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Court : Delhi

Decided On : Feb-20-2003

Reported in : [2003]130TAXMAN570(Delhi)

Appeal No. : CW No. 303 of 1979 20 February 2003

Appellant : Orissa Cement Ltd.

Respondent : ito

Advocate for Pet/Ap. : Harihar Lal,;for the assessed; Sanjeev Khanna,;for the Revenue.

Judgement :
ORDER

D.K. Jain, J.

The challenge in this writ petition is to the validity of the notice, dated 30-3-1978, issued to the petitioner under section 147/148 of the Income Tax Act, 1961 (for short hereinafter referred to as 'the Act'), proposing to re-open assessment for the assessment year 1973-74.

2. To appreciate the controversy involved, it would be necessary to notice the background facts, which are as follows :

Assessment for the assessment year in question was completed on 6-4-1976. While completing the assessment, the Income Tax Officer had allowed a deduction of Rs. 45,43,630 under section 35(1)(ii) of the Act. However, subsequently, the Commissioner of Income Tax felt that deduction, amounting to Rs. 45,00,000 in respect of the contribution made by the petitioner to M/s. Dalmia Institute of Scientific & Industrial Research, had been wrongly allowed by the assessing officer and hence his assessment order was erroneous insofar it was prejudicial to the interest of the revenue. Invoking his powers under section 263 of the Act, after issuing show-cause notice to the petitioner, the Commissioner directed withdrawal of the said deduction, vide order dated 31-3-1978.

3. Being aggrieved of the order passed by the Commissioner, the petitioner filed a writ petition, being CWP No. 230 of 1978, praying for quashing of the said order. Simultaneously, the petitioner also preferred an appeal against the said order to the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal').

4. The appeal filed by the petitioner before the Tribunal was disposed of on 15-3-1980, whereby the order passed by the Commissioner was set aside. While allowing petitioner's appeal, the Tribunal held as follows :

'There is no dispute here that the Dalmia Institute stands approved by the prescribed authority till today. That was the position at any rate up to the time the Commissioner passed the order in appeal. It is true that the provision is meant to encourage scientific research; and where, however, it is used as cover for gaining illegal or undue fiscal advantage the revenue is not expected to sit back and do nothing in the matter. But in such a situation the revenue is not expected to do as de hors the Act. It has to set about the matter in accordance with law. It is not as if the Legislature slept over this aspect of the tax relief. The legislature in its wisdom enacted section 35(3) specifically to enable the prescribed authority to examine the question where a doubt is raised in the matter. The prescribed authority is clothed with the power of deciding the question as to whether and if so, to what extent any activity constitutes or constituted scientific research, or whether any asset is or was being used for scientific research, on a reference being made by the Board to the prescribed authority and the decision of the prescribed authority

shall be final. In other words neither the Income Tax Officer nor the Commissioner (or even the officers of the Board of Direct Taxes) have been given power to decide such questions. We must, therefore, agree with the submission for the assessed that the Commissioner's assumption of jurisdiction was not in accordance with law.'

5. Admittedly, the said order has been accepted by the revenue inasmuch as no reference application against the said order was filed. In view of the order of the Tribunal, CWP No. 230/1978 was disposed of, having been rendered infructuous.

6. Even while proceedings under section 263 were pending before the Commissioner on 30-3-1978, the Income Tax Officer issued the impugned notice to the petitioner on the ground that he had reason to believe that its income chargeable to tax had escaped assessment for the reason that the petitioner was not entitled to deduction for the said contribution under section 35(1)(ii) of the Act. The present writ petition was filed on 5-3-1979, challenging the validity of the said notice, issued on 30-3-1978.

7. It is submitted by Mr. Harihar Lal, learned counsel for the petitioner, that in the light of the afore-extracted order of the Tribunal, the present writ petition has to be allowed because the Tribunal has also held that the assessing officer had no jurisdiction to decide the question as to which activity constituted scientific research. It is urged that under section 35(3), the power to decide this issue was vested only in the prescribed authority. It is asserted that the extent of activity of an approved scientific research institute and the question whether assets are being used for scientific research or not is also to be decided by the prescribed authority.

8. Mr. Sanjeev Khanna, learned senior standing counsel for the revenue, on the other hand, submits that for determination of the question whether a particular activity constitutes scientific research or not and whether the assets were being used for scientific research, the assessing officer is competent to make a reference to the Board in terms of section 35(3) of the Act and, therefore, the issue should be left to the discretion of the assessing officer.

9. Having heard learned counsel for the parties, we are of the view that although the writ petition was admitted to hearing in the year 1979, but the events taking place during the pendency of the writ petition,; in particular the afore-noted order of the Tribunal, have material bearing on the re-opening of the assessment for the relevant year. As a matter of fact, in our view, the said order should have been brought on record in the year 1980 when it was passed. Under the circumstances, we feel that it would be appropriate and expedient if all these subsequent events are brought to the notice of the assessing officer to enable him to take a decision as to whether he would still like to continue with the proceedings initiated by virtue of notice under section 148 of the Act.

10. Accordingly, we dispose of the writ petition with a direction that the petitioner may place before the assessing officer, all the subsequent events which have taken place after the impugned notice was issued, including its objection with regard to the jurisdiction of the assessing officer to initiate the reassessment proceedings during the pendency of proceedings under section 263 of the Act. The objections, if filed, shall be disposed of by the assessing officer by a speaking order, before proceeding further with the reassessment.

11. Since the matter pertains to the assessment year 1973-74, let the objections be filed before the assessing officer within four weeks of the receipt of this order and the assessing officer shall dispose of the same as expeditiously as possible, but in any case not later than eight weeks from the date of filing of the objections.

12. The writ petition stands disposed of in the above terms with no orders as to cost.