Cit Vs. Vishal Gupta

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Court : Delhi

Decided On : Apr-30-2012

Judge : Sanjiv Khanna &Amp; R.V. Easwar

Appeal No. : ITA Nos. 1782 of 2010 & 1784 of 2010

Appellant : Cit

Respondent : Vishal Gupta

Judgement :

1. Having heard learned counsel for the parties in these two appeals under Section 260A of the Income Tax Act, 1961 (Act, for short), which pertain to the assessment year 1995-96 and 1996-97, we formulate the following substantial question of law:-

“Whether the Income Tax Appellate Tribunal was right in quashing/setting aside the re-assessment proceedings under Section 147/148 of the Income Tax Act, 1961 on the ground that the original re-assessment proceedings had abated?

2. We have heard the learned counsel for the parties on the aforesaid question of law and proceed to dictate our decision.

3. The respondent-assessee is an individual. Additional Director of Income Tax (Investigation), Ambala on 17th October, 1996 had conducted survey under Section 133A at the business premises of Hindustan Agro Tech at Karnal and

books of accounts pertaining to Gupta and Gupta Agro Tech were impounded. The respondent-assessee is the proprietor of Gupta and Gupta Agrotech. Statement of the respondent-assessee was also recorded by the Additional Director of Income Tax (Investigation), Ambala.

Assessment Year 1995-96

4. The assessee had not filed return of income under Section 139 of the Act for the assessment year 1995-96. The Assessing Officer recorded reasons under Section 147 and notice under Section 148 was issued on 21st January, 1997. In response, the respondent-assessee filed a return declaring income of Rs.42,500/- on 30th June, 1997. The assessment was completed under Section 144 of the Act vide order dated 29th January, 1999. This order was set aside by the tribunal on the ground that the statutory notice under Section 143(2) was not served on the respondent-assessee within the stipulated period of 12 months from the end of the month in which return was filed.

5. Subsequently, the Assessing Officer recorded fresh reasons and notice under Section 147/148 of the Act was issued and served on the respondent-assessee on 23rd March, 2002. The respondent-assessee challenged the said notice before the Punjab and Haryana High Court at Chandigarh, but the writ petition was dismissed vide order dated 24th October, 2002. The Assessing Officer thereafter passed the assessment order dated 20th March, 2003 assessing the total income at Rs.30,10,100/-.

6. The first appeal was dismissed by the CIT (Appeals).

7. On further appeal before the tribunal, by the impugned order dated 11th December, 2009 it has been held that the re-assessment proceedings initiated were bad in law as the Assessing Officer in the original re-assessment proceedings, had failed to issue notice under section 143(2) of the Act, within 12 months from the end of the month in which the return was filed. The reasoning given by the tribunal reads:-

“5. We have considered the rival contentions and gone through the record carefully. Section 147 of the Act provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment in any assessment year, he may, subject to the provisions of sec. 148 to 153 of the Act, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the assessment proceeding under this section or recomputed the loss or the depreciation etc. as the case may be for the year concerned. Thus, the Assessing Officer should have some information which enable him to believe that any income chargeable to tax has escaped assessment. In the present case, whatever information was available with the Assessing Officer was considered by him before issuing notice under sec. 148 on 21.1.1997 in both these assessment years. These assessments have been quashed by the ITAT on the ground that notice under sec. 143(2) of the Act was not issued upon the assessee within 12 months from the end of the month in which return was filed and, therefore, the Assessing Officer cannot scrutinize the return filed by the assessee in response to the notice issued under sec. 148 of the Act. Thus, the assessment reached at a finality. Assessing Officer may be within his realm of power to issue fresh notice under sec. 148 if he is able to lay his hands on any fresh material indicating the escapement of income. We have gone through the reasons recorded by the Assessing Officer which have been placed on record by the learned counsel for the assessee. In these reasons, there is no reference to any fresh information. The Assessing Officer again reiterated the stand which was taken by him while issuing the first notice for reopening of assessment. The second notices issued under sec.148 of the Act for reopening of both these assessments were issued admittedly after expiry of four years from the end of the relevant assessment year. The assessment in the first instance was made under sec. 147 read with sec.143(3) of the Act. The interdiction provided in the proviso appended to sec. 147 putting an embargo upon the powers of the Assessing Officer for issuing notice under sec. 148 in the cases, where four years have expired from the end of the relevant assessment year and where assessment was made under sec.143(3) or under sec. 147 would come in the way of Assessing Officer. He has been denuded from his powers to issue notices for reopening of assessment after expiry

of four years if an assessment has been made under sec. 143(3) or under sec. 147 of the Act. The Assessing Officer can only issue the notice under sec. 148 in such cases if it is established that full and true particulars were not disclosed by the assessee for his assessment in the first round. There is no allegation or charge against the assessee in the present proceedings. Nowhere Assessing Officer has observed in the reasons that assessee failed to disclose fully and truly all material fact necessary for his assessment when he filed the return in response to the notice under sec. 148 of the Act. The earlier assessments made by the Assessing Officer are on the basis of full particulars. These were quashed because of some inherent legal lacuna of the jurisdiction at the end of Assessing Officer. There is no failure on the part of assessee in disclosing the material fact fully and truly which can authorize the Assessing Officer after expiry of four years from the end of relevant assessment years to re-appreciate the information already available to him for forming an opinion that income has escaped assessment. Thus, we are of the opinion that assessment in these two assessment years have been reopened only on the basis of change of the opinion. Therefore, we allow the ground of appeals raised by the assessee whereby he has challenged the reopening of assessment in assessment years 1995-96 and 1996-97."

Assessment Year 1996-97

8. On the basis of the survey report and statements, notice under Section 142(1) dated 20th January, 1997 was issued and served on the respondent-assessee. The respondent-assessee thereafter filed his return declaring income of Rs.55,000/- on 30th June, 1997. The return of income was not supported by any documents i.e. trading account, capital account and balance sheet etc. Notices under Section 143(2) and 142(1) were issued by the Deputy Commissioner of Income Tax, Special Range, Karnal, but as per the Revenue, the assessee did not cooperate and the assessment was completed under Section 144 of the Act. This order was confirmed in the first appeal, but the respondent-assessee succeeded in the second appeal before the tribunal, where it was held that the notice under Section 142(2) was required to be served within 12 months from the end of the month in which return was filed, but the Assessing Officer had failed to serve the notice.

9. Thereafter, the Assessing Officer recorded reasons to believe and issued notice under Section 147/148 of the Act and the said notice was served on the respondent-assessee. The respondent-assessee filed his return of income on 16th January, 2004 declaring income of Rs.55,000/-, again without trading account, profit and loss account, capital account and balance sheet etc.

10. The Assessing Officer completed assessment vide order dated 16th March, 2004 and the income of the respondent-assessee was assessed at Rs.17,50,300/-. The assessee did not succeed in the first appeal. The tribunal by the same order dated 11th December, 2009, allowed the appeal of the assessee for the reasons which have been set out and quoted above.

11. The facts elucidated above clearly show that the tribunal has quashed/set aside the original proceedings on the technical ground that statutory notice under Section 143(2) was not served on the respondent-assessee within the stipulated period of 12 months from the month in which return was filed.

12. The Assessing Officer thereafter had recorded fresh reasons and issued notice under Section 147/148 of the Act. The reasons to believe now recorded have to stand on their own legs and are separate from the reasons to believe, which were recorded earlier before initiation of the re-assessment proceedings, which abated. The said reasons to believe and issue of notice under Section 147/148 of the Act cannot be faulted and rejected on the ground that in the earlier/original assessment or re-assessment proceedings, notice under Section 143(2) was not served on the assessee within the statutory time/period. This was a valid ground to quash the first/original assessment/re-assessment order, but it cannot be a ground to quash the re-assessment proceedings, which have been initiated afresh after recording reasons to believe. In R. Kakkar Glass and Crockery House Vs. Commissioner of Income-tax, [2002] 254 ITR 273 (PandH), it has been held:

“10. .....When a notice is quashed on some technical ground, it would be in order to issue a fresh notice under Section 148 provided all other legal requirements of law have been complied with. For instance, if a notice under Section 148 is quashed on the ground that no reasons had been recorded, a second notice shall be in order after recording the reasons. Similarly, if a notice is quashed on the

ground that it has been issued without the requisite sanction of the higher authority, fresh notice can be issued after obtaining the necessary sanction. Such instances can be multiplied. However, if a notice under Section 148 is quashed after examination of the material relied on by the Assessing Officer and after recording a finding that on the basis of such material the additional income cannot be said to have escaped assessment, then it shall not be permissible for the Assessing Officer to issue a fresh notice on the basis of the same material in respect of the same item of income. However, in case some fresh material comes into the possession of the Assessing Officer subsequently suggesting escapement of income under the same head or some other head, we see no fetters on his power to issue a fresh notice under Section 148. Needless to emphasise that all such subsequent notices have to conform to the parameters prescribed under the law including the provision regarding limitation."

13. We may note here, the order passed by the Punjab and Haryana High Court in CWP No.16988/2002, Vishal Gupta Vs. Union of India and Others, which related to the assessment year 1995-96. The said writ petition was dismissed recording as under:-

"Challenge in this writ petition is to the notice dated 22.3.2002 issued by the Income Tax Officer, Karnal under Section 148 of the Income Tax Act (for short, the Act) seeking to re-assess the income for the assessment year 1995-96 which in his opinion has escaped assessment.

After hearing counsel for the petitioner and having gone through the writ petition, we are satisfied that the Income Tax Officer had prima facie reasonable basis to believe that the income in the hands of the assessee had escaped assessment as stated in the reasons contained in Annexure P-5. In response to the notice the petitioner has submitted his reply talking all possible objections including the one that the Income Tax Officer has no jurisdiction to deal with the matter. WE have no doubt in our mind that the Income Tax Officer will decide all the issue raised by the petitioner while making the final assessment under Section 147 of the Act. There is no ground for us to interfere at this stage.

Dismissed."

14. At this stage, learned counsel for the appellant submitted that this is a case of change of opinion and, therefore, the re-assessment proceedings have not been validly initiated. We do not find any merit in the said contention. In the present case, the original/first assessment/re-assessment proceedings were struck down on the ground that the notice under Section 143(2) was not served within the statutory time limit/period. The tribunal, therefore, did not go into and examine the findings on merits. The re-assessment proceedings were declared as invalid and illegal for technical reasons. The effect of the order passed by the tribunal in the first round was that the Assessing Officer was not competent to frame the assessment orders under Section 144 of the Act because notice under Section 143(2) was not served within the statutory time. Similar situation was examined by the Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC). The contention raised by the assessee in the said case was that the Assessing Officer had not issued notice under Section 143(2) after return of income was filed and therefore subsequent notice under Section 147/148 of the Act was illegal and void for lack of jurisdiction. It was averred that failure of the Assessing Officer to issue/serve notice under Section 143(2) of the Act itself amounted to change of opinion. This contention was rejected by the Supreme Court, inter alia, recording as under:-

“11. It is to be noted that substantial changes have been made to Section 143(1) with effect from 1-6-1999. Up to 31-3-1989, after a return of income was filed the assessing officer could make an assessment under Section 143(1) without requiring the presence of the assessee or the production by him of any evidence in support of the return. Where the assessee objected to such an assessment or where the officer was of the opinion that the assessment was incorrect or incomplete or the officer did not complete the assessment under Section 143(1), but wanted to make an inquiry, a notice under Section 143(2) was required to be issued to the assessee requiring him to produce evidence in support of his return. After considering the material and evidence produced and after making necessary inquiries, the officer had power to make assessment under Section 143(3). With effect from 1-4-1989, the provisions underwent substantial and material changes. A new scheme was introduced and the new substituted Section 143(1) prior to the subsequent substitution with effect from 1-6-1999, in clause (a), a provision was

made that where a return was filed under Section 139 or in response to a notice under Section 142(1), and any tax or refund was found due on the basis of such return after adjustment of tax deducted at source, any advance tax or any amount paid otherwise by way of tax or interest, an intimation was to be sent without prejudice to the provisions of Section 143(2) to the assessee specifying the sum so payable and such intimation was deemed to be a notice of demand issued under Section 156. The first proviso to Section 143(1)(a) allowed the Department to make certain adjustments in the income or loss declared in the return. They were as follows:

(a) an arithmetical error in the return, accounts and documents accompanying it were to be rectified;

(b) any loss carried forward, deduction, allowance or relief which on the basis of the information available in such return, accounts or documents, was prima facie admissible, but which was not claimed in the return was to be allowed;

(c) any loss carried forward, relief claimed in the return which on the basis of the information as available in such returns, accounts or documents were prima facie inadmissible was to be disallowed.

12. What were permissible under the first proviso to Section 143(1)(a) to be adjusted were, (i) only apparent arithmetical errors in the return, accounts or documents accompanying the return, (ii) loss carried forward, deduction allowance or relief, which was prima facie admissible on the basis of information available in the return but not claimed in the return and similarly (iii) those claims which were on the basis of the information available in the return, prima facie inadmissible, were to be rectified/allowed/disallowed. What was permissible was correction of errors apparent on the basis of the documents accompanying the return. The assessing officer had no authority to make adjustments or adjudicate upon any debatable issues. In other words, the assessing officer had no power to go behind the return, accounts or documents, either in allowing or in disallowing deductions, allowance or relief.

13. One thing further to be noticed is that intimation under Section 143(1)(a) is given without prejudice to the provisions of Section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under Section 156, that did not per se preclude the right of the assessing officer to proceed under Section 143(2). That right is preserved and is not taken away. Between the period from 1-4-1989 to 31-3-1998, the second proviso to Section 143(1)(a), required that where adjustments were made under the first proviso to Section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from 1-4-1998, the second proviso to Section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till 1-6-1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to Section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between 1-4-1998 and 31-5-1999, sending of an intimation under Section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word “intimation” as substituted for “assessment” that two different concepts emerged. While making an assessment, the assessing officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to Section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the assessing officer. The reason is that under Section 143(1)(a) no opportunity is granted to the assessee and the assessing officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under Section 143(1)(a) indicates that the assessing officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to Section 143 by the Finance (No. 2) Act of 1991 with effect from 1-10-1991, and subsequently with effect from 1-6-1994, by the Finance Act, 1994, and ultimately omitted with effect from 1-6-1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under Section 143(1)(a) was deemed to be an order for the purposes of Section 246 between 1-6-1994 to 31-5-1999, and under Section 264 between 1-10-1991, and 31-5-1999. It is to be noted that the expressions “intimation” and “assessment

order” have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes “the computation of income”, sometimes “the determination of the amount of tax payable” and sometimes “the whole procedure laid down in the Act for imposing liability upon the taxpayer”. In the scheme of things, as noted above, the intimation under Section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under Section 143(1)(a) as it stood prior to 1-4-1989, the assessing officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the legislature i.e. to minimise the departmental work to scrutinise each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D.K. Jain, J.) in Apogee International Ltd. v. Union of India. It may be noted above that under the first proviso to the newly substituted Section 143(1), with effect from 1-6-1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under Section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any assessing officer, but mostly by ministerial staff. Can it be said that any “assessment” is done by them? The reply is an emphatic “no”. The intimation under Section 143(1)(a) was deemed to be a notice of demand under Section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under Section 143(1)(a), the question of change of opinion, as contended, does not arise.”

15. In view of the aforesaid position, we answer the aforesaid question of law in negative i.e. in favour of the appellant and against the respondent-assessee. No costs.

16. The tribunal will decide the appeal on merits. To cut short delay, the parties are directed to appear before the Assistant Registrar of the tribunal on 28th May, 2012, when a date of hearing will be fixed.