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THE HON'BLE SRI JUSTICE DILIP B. BHOSALE AND THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

I.T.T.A. No. 36 of 2004

31-03-2015

Commissioner of Income Tax-II, Visakhapatnam. Petitioner

Shri Varanasi Khanta Rao, Prop. Sri Sai Srinivasa Modern Rice Mill, Avalangi
Village, Srikakulam Mandal, Srikakulam District. Respondent

Counsel for petitioner: Senior Counsel Sri S.R.Ashok

Counsel for the Respondents : Sri Challa Gunaranjan

<Gist:

>Head Note:

? CITATIONS:

1.(1968) 67 ITR 84
2.(1973) 88 ITR 323
3.(2000) 2 SCC 718

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JUDGMENT: (Per Honble Sri Justice A.Ramalingeswara Rao)

This appeal is filed by the Revenue against the order of the Income Tax Appellate Tribunal, Visakhapatnam, in I.T.A. No. 375/V/2002, dated 20.11.2002, allowing the appeal of the assessee for the year 1999-2000.

The following substantial questions of law were framed for

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our consideration:
(a) Whether the Appellate Tribunal is justified in holding that the revisional proceedings are vitiated on the ground of lack of jurisdiction?

(b) Whether the observations of the Appellate Tribunal with regard to jurisdictional constraints u/s.263 are not based on statutory language employed in Sec.263 of I.T. Act?

(c) Whether the Appellate Tribunal is justified in holding that cancellation of assessment by the Commissioner and ordering fresh enquiry is beyond the jurisdiction of the Commissioner U/s.263?

(d) Whether the Appellate Tribunal is justified in entering into merits of the case and recording findings on the factual matrix in the absence of placement of any material either before assessing authority or revisional authority much less findings were recorded by them?

Though the above questions of law were framed, all the questions centered round the power and jurisdiction of the revisional authority under Section 263 of the Income Tax Act (for short, the Act), and hence in the facts and circumstances of the case, we reframe the substantial question of law as follows for our consideration:

Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal, Visakhapatnam, is justified in holding that the Commissioner of Income Tax did not exercise his jurisdiction under Section 263 of the Income Tax Act properly?

The assessee is a Proprietor of Sri Sai Srinivasa Modern Rice Mill, Srikakulam, and he completed the construction of rice mill by March 1999. He filed return of income for the assessment year 1999-2000 declaring the income of Rs. 4,60,960/-. It was processed under Section 143(1) of the Act. The assessee was connected to Sri Venkata Santhamani Modern Rice, Groundnut Oil Mill, in respect of which a survey under Section 133A of the Act was conducted and the case of the assessee was also taken up for scrutiny by the

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Assessing Officer. The Assessing Officer passed an order on 15.03.2000 as follows:

The assessee has filed return of income for the Assessment year 1999-2000 on 31.12.1999 by declaring income of Rs. 4,60,960/- and the same has been processed U/s.143(1). This case is connected case to Sri Venkata Santhamani Modern Rice G.N.Oil Mill where in Survey under Section 133A was conducted. Hence it has been taken up for scrutiny and notices U/s.143(2) have been issued. In response there to the assessee and his Authorised Representative appeared and discussed about the case. As the assessee has filed return of income by admitting income and paid the taxes as agreed at the time of survey, the assessment is completed by accepting the returned income.

		Rs.	
Income Returned	:	4,60,960	
Add: Agrl. Income	:		38,200
Total	:		4,99,160
Income Tax thereon	:		1,23,748
Less: Rebate on Agrl.Income		6,640	
		1,17,108	
Less: Rebate U/s.88		7,457	
		1,09,651	
Add: Int. U/s.234B & C		19,349	
		1,29,000	
Less: Prepaid Taxed			1,29,000
Tax payable			NIL

The Commissioner of Income Tax 2, Visakhapatnam, called for the assessment record of the assessee and on the basis of the verification of the material available in the assessment records he found that the order of assessment was

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erroneous in so far as it was prejudicial to the interests of revenue on the following grounds:

i) There was a short accounting of yield of finished rice to the extent of 18% of total paddy consumed which amounted to 5653.95 quintals of finished rice, and it resulted in short charge of tax of about Rs. 19,04,535/-;

ii) As per the tax audit report, the valuation of closing stock was not made at the cost price of the paddy purchased during the financial year 1998-1999;

iii) There was a discrepancy in the purchase cost of 2nd gunnies as compared to the 1st gunnies and also the sale price of 2nd gunnies as compared to the valuation adopted in respect of the closing stock of 2nd gunnies;

iv) There was apparent discrepancy between the raw material cost of each unit and the sale price of finished rice amounting to Rs. 19/- per unit of finished rice sold;

v) The correctness of the credit liabilities of 102 parties with their full addresses and the year wise breakup of the past years was not verified by the Assessing Officer;

vi) The deduction of interest liability towards other concerns was not properly examined, and

vii) The rebate under Section 88 of the Act should not have been allowed for NSC deposit of Rs. 11,000/-.

A show cause notice was issued to the assessee requiring him to submit clarification or explanation to the above issues and also to show cause why the assessment made under Section 143(3) of the Act dated 15.03.2000 should not be set aside. The assessee appeared through his representative and submitted a written explanation to the show cause notice. After considering the explanation, the Commissioner considered it desirable to restore the entire assessment order for making fresh assessment de novo and in the concluding paragraph of his order he observed as follows:

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In the totality of the facts and circumstances of the case, the assessment order passed by the Assessing Officer u/s.143(3) on 15.03.2000 is hereby set aside and the A.O. is directed to initiate fresh assessment proceedings and carry out necessary enquiries/cross verification in respect of the various points stated in the show-cause notice served u/s.263 of the I.T. Act, 1961 and provide reasonable opportunity to the assessee to produce its regular books of accounts/bills and vouchers/documents which he may choose to rely upon for substantiating his own claim. During the fresh assessment proceedings, the A.O should call for the minimum support of price fixed by State Govt., towards purchase cost of different variety of paddy for the F.Y. 98-99 and also the sale price of rice fixed in respect of levy rice sold to FCI for the F.Y. 98-99 and examine whether the purchase cost of paddy was properly shown in the accounts of assessee and the sale price of the rice was properly accounted for. Wherever, the purchase cost of paddy is found to be shown at higher amounts compared to the minimum support price fixed by the State Govt. for the F.Y.98-99, necessary cross verification may be carried out before allowing the assessees claim. The complete details of sundry creditors amounting to Rs. 33,60,999/- as on 31.03.99 should be cross verified from the creditors concerned including subsequent date of payment of such credit liabilities to each creditor concerned after 31.3.99. Thereafter a fresh assessment order may be passed in accordance with the relevant provisions of law.

While coming to the said conclusion he relied on the decisions of the Supreme Court in Rampyari Devi Saraogi v. Commissioner of Income Tax and Smt.Tara Devi Aggarwal v. Commissioner of Income Tax.

The assessee went in appeal before the Tribunal, wherein reliance of the Commissioner on the above decisions was disputed. The Tribunal considered the above issues and replies furnished by the assessee and came to the conclusion that the above points raised by the Commissioner of Income Tax in no way affect the income of assessee and render the assessment proceeding erroneous and prejudicial to the interests of the revenue. The Tribunal further held that after

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an agreed assessment is completed on the basis of discussion and deliberations made with the assessee and his authorized representative by the Assessing Officer, the Commissioner of Income Tax is not supposed to raise the issue again and step into the shoes of the Assessing Officer like an appellate authority. After holding so, the Tribunal concluded as follows:

After all his powers as per the provisions of Section 263 are supervisory in nature and not like that of an appellate authority. It will not be out of place to mention here that the legislature while compiling the statute has assigned only to the first appellate authority the powers of an AO. By virtue of that power only the first appellate authority is supposed to step into the shoes of an AO and even can enhance the assessment. Even the Tribunal has not been assigned with that power of enhancement. Therefore, in all fitness of things and in all fairness the legislatures intention has to be properly understood and the supervisory power of the CIT should not be misused simply because the order passed by the AO was a cryptic one as has been in the impugned case. Hence in our considered view when the issue raised by the CIT in the show cause notice in pursuance to invoking of Section 263 in no way are fatal to the interest of the Revenue when the assessee has already disclosed income at the time of survey u/s.133(A) amounting to Rs. 3,60,000/- and has accepted the same on agreed basis after due discussions and deliberations along with his authorized representative before the AO at the time of assessment proceedings which means sticking to his disclosure at the time of survey, in all fairness there does not remain any scope for the CIT to invoke Section 263 and assume his revisional jurisdiction.

Further we do not find any infirmity in the order of the AO in the impugned case as per the two limbs contemplated u/s.263 (i.e., erroneous and prejudicial to the interest of the Revenue); hence in our considered opinion in the present facts and circumstances of the case assumption of jurisdiction u/s.263 by the CIT does not stand on a sound footing. We therefore, set aside the order of the CIT and restore the order of the AO.

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Against the said finding recorded by the Tribunal, the present appeal is filed by the Revenue.

It is contended by the learned Counsel for the Revenue that the assessment order is cryptic and the points raised by the Commissioner of Income Tax are the errors, which are prejudicial to the interests of the revenue. Learned Counsel for the assessee, on the other hand, submitted that since the Assessing Officer discussed about the case with the assessee and filed the return of income admitting the income, paid taxes as agreed at the time of survey and the assessment was completed by accepting the return of income, the Commissioner cannot issue the order for de novo enquiry in exercise of his powers under Section 263 of the Act.

Section 263 of the Act reads as follows:

Revision of orders prejudicial to revenue.

263. (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub- section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court

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On a reading of the above provision it is clear that the only precondition for revising the order of Assessing Officer is that the order of the Assessing Officer should be erroneous in so far as it is prejudicial to the interests of the revenue. The Commissioner pointed out the errors in the order of the Assessing Officer and a perusal of the errors would clearly disclose the prejudicial interest of the revenue. The vesting of such power in the hands of the Commissioner under Section 263 of the Act is to see that the Assessing Officer does not commit any error affecting the interests of the revenue.

We will consider the cases relied on by the learned Commissioner of Income Tax while passing the order impugned before the Tribunal. The first case is Rampyari Devi Saraogi (supra) decided by the Supreme Court. In the said case the appellant, who was an assessee, was sent a notice by the Commissioner of Income Tax, West Bengal, under Section 33B of the Income Tax Act, 1922, proposing to pass an order under Section 33B of the said Act and, accordingly, giving an opportunity to her. The Tax Consultant, on behalf of the assessee, wrote a letter to the Commissioner stating that the show cause notice was bad in law, illegal, void and without jurisdiction. However, the assessee appeared before the Commissioner, and the Commissioner passed an order on the same day cancelling the assessments made in favour of the assessee and directing the Income Tax Officer to do fresh assessments according to law after making proper enquires and investigation with regard to the jurisdiction, carrying on of the business, possession of initial capital, gifts received and the sources of the moneys invested in the name of the assessee. The same was challenged before the High Court of Calcutta under Article 226 of the Constitution of India, and the Division Bench of the High Court dismissed the Writ Petition. While upholding the order of the Division Bench of the High Court, the Supreme Court, speaking through the three Judge Bench, held as follows:

It is not necessary to further detail the reasons given by the Commissioner because on the face of the record the orders were prejudicial to the interest of the revenue, and even if the facts which the Commissioner introduced regarding the enquiries made by him had been indicated to the assessee,

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the result would have been the same. The assessee, in our view, has not in any way suffered from the failure of the Commissioner to indicate the results of the enquiries, mentioned above. Moreover, the assessee will have full opportunity of showing to the Income Tax officer whether he had jurisdiction or not and whether the income assessed in the assessment orders which were originally passed was correct or not.

The said decision was followed by another three Judge Bench of Supreme Court in Smt.Tara Devi Aggarwal (supra).

On a perusal of the above two judgments, we have no doubt that the Commissioner of Income Tax followed the ratio laid down in the above decisions and exercised his powers under Section 263 of the Act.

In Malabar Industrial Co.Ltd. v. Commissioner of Income Tax the scope of the revisional power of the Commissioner was examined. It was held that the Commissioner has to be satisfied of twin conditions, namely, i) the order of the Assessing Officer sought to be revised is erroneous; and ii) it is prejudicial to the interests of the revenue. If one of them is absent, it was also held that recourse cannot be had to Section 263(1) of the Act. It was also held that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. It was also held that the order passed without applying the principles of natural justice or without application of mind fall under the said category. The phrase prejudicial to the interests of the revenue was explained as follows:

8. The phrase prejudicial to the interests of the Revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not conferred to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. v. S.P. Jain & Anr. [(1957) 31 ITR 872 (Cal)], the High Court of Karnataka in Commissioner of Income-tax, Mysore v. T. Narayana Pai [(1975) 98 ITR 422 (Kant)], the High Court of Bombay in Commissioner of

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Income-tax v. Gabriel India Ltd. [(1993) 203 ITR 108 (Bom)] and the High Court of Gujarat in Commissioner of Income-tax v. Smt. Minalben S. [(1995) 215 ITR 81 (Guj)] treated loss of tax as prejudicial to the interests of the revenue.

9. Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Company v. Commissioner of Income-tax [(1987) 163 ITR 129 (Mad)] interpreting "prejudicial to the interests of the revenue". The High Court held:

"In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration".

In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

10. The phrase prejudicial to the interests of the Revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by

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the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See Rampyari Devi Saraogi v. Commissioner of Income tax [(1968) 67 ITR 84 (SC)] and in Smt. Tara Devi Aggarwal v. Commissioner of Income-tax, West Bengal. [(1973) 88 ITR 323 : (1973) 3 SCC 482 : 1973 SCC (Tax) 318]

In the instant case, a perusal of the order of the Assessing Officer would show that the return of income filed by the assessee was accepted and the tax was finalized. From the order of the Assessing Officer, one cannot deduce whether the errors pointed out by the Commissioner of Income Tax were considered by the Assessing Officer or not. The Commissioner of Income Tax, not only pointed out the errors, but also had shown the effect of the same on the revenue. It is not known how the Tribunal has come to the conclusion that the errors have no effect on the revenue. The Tribunal ought not to have taken into consideration the explanation submitted by the assessee before the Commissioner for coming to the conclusion that the errors pointed out by the Commissioner have no effect on the revenue. Ultimately, it is for the Assessing Officer, at the time of de novo enquiry, to consider whether the explanation offered by the assessee to the points raised by the Commissioner is proper or not. When once the Commissioner has got power to point out the errors which had the effect on the revenue, the Tribunal cannot sit as an appellate authority on the order of the Commissioner passed under Section 263 of the Act. If the power exists in the Commissioner and is exercised by him after satisfying himself on the facts of the case, it is not for the Tribunal to re-appreciate the said satisfaction of the Commissioner. It is only when the Commissioner does not exercise the power properly in satisfying the twin test contemplated under Section 263 of the Act, the order of the Commissioner can be held to be perverse, but not by re- appreciating the order of the Commissioner. A prima facie perusal of the order of the Commissioner shows that the Commissioner was satisfied that there were errors which had effect on the interests of the revenue and it needed a further probe by the Assessing Officer.

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In the facts and circumstances of the case, we are satisfied that the order passed by the Commissioner is proper and validly exercised as per the powers conferred on him under Section 263 of the Act and we, accordingly, set aside the order of the Tribunal. Hence, we hold the substantial question of law in favour of the Revenue and against the assessee.

The appeal is, accordingly, allowed. The miscellaneous petitions, if any, stand disposed of. There shall be no order as to costs.

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(DILIP B. BHOSALE, J)

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(A.RAMALINGESWARA RAO, J)
31.03.2015