



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.112 OF 1993

Prime Securities Limited, a Company
incorporated under the Companies Act,
1956 and having its registered
office at World Trade Centre No.1,
6th floor, Cuffe Parade,
Bombay- 400 005

...Petitioner.

V/s.

1. Varinder Mehta, Assistant
Commissioner of Income-tax
(Inv.) Circle 1(1), Bombay
having his office at Aayakar
Bhavan, Maharashi Karve Marg,
Bombay- 400 020.

2. Union of India

...Respondents.

Mr.P.J.Pardiwala, Sr.Counsel with Mr.A.K.Jasani , advs. for the
Petitioner.

Mr.Suresh Kumar with Ms.Suchitra Kambli , advs. for the
Respondents.

**CORAM: Ferdino I. Rebello &
J.H.Bhatia, JJ.**

DATE : 27th April, 2009.

JUDGMENT: (Ferdino I. Rebello, J.)

1 Petitioner had approached this Court to impugn the



notice and letter both dated 16th October, 1992 and the notice dated 1st January, 1993 being Exhibit A to the petition and letter dated 1st January, 1993 being Exhibit

B. A few facts may now be set out. In November, 1990, petitioner sold shares of Pudumji Pulps & Paper Mills Limited and Noble Soya House Ltd. to Great Eastern Shipping Company Ltd. which company was the petitioner's holding company. On 31.12.1991 petitioner filed return of income for the assessment year 1991-92, in which the capital gains arising on the transfer of shares of Great Eastern Shipping Company Ltd. were claimed as not chargeable to tax in view of the provisions of Section 47(v) of the Income-tax Act (In short 'The Act'). This return was signed by the company secretary. In March, 1992, the petitioner had issued fresh shares to entities other than its



holding company as a result whereof the shareholding of Great Eastern Shipping Company Ltd. came down from 100% to 43% of the petitioner's share capital.

2 By letter of 9.10.1992 respondent no.1 informed the petitioner that the return it filed on 31st December, 1991 was invalid inasmuch as the return was signed by the Company secretary and not by the Managing Director as required under section 140 of the Act. Petitioner was called upon to show cause as to why the return filed should not be treated as an invalid return. On 15.10.1992 petitioner substituted the return it filed on 31st December, 1991 by another return which was identical to the one filed on December 31, 1991 except that it was signed by the Director in accordance with Section 140 of the Act. Petitioner informed respondent no.1 that on account of an inadvertent error the earlier return

was signed by the Company Secretary and requested respondent no.1 to treat the original return filed on 31st December 1991 as a valid return. In this return also, the exemption under Section 47(v) was claimed having regard to the fact that it merely substituted the earlier return. On 15.10.1992 respondent no.1 issued an intimation under Section 143(1)(a) accepting the income disclosed in the return filed on 15th October, 1992.

3 On 16.10.1992, a letter was issued by respondent no.1 to the petitioner pointing out that instead of filing a reply to his letter dated 9th October, 1992, the petitioner had merely filed a substituted return. Respondent no.1 reiterated that the return filed on 31st December, 1991 was an invalid return and the return filed on 15th October, 1992 would be considered as the original return. On 16.10.1992 respondent



no.1 wrote to the petitioner pointing out that in the original return filed on 15th October, 1992, the petitioner had claimed the benefit of Section 47(v) even though it ceased to be a 100% subsidiary of Great Eastern Shipping Company Ltd. with effect from March, 1992. Therefore, the petitioner was called upon to show cause as to why the intimation issued on 15th October 1992 should not be rectified in accordance with Section 155(7B) read with Section 47A. On 16.10.1992 respondent no.1 issued a notice under Section 155 pointing out that the intimation made on 15th October, 1992 needed to be rectified as there is a mistake apparent from the record and called upon the petitioner to show cause within three days of receipt of the said notice, as to why such rectification order should not be passed. On 3.11.1992 respondent no.1 wrote to the petitioner informing it, that nobody appeared in response

to the notice dated 16th October, 1992 and gave one more opportunity to appear on 6th November, 1992. Petitioner filed a reply with respondent no.1 and petitioner pointed out that the petitioner's chartered accountant had by its letter dated 15th October, 1992 replied to the earlier letter dated 9th October, 1992. It was also pointed out that by virtue of Section 139(9) an assessee is entitled to be given an opportunity to rectify a defect that may exist in the original return and accordingly, the petitioner treated the letter dated 9th October, 1992 as an intimation of a defect and had accordingly cured the defect. Respondent's attention was also invited to the provisions of Section 292B of the Act and it was submitted that in view thereof the original return must be regarded as having been substituted by the return filed on 15th October, 1992. It was also submitted that the

decisions relied upon in the show cause notice were in respect of the provisions as they existed prior to the insertion of Section 139(9) and Section 292B. Respondent no.1 was requested to treat the original return filed on 31st December, 1991 as a valid return and rectify the intimation wherein it was stated that the return was filed on 15th October, 1992.

4 On 6.11.1992 petitioner filed a reply in response to the notice under Section 155. Therein it was pointed out that detailed submissions had already been filed on 31st December, 1991. It was also pointed out that on the date when the return was filed the benefit under Section 47(v) was correctly claimed and there was no question of concealment of any facts from the income-tax department. It was further pointed out that there was no question of rectifying the intimation under Section 143(1)(a) because under clause (iii)

of the first proviso to Section 143(1)(a) an adjustment has to be made on the basis of the information in the return or the accounts and documents accompanying the return. The information about the reduction in the shareholding of Great Eastern Shipping Company Ltd. in the petitioner, was available from an external source and hence the same could not be the basis for rectifying the intimation. By the reply of 11.11.1992 the petitioner made further submissions to respondent no.1 in support of its contention that the return filed on 15th October, 1992 correctly substituted the original return filed on 31st December, 1991. Respondent no.1 was also requested to furnish a copy of the approval granted by the Commissioner for withholding the refund due to the petitioner pursuant to the intimation dated 15th October, 1992. On 1.1.1993 fresh notice under Section 155 was

issued to the petitioner asking the petitioner to show cause as to why the intimation issued on 15th October, 1992 be not rectified in terms of section 155(7B) of the Act. Petitioner on 9.1.1993 addressed a letter to the respondent no.1 pointing out that neither the notice nor the letter accompanying the notice dated 1st January, 1993 specified which order was purported to be rectified. It was further pointed out that although the petitioner has repeatedly drawn the attention of respondent no.1 to the provisions of section 139(9) and section 292B no reference to the same is made in the show cause notice.

5 On behalf of the petitioner, the learned counsel submits that the respondents were not justified or right in treating the return filed on 31st December, 1991 as invalid. It was submitted that an inadvertent signing of the return by the Company Secretary would not render return illegal. Defect at

the highest would amount to an irregularity and as such, is curable. It is further submitted that under Section 139(9) of the Act, it was incumbent on the respondents in law to inform the defect to the petitioner and permit the petitioner to rectify the defect. On the defect being pointed out on 9.10.1992, the same was corrected on 15.10.1992. This aspect has not been considered by the respondents while issuing the notice. At any rate in alternative, it is submitted that in view of the provisions of Section 292(B) of the Act, original return of the income filed on 31st December, 1991 cannot be declared as bad and invalid. Once Section 292(B) has been inserted by the Taxation Laws (Amendment) Act, 1975, with effect from 1.10.1975, the return is not to be treated as invalid merely by reason of if mistake, defect or omission, if the return was in substance and effect in conformity with or

according to the intent and purpose of this Act. It is not necessary to refer to some other submissions.

On the other hand, on behalf of the respondents, the learned counsel submits that the return being non-est, respondents were within their jurisdiction to issue the notice. At any rate, they submitted that the petitioner ought not to have approached this Court but awaited the final outcome of the proceedings. In these circumstances, it is submitted that the petition being pre-mature ought to be dismissed.

6 The first question that we have called upon to answer is whether the signing of the return by the Company Secretary instead of a director as contemplated under Section 140 of the Income-tax Act, renders the return defective and or non-est. For that purpose, we may at the outset consider the law



as enunciated in Commissioner of Agricultural Income-tax, West Bengal v. Sri Keshab Chandra Mandal (1950) XVIII Income-tax Reports 569 (SC). The Supreme Court was considering whether the declaration in the form of return of an individual assessee should be signed by the assessee himself or could be signed by the agent under the provisions of the Bengal Agricultural Income-tax Act, 1944. After considering the scheme of the Act and the Rules of interpretation, the Supreme Court was pleased to observe that hardship or inconvenience cannot alter the meaning of the language employed by the legislature, if such meaning is clear on the face of the statute or the rules. The Supreme Court then observed, not to insist on personal signature on returns or appeals or applications will let in signature by agent not duly authorised in writing and without production of such

writing. In that case the provisions for penalty for filing false returns may quite conceivably be difficult of application. The Supreme Court observed that if a statute requires personal signature of a person, which includes a mark, the signature or the mark must be that of the man himself. There must be physical contact between that person and the signature or the mark put on the document. In that light, it was held that the return filed was non-est.

Our attention was further invited to the judgment of the Calcutta High Court in Sheonath Singh v. Commissioner of Income-tax, West Bengal (1958) Vol. XXXIII Income Tax Reports 591 where the issue was absence of or defect in the signature of the appellant on the memorandum of appeal filed under the provisions of the Income-Tax Act. A learned Bench of the Calcutta High Court held that the same



to be in the nature of rectifying irregularity and not an illegality and as such, could be amended. This view was followed by the Patna High Court in *Gouri Kumari Devi v. Commissioner of Income-tax, Bihar & Orissa* (1959) XXXVII I.T.R. 220 as also by the learned Bench of the Orissa High Court in *Addl. Commissioner of Income-tax, Orissa v. K.Padmaloachan Sahu* (1974) 95 I.T.R. 113. These judgments were brought to the attention to contend that at the highest failure to sign by the director was an irregularity and as such, was curable.

7 In our opinion, once Section 140 of the Act mandates that the return has to be signed in the case of a company by the Managing Director and where Managing Director is not available by any Director thereof, it is not possible to hold that the signing of the return by the Company Secretary is

merely an irregularity. When the law provides for a particular thing to be done in particular manner, it must be so done. Apart from that the language used in Section 140 is "Shall be signed and verified". In our opinion, therefore, the principles as laid down by the Supreme Court in *Sri Keshab Chandra Mandal (Supra)* will have to be applied. Such a defect, therefore, will not amount to a mere irregularity and the return filed on 31.12.1991 will have to be treated as defective.

8 Having so held, we may now consider the second contention based on Section 139(9) of the Act. Section 139(9) reads as under:

"139(9). Where the [Assessing] Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such

further period which, on an application made in this behalf, the Assessing Officer may, in his discretion, allow; and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Act, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return:

Perusal of this subsection indicates that a duty is cast on the Assessing Officer when he considers the return of income to be defective to intimate the defect to the assessee and to give an opportunity to rectify the defect within a period of 15 days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing Officer may allow.

9 In the instant case, if it is held that the notice of 9.10.1992 is the notice as contemplated by Section 139(9) then in that event, petitioner within 15 days had removed the defect by



filing the same return but with the signature of the director.

A similar issue had come up for consideration before the learned Division Bench of the Kerala High Court in

Commissioner of Income-tax v. Masoneilan (India)

Ltd. (2000) Vol.242 I.T.R. 569. In that case also, the

assessee was a public limited company. Return was signed by a

person not named under Section 140 of the Act in relation to

the "company". Notice was issued under Section 154 of the Act

to the assessee stating that the return was non-est and all

proceedings were being initiated on the basis that return

were void ab initio. The issue before the learned Division

Bench of the Kerala High Court was, whether Section 292B of

the Act applied to the facts of the case. The learned Division

Bench held that once the defect was cured, question of

rectification would not arise. In our opinion, therefore,

considering the duty cast on the Assessing Officer, the communication of 9.10.92 must be read as an intimation to the petitioner pursuant to which the defect was remedied on 15.10.1992. We have earlier held that not signing the return by the proper person results in the return being defective. Can then the defect in the return be cured by virtue of Section 139(9). In our opinion, the answer is in the affirmative. Failure to sign by a proper person is a defect. The expression defect will have to be understood as it is naturally understood. Even if the defect has the effect of treating the return as non-est, the legislature still has provided for curing such defects. If the defect is cured then the return becomes a valid return. Petition on that count will have to be allowed.

10 The last submission is the consequence flowing

from the provisions of Section 292B. It was introduced by Taxation Laws (Amendment) Act, 1975, with effect from 1.10.1975 and reads as under:

“292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.”

A bare reading of this provision, makes it clear that a return of income shall not be treated as invalid merely by reason of any mistake, defect or omission in such return of income, if such return of income is in substance and effect in

conformity with or according to the intent and purpose of this Act. The return of income, therefore, if not signed by signatory as contemplated by Section 140 would be mistake, defect or omission. Question is whether in spite of the defect, the return was in substance and effect in conformity with or according to the intent and purpose of this Act. Submissions on behalf of the respondents is that by virtue of fresh shares issued by the petitioner, petitioner ceased to be a holding company of Great Eastern Shipping Company Ltd. and consequently, benefit of Section 47 of the Income-tax Act was not available. The assessment year was 1991-92. The previous year would be 1990-91. Admittedly, when the petitioner filed the return, it was a 100% subsidiary of Great Eastern Shipping Company Ltd. and upto March, 1992. Return had been filed on 31.12.1991. The return had been

substituted on 15.10.1992 by which date the petitioner had ceased to be a 100% subsidiary of the company. It is in that context, we will have to examine the later part of Section 292B. We may gainfully refer to the judgment of the Supreme Court in **Commissioner of Income-tax v. Hindustan Electro Graphites Ltd. (2000) Vol.243 I.T.R. 48**, which approved the judgment of the Calcutta High Court in **Modern Fibotex India Ltd. And another v. Deputy Commissioner of Income-tax and others (1995) Vol.212 I.T.R. 496**. The issue before the Calcutta High Court was the validity of intimation under Section 143(1)(a) and the constitutionality of sections 143(1)(a) and 143(1A) of the Income-Tax Act. The Company in its return for the assessment year 1989-90 discloses business loss on the ground that cash compensatory support was not taxable and

that even if cash compensatory support was treated as taxable, the company would still have suffered a loss in the year. Subsequent to the company submitting its return, the Finance Act, 1990, was enacted and Section 28 of the Act were amended with effect from April 1, 1967, making cash compensatory support taxable. The Income-tax officer issued notice under Section 143(2) of the Act to the company for the assessment year 1989-90. After notice under 143(1)(a), additional tax was levied and a demand was raised. Company in that event filed revised return and on September 7, 1990, filed an application under Section 154 of the Act against the intimation under Section 143(1)(a) of the Act. A learned Single Judge of the Calcutta High Court was pleased to observe that the date for judging the question of adjustment must be the actual date of the return in the light of the law

then prevailing. The Court held to hold otherwise would manifestly shock one's sense of justice that an act, correct at the time of doing it, should become incorrect by some new enactment. In the case before the Supreme Court, assessee had filed return for the assessment year 1989-90 in December, 1989. It received cash assistance from Government of India in respect of exports, which it had not included as income. Consequent to Section 28 being given retrospective effect from 1.4.1967, the Cash compensatory assistance was made chargeable as business income. Question was whether the return filed by the assessee was correct. The Court held there that where the return is valid, the law applicable would be law as it stood on the date of filing of the return.

11 In the instant case, when the petitioner filed its return

for the previous year 1990-91 the petitioner was a fully owned subsidiary of Great Eastern Shipping Company Ltd. The petitioner ceased to be fully owned subsidiary only after March, 1992. The defect in signature was removed on 15.10.1992 but in respect of the same assessment year 1991-92. In our opinion, the subsequent event can not result in holding that the return as originally filed was not in substance and effect in conformity with or according to the intent or purpose of the Act on the date the return was filed. The test to be applied is whether on the date the original return was filed was the return in conformity with or according to the purpose of the Act. On the date the return was filed the petitioner was admittedly a wholly owned subsidiary of Great Eastern Shipping. It is true that the return was invalid as originally filed because of a defect in the person signing the

returns. But by virtue of Section 139(9) that defect could be cured and was in fact cured. Though the defect was cured on 15.10.92 it would relate back to 31.12.1991 the date of original filing of the return. Once the return is valid and in conformity with the intended purpose of the act, in our opinion, therefore, on this count also, the petition will have to be allowed.

12 Petition therefore, allowed in terms of prayer clauses (a), (b) and (c). Rule made absolute accordingly. In the circumstances of the case, there shall be No order as to costs.

(J.H.Bhatia, J.)

(Ferdino I. Rebello, J.)