

Fateh International Vs. the Dcit

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Apr-26-2006

Reported in : (2007)104ITD305(Mum.)

Judge : O Narayanan, S Chowla

Appellant : Fateh International

Respondent : The Dcit

Judgement :

1. This appeal by the assessee is against the order of CIT (A).

Central-VI. Mumbai. dated 08 12.2004 relating to Assessment Year 2000-2001 against the order under Section 143(3) read with Section 147 of the IT Act.

2. During the course of hearing, the assessee has raised the under mentioned additional ground of appeal 1. The learned Assessing Officer has erred on facts and in law by issuing Notice Under Section 148 and completing the assessment Under Section 147 of the Income Tax Act. 1961 and the said Notice Under Section 148 and order passed Under Section 147 are both had in law and liable to be quashed as no income could be said to have escaped by the appellant prior to issue of Notice Under Section 147. The Assessing Officer has already issued Notice Under Section 143(2) and the Return filed Under Section 139 was pending for assessment under Section 143(3) at the time of issue of Notice Under Section 148 The time limit to complete assessment Under Section 143(3) has not expired

at the time of issue of Notice Under Section 148.

The additional ground of appeal raised by the assessee being a legal ground of appeal is admitted for adjudication. The said additional ground of appeal raised by the assessee is against the validity of reassessment made by the Assessing Officer and is dealt in the first instance before going into the merits of the case.

3. The Assessment Year under consideration is 2000-2001. The due date for filing the Return of Income for the year under consideration was 31.10.2000. The Return of Income was filed by the assessee on 31.10.2000. The Assessing Officer issued Notice under Section 143(2) of the IT Act on 25.10.2001. The time limit for issuing Notice of hearing under the provisions of Section 143 (2) of the I.T. Act expired on 30.10.2001. As per the provisions of Section 153 of the I.T. Act, the time limit to complete the assessment under Section 143(3) of the IT Act expires in the instance case on 31.03.2003 i.e., a period of two years from the end of the relevant Assessment Year.

4. A notice under Section 148 of the I.T. Act was issued by the Assessing Officer on 07.02.2003. Order under Section 143(3) read with Section 147 of the IT Act was completed on 23.03.2004. In the present case, no order under Section 143(3) of the Act was passed pursuant to the issue of notice under Section 143(2) of the I.T. Act on 25.10.2001. The Assessing Officer while completing the assessment under Section 143(3) read with Section 147 of the I.T. Act has referred to the issue of Notice under Section 143(2) of the I.T. Act for scrutiny of assessment in the case of the assessee. The Assessing Officer has elaborately discussed the reasons recorded before the reopening of the assessment under Section 147 of the I.T. Act and the same form part of the assessment orders and the Assessing Officer has concluded the same as under: ...This case M/s. Fateh International was selected for scrutiny by issue of notice under Section 143(2). The notice is found mysteriously missing from the file, and hence compulsion to re-open the file. This is a sensitive case involving fraud and wrongful claim of deduction under Section 80HHC. The entire income of Rs. 42.72.187 - representing unaccounted cash in the hands of the assessee is sought to be laundered by way of misuse of Section 80HHC. Under these facts and circumstances, I have reason to believe that

income chargeable to tax has escaped assessment within the meaning of Section 147 of I.T. Act, 1961.

5. Thereafter, notices were issued along with detailed questionnaire before the completion of assessment under Section 143(3) read with Section 147 of the I.T. Act. The assessee is aggrieved with the action of the Assessing Officer in invoking the provisions of Section 147/148 of the I.T. Act as the Assessing Officer had already issued a notice under Section 143(2) of the Act and the Return of income filed by the assessee was pending for assessment under Section 143(3) of the I.T. Act at the time of issue of notice under Section 148 of the I.T. Act.

The time limit to complete the assessment under Section 143(3) of the I.T. Act had not expired at the time of issue of notice under Section 148 of the I.T. Act. The ground of appeal relating to the validity of reassessment proceedings in the present case has been raised for the first time before us. The learned AR for the assessee stated that in the facts of the present case once the Assessing Officer has issued a notice under Section 143(2) of the I.T. Act prior to completing the assessment under Section 143(3) of the I.T. Act, time period for which had not been expired on the date when the notice under Section 148 was issued, there is no merit in making reassessment proceedings against the assessee.

6. The learned AR drew our attention to the order of the Assessing Officer wherein it was pointed out that the Assessing Officer has accepted the fact of issue of notice of hearing under Section 143(2) of the I.T. Act and once the proceedings so initiated are pending, the Assessing Officer cannot be allowed to take an umbrella under Section 148 of the I.T. Act. Thus, the fact that the notice under Section 143(2) of the I.T. Act is mysteriously missing from the file of the Assessing Officer is to be taken into cognizance or not while deciding the issue in hand. 7. The learned AR brought to our attention that the provisions of Section 147 have been amended by way of insertion of Explanation 2, wherein under Clause (b) it has been provided that where a Return of Income has been furnished by the assessee but no assessment has been made, the same can be deemed to be a case where income chargeable to tax has escaped assessment in case it is noticed by the Assessing Officer that the assessee has understated the income or has claimed

excessive loss, deduction, allowance or relief in the Return of Income.

The learned pointed AR out that though the scope of cases where income chargeable to tax has escaped assessment has been enlarged by the insertion of Clause (b) of explanation 2 to Section 147 of the I.T. Act. the aforesaid provisions covers cases where though no assessment has been made and also where assessment is not possible; in cases where assessment is otherwise possible the provisions of the said clause are not applicable. Reference was made to the decision of Agra Bench of Tribunal in the case of ACIT v. Subhash Chandra Goyal reported in [2005] 4 SOT 405 (AGRA), where the provisions of Section 147 read with explanation 2 (b) have been considered Reliance also was placed on the decision of Hon'ble Bombay High Court in the case of CIT v. Rajendra G. Shah 247 ITR 772 and also Hon'ble Calcutta High Court in the case of Mohindra Mohan Sirkar v. ITO 112 ITR 47, which covers cases before the amendment to Section 147.

8. The learned DR vehemently argued that by issuing the notice under Section 148 of the I.T. Act, there was no malafide of the Assessing Officer. In case the said notice had been issued after March, 2003, then motive of malafide could have been attributed to the Assessing Officer The original notice issued under Section 143(2) of the I.T. Act was missing from the file. In the absence of any notice the Assessing Officer had no jurisdiction to complete the assessment under Section 143(3) of the I.T. Act The Assessing Officer had no alternative but to invoke the provisions of Section 147 as under explanation 2 (b) wide powers have been given to Assessing Officer to reopen all cases where he finds that the income chargeable to tax has escaped assessments. In the facts of the present case, the action of Assessing Officer in making reassessment was bonafide and correct 9. We have considered the rival submissions and perused the records.

Under the provisions of Section 139 of the I.T. Act, it is the duty of every person being a company or other than a company, in case his total income exceeds the maximum amount not chargeable to income tax, to furnish a Return of Income for the previous year in the prescribed form and verified in the prescribed manner. Once the Return of Income has been furnished under Section 139 of the I.T. Act

by the assessee, the procedure of assessment is provided under Section 143 of the I.T. Act.

The Return of Income furnished by the assessee under Section 139 of the I.T. Act is to be processed under Section 143(1) of the I.T. Act. The Assessing Officer if it considers necessary to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the taxes, serve on the assessee a notice of hearing requiring him to produce any evidence that the assessee may rely on in support of the Return of Income. The said authority has been entrusted on the Assessing Officer under the provisions of Section 143(2) of the I.T. Act. The said authority to serve notice of hearing is subject to the proviso to Section 143(2) of the I.T. Act, which provides as under: Provided that no notice under this Section shall be served on the assessee after the expiry of twelve months from the end of the month, in which the return is furnished.

10. The Assessing Officer is empowered to pass an order in writing in allowing or rejecting the claims of the assessee and thereby making assessment determining the total income or loss after hearing the assessee pursuant to the issue of notice under Section 143(2) of the I.T. Act. The provisions of Section 143(3) of the I.T. Act entrusts the Assessing Officer to make the assessment determining the income/loss of the assessee as per the provisions of the Income Tax Act. Section 153 of the I.T. Act provides the time limit for completion of assessment and reassessments for passing an order of assessment under Section 143 of the I.T. Act, Time limit of two years from the end of the assessment year in which the income was first assessable has been provided.

11. In the facts of the present case, after the Return of Income was filed by the assessee on 31.10.2000 i.e., within the due date for filing the Return of Income, notice under Section 143(2) of the I.T. Act was issued on 25 10.2001. The assessee has filed the copy of the aforesaid notice issued under Section 143(2) of the I.T. Act, which was issued by the Assessing Officer on 25 10.2001 requiring the assessee to attend his office on 19.11.2001 at 11.30 a.m. in connection with the Return of Income submitted by the assessee for the Assessment Year 2000-01. Thereafter the Assessing Officer as per the provisions of Section 153 of the

I.T. Act had time limit up to 31.03.2003 to complete the assessment under Section 143(3) of the I.T. Act. No assessment under Section 143(3) of the I.T. Act was completed by the Assessing Officer, though notice under Section 143(2) of the I.T. Act was issued in time by the Assessing Officer and the proceedings were not completed. Pending the completion of the assessment proceedings, the Assessing Officer issued a separate notice under Section 148 on 07.02.2003 and after conducting hearing on several dates, the order under Section 143(3) read with Section 147 was passed on 23 03.2004. The question for our determination is that pending the completion of assessment under Section 143(3) of the I.T. Act which was initiated by way of issue of notice under Section 143(2) of the I.T. Act, whether the Assessing Officer had the power to complete the assessment under Section 143(3) read with Section 147 of the I.T. Act. The scheme of the Income Tax Act provides steps for filing the Return of Income, assessment and reassessment in connection with the income earned by the assessee during the previous year. In the facts of the present case, the Return of Income was duly filed by the assessee on 31.10.2000, which was within the time limit of the filing of return. Thereafter the cases were picked up for scrutiny by way of issuing and serving notices under Section 143(2) of the I.T. Act within the time limit provided in the proviso to Section 143(2) of the I.T. Act. The said notice issued by the assessee is claimed by Assessing Officer to be missing from the file of the assessee. The factum of issue of notice is accepted by the Assessing Officer once he states that "the notice is found mysteriously missing from the file". The said statement of the Assessing Officer presupposes the factum of issue of notice of hearing under Section 143(2) of the I.T. Act. Once a notice under Section 143(2) of the Act has been issued, the next step under the procedure for assessment is completion of order of assessment under Section 143(3) of the I.T. Act.

The said step of completion of order of assessment under Section 143(3) of the I.T. Act is mandatory as per the provisions of Income Tax Act.

No exception to passing of order of assessment has been provided under the Act. Despite the issue of notices, and pendency of the proceedings, the Assessing Officer fails to complete the assessment and pass an order of assessment under Section 143(3) of the Act in the case, before the time limit provided under Section

153 of the I.T. Act expires The assessment under Section 143(3) of the I.T. Act was mandatorily required to be completed by 31.03.2003. i.e. two years from the end of the assessment year: but no such order of assessment has been passed in the case of the assessee by the Assessing Officer by or before 31.03.2003 Under Section 147 of the I.T. Act. provisions have been made to assessee or reassess such income which has escaped assessment.

Explanation 2 to Section 147 of the I.T. Act provides instances of cases where income chargeable to tax has escaped assessment.

Explanation 2 Clause (b) of Section 147 of the Act provides as under: where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return; 12. In case, there is a case of income escaping assessment, the law provides that notice of hearing shall be served on the assessee prior to making any assessment, reassessment or recomputation under Section 147 of the I.T. Act The said notice of hearing is to be issued as per the provisions of Section 148 of the I.T. Act Proviso to Section 147 of the I.T. Act covers situation where assessment under Section 143(3) has been made The same clearly indicates that the provision of making an assessment under Section 143(3) of the I.T. Act is an independent provision and cannot be co-related to assessment/reassessment made under Section 147 of the I.T. Act. 'In the facts and circumstances of the present case, once a notice under Section 143(2) of the IT Act was issued, it was mandatory on the Assessing Officer to complete the assessment under Section 143(3) of the I.T. Act. There is no merit in the argument of the learned DR that once the original notice of hearing is missing from the assessment records, the Assessing Officer had no jurisdiction but to take action under the explanation 2 (b) of Section 147 of the I.T. Act in the facts of the present case. No doubt, under explanation 2 (b) to Section 147, the Assessing Officer has been given wide powers of assessment/reassessment where income chargeable to tax has escaped assessment. But the clause very clearly provides that it shall apply in all cases, where the Return of Income has been furnished by the assessee and no assessment has been made The reference to 'no assessment' made is limited to

cover cases where no assessment is otherwise possible. The Agra Tribunal in the case of ACIT v. Subhash Chandra Goyal (supra) have elaborated on the aforesaid specific provisions of Section 147 and held as under: ...The next ground of appeal taken by the revenue was that the Commissioner (Appeals) had erred in holding that the notice under Section 148 was invalid in view of specific provisions of Section 147 read with Explanation 2 (b) of Section 147. The language of Explanation 2 (b) of Section 147 says that 'but no assessment has been made meaning thereby that if it is not possible to be made on that date, this Explanation shall apply. However, on the date of issue of the notice under section 148, time for making regular assessment was available. Hence, issue of notice under Section 148 was illegal and invalid...

13. In the facts of the case before Agra Bench, notice under Section 148 was issued where there was still time to issue notice under Section 143(3) of the I.T. Act and it was held that on the date of issue of notice under Section 148 when there was time to make regular assessment, the issue of notice under Section 148 was illegal and invalid ab initio Their Lordships of Hon'ble Bombay High Court in the case of CIT v. Rajendra Shah 247 ITR 772 deliberated upon the issue and held as under: Held, that it was found that all the proceedings were taken pursuant to the reopening of the assessment in 1985, losing sight of the fact that the main return was pending assessment. The Tribunal was right in annulling the assessment proceedings. No substantial questions of law arose.

14. Similar view was taken by the Hon'ble Calcutta High Court in the case of Mohindra Mohan Sirkar v. ITO 112 ITR 47. No doubt, both these case laws were rendered by the respective High Courts before the amendment provided by way of Explanation 2 (b) to Section 147 of the I.T. Act. At the time of issue of notice under Section 148 of the IT Act, the proceedings for assessment under Section 143(3) were pending and had not been completed, and the time limit to complete the assessment under Section 143(3) of the I.T. Act had not expired till then. The procedure provided for assessment under Section 143 is complete in itself and once a valid notice of hearing has been issued under Section 143(2) of the I.T. Act, the only recourse available to the Assessing Officer was to complete the assessment under Section 143(3) of the I.T. Act. The issue of notice under Section

148 of the Act, when the assessment proceedings were pending under Section 143(3) of the Act was illegal and invalid. The reassessment proceedings completed in the case are invalid ab initio and are directed to be cancelled. The additional ground of appeal raised by the assessee is allowed. As the additional ground of appeal has been allowed and the assessment proceedings have been directed to be cancelled, we are not going into the merits of the case.

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