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Court : Rajasthan

Decided On : Mar-19-2001

Reported in : [2001]249ITR760(Raj)

Appeal No. : S.B. Civil Writ Petition No. 425 of 2000 19 March 2001 A.Y. 1993-94

Appellant : Prakash Chitra

Respondent : ito

Advocate for Pet/Ap. : Suresh Ojha, *for the Assessee* L. M. Lodha, *for the Revenue*

Judgement :

Rajesh Balia, J.

Heard learned counsel for the parties.

The petitioner challenges the continuance of the proceedings of assessment in pursuance of the order passed by the Commissioner under section 263 of the Income Tax Act, 1961, on 20-2-1998, which order stood set aside by the Tribunal in appeal on 18-5-1998.

2. The assessee was assessed on his income for the assessment year 1993-94 by an assessment order dated 28-6-1995.

The Commissioner in exercise of his powers under section 263 initiated proceedings and held the assessment order to be erroneous and prejudicial to the interests of the Revenue and accordingly set aside the same and directed the Income Tax Officer to make a fresh assessment. In pursuance of that order, the assessing officer issued notice on 26-2-1998. However, before any order could be made in pursuance of the order of the Commissioner, on appeal by the petitioner, the order of the Commissioner was set aside by the Tribunal by its order dated 18-5-1998, in I. T. A. No. 106/Jod of 1998. A reference application preferred by the Commissioner under section 256(1) was also rejected in September 1998. An application to require the Tribunal to state the case and refer the proposed question of law to this court under section 256(2) of the Act is stated to be pending before this court.

The assessee was served with another notice of proceedings with the assessment in pursuance of the order of the Commissioner and issued fresh notices on 16-11-1999, which is annexure 6 which was replied to by the assessee pointing out that since the order passed by the Commissioner under section 263 has been set aside, no proceedings could continue and the same may be dropped vide annexure 7.

However, the assessing officer issued author notice on 3-2-2000, and communication dated 7-2-2000, showing his intention to continue with the proceedings and make assessment in pursuance of the said order of the Commissioner and the petitioner was informed that since an application under section 256(2) has been made before the High Court and the Commissioner has not accepted he must participate in the assessment proceedings.

This led to the filing of this writ petition. This court by order dated 17-2-2000, issued notices and by way of interim order directed that the Income Tax Officer shall not finalise the assessment. However, this order was modified by order dated 27-3-2000, by directing the Income Tax Officer to go on with the assessment but he will not give effect to it till next date of hearing. This order too does not appear to have been extended thereafter.

3. Learned counsel for the respondent urges that since the revenue has not accepted the order passed by the Tribunal and has filed a reference application under section 256(2), the Income Tax Officer was within his jurisdiction to proceed with the matter and complete the same within limitation prescribed under section 155(2A).

4. Having carefully considered the rival contentions, I am of the opinion that the contention of the respondent is not sustainable, because the revenue has not accepted the order of the Tribunal, the assessing officer is entitled to give effect to order which has been set aside by the Tribunal. The efficacy of the order does not depend on its acceptance or non-acceptance by litigating party but it depends on the operating force of the order. Once the order of the Commissioner was set aside by the Tribunal the order of the Commissioner ceased to be operative. Unless the Tribunals order is set aside in appropriate proceedings and the order of the Commissioner is resurrected, the only operative order as with effect from the date of the Tribunals order was the order of the Tribunal and not the order of the Commissioner. It is not within the jurisdiction of Income Tax Officer to continue with the proceedings in pursuance of the order of the Commissioner by ignoring the order of Tribunal which binds him. There is no provision under the Income Tax Act which permits the Income Tax Officer to continue with the proceedings even if the order of the Income Tax Officer by the appellate or revisional order is set aside because the revenue has not accepted the order and matter is sub judice. The proceedings, if any, during that period remain in suspended animus, unless the order of the superior authority itself is suspended or stayed. Any other view will lead to a chaotic position and breed administrative anarchism and persons will continue to be subjected to orders non-existing by treating them to be operative.

I am, therefore, of the opinion that the assessing officer cannot be permitted to continue with the proceedings in pursuance of an order which has ceased to exist, in view of Tribunals order.

So far as reference to the provisions of limitation under section 155(2A) is concerned, suffice it to state that if it is accepted, as contended by Mr. Lodha, that notwithstanding the setting aside of the order of the Commissioner, the order still

remains operative and live and binds the assessing officer to give effect thereto within the period prescribed under section 155(2A), if the matter is sub judice then such limitation for making assessment in pursuance of the order of the Commissioner, then the said period has already expired. However, I refrain from making any comments on the question of limitation for completing the proceedings in case the revenue becomes successful in the pending proceedings ultimately and the treatment of the period during which the order of the Commissioner remained inoperative because of its setting aside.

Accordingly, this petition is allowed and the respondents are restrained from continuing with the proceedings in pursuance of the order passed by the Commissioner under section 263 on 20-2-1998.

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