted by the AO.Yet, there is another angle to look at the issue. The assessee has also contended that adjustment under consideration is not a prima facie adjustment as it involves a debate and long-drawn process of argument on the point on which more than one opinion is conceivable and possible. In the case of Bharat General & Textile Industries vs. Asstt.

CIT, (ITA Nos. 2996 to 2998/Cal/92), where similar facts, as in the case of the present assessee, were considered and where the assessee relied on the Calcutta High Court decision in the case of Modern Fibotex India Ltd. (supra) and Tribunal Cochin Bench decision in the case of Kerala State Coir Corpn. Ltd. vs. Dy. CIT (1994) 50 ITD 1 (Coch), the Tribunal 'B' Bench, Calcutta decided the issue in favour of the assessee by holding that once notice under s. 143(2) has been issued, there is no scope for the authorities to make a prima facie adjustment. In view of this a well as for the reasons given above, we hold that the order passed by the AO under s. 154, after issuance of notice under s. 143(2), is not in accordance with the provisions of law on jurisdiction as well as on merits and, therefore, the same has correctly been cancelled by the CIT(A). Consequently, we confirm the impugned order of the CIT(A).

12. In the result, the Departmental appeal fails and is hereby dismissed.