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**(2005) 04 AHC CK 0226**

**Allahabad High Court**

**Case No:** IT Reference No. 99 of 1993 27 April 2005

Commissioner of  
Income Tax

APPELLANT

Vs

Asha Family Trust

RESPONDENT

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**Date of Decision:** April 27, 2005

**Acts Referred:**

- Income Tax Act, 1961 - Section 143, 161, 246, 256, 32

**Citation:** (2005) 148 TAXMAN 578

**Hon'ble Judges:** R.K. Agrawal, J; P. Krishna, J

**Bench:** Full Bench

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### **Judgement**

@JUDGMENTTAG-ORDER

P. Krishna, J.

The Income Tax Appellate Tribunal, New Delhi at the instance of the Income Tax department has referred the following question of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act,") for opinion to this Court:-

"Whether on the facts and in the circumstances of the case, Tribunal is right in holding that the assessing officer has no jurisdiction to change the status while making the assessment u/s 143(1) and in that background whether a change in the status is appealable to the first appellate authority".

2. The assessment year 1984-85 is involved in the present reference. The brief facts of the case are as follows :-

The assessee-respondent had filed the Income Tax returns and claimed the status as "specified trust". The Income Tax Officer completed the assessment for all these years u/s 143(1) of the Act. However, he while making the assessment u/s 143(1) of the Act

adopted the status as that of AOP and charged tax at maximum marginal rate. The said assessment orders were challenged by way of filing appeals before the Deputy CIT(A) and it was contended that the Income Tax Officer had erred in taking status of AOP. and charging maximum rate of tax. It was claimed that as per the "returns in the status of specified family trust there was no tax liability in view of section 161 of the Act as the Trust was not a business trust. But the Income Tax Officer by treating the assessee in the status of AOP has created tax liability. After overruling the objection that the appeal is not maintainable, the Deputy CIT(A) allowed the appeals and held that u/s 143(1) of the Act the Income Tax Officer could make certain adjustments for the determination of the income, but could not change the status and charge at maximum rate of tax. The order of the Deputy CIT(A) has been confirmed by the Tribunal. The Tribunal agreed with the view point of the First Appellate Authority that the status of the assessee could not be changed while framing assessment u/s 143(1) of the Act.

3. Heard, the learned standing counsel for the department and none appeared for the assessee-respondent.

4. It was submitted that an order passed u/s 143(1) of the Act is not appealable u/s 256(1) of the Act. Appeal being creature of statute, the order u/s 143(1) having not been made appealable under the provisions of the Act, the view of the Tribunal that the appeal was maintainable is wrong. He further submitted that an order passed u/s 143(1) of the Act has been made appealable for the first time by making necessary amendments with effect from 1-10-1998 by amending sub-clause (a) of section 246(1) of the Act. In contra, the learned counsel for the assessee submitted that the order passed by the Income Tax Officer though in exercise of power u/s 143(1) of the Act was, in fact, an order u/s 143(3) of the Act and was, therefore, appealable u/s 246(1)(a) of the Act. Elaborating the argument, he submitted that only certain specified adjustments could have been made by the Income Tax Officer while passing an order u/s 143(1) of the Act. In a case where the Income Tax Officer exceeds its power and makes the adjustments not permissible u/s 143(1), the assessment order shall be referable to section 143(3) of the Act. Mere mention of a wrong provision in an order will be of little consequence if the power to pass such an order could be traced out in the Act.

5. We have carefully considered the respective submissions of the counsel for the parties and have also perused all the three orders annexed with the reference. The facts which are either not disputed, or are, at this stage, beyond the plea of controversy, may briefly be noticed. The returns were filed by the assessee-respondent in the status of "specified trust". These returns were processed u/s 143(1) of the Act, by the Income Tax Officer. He passed the assessment orders and while doing so he did not accept the disclosed status of the assessee firm and treated the assessee as AOP. and levied the tax at maximum marginal rate of tax. According to the assessee-respondent the trust being not a business trust, there was no tax liability. It is also not in dispute that the assessee challenged the orders purporting to have been passed u/s 246(1) of the Act. In this factual background the question referred to us is to be answered.

6. Section 143 of the Act deals with the assessment of income. Two kinds of procedure is provided therein. Section 143(1) provides for assessment, without issuing any notice to the assessee, and gives a limited power to Income Tax Officer to rectify arithmetical mistakes and make prima facie adjustments only. Section 143(3) empowers the Income Tax Officer to frame assessment after notice to the assessee and after making such inquiry as he deems fit.

7. A bare perusal of section 143(1), as it stood at the relevant time, shows that the Income Tax Officer without calling upon the assessee for production by him of any evidence in support of the return, may make assessment of total income or loss of the assessee after making such adjustments to the income or loss declared in the return as was required to be made under clause (b). The said assessment to the income or loss declared in the return is to be made with reference to the return and accounts and documents, if any, accompanying to it and also with reference to the past record of the earlier assessment years and determine the sum payable by the assessee or refundable to him on the basis of such assessment. The sub-clause (iv) of clause (b) of section 143(1) of the Act provides for the adjustments, as follows :-

- (i) Rectification of arithmetical errors in the return, accounts and documents,
- (ii) Giving effect, on the basis of the regular assessments of past years, to the following:-
  - (a) Unabsorbed depreciation u/s 32(2).
  - (b) Unabsorbed investment allowance u/s 32A(3)(ii).
  - (c) Unabsorbed development rebate u/s 32(2)(ii).
  - (d) Unabsorbed development allowance u/s 33A(2)(ii).
  - (e) Expenditure on scientific expenditure u/s 35(2)(1).
  - (f) Expenditure on acquisition of patent rights and got rights u/s 35A(1).
  - (g) Preliminary expenses u/s 35D(1).
  - (h) Prospecting expenses u/s 35E(1).
  - (i) Expenses on family planning etc. u/s 36(1)(ix), first proviso.
  - (j) Any loss carry forward u/s 72(1) or 73(1) or 74(1) or 74(3) or 74A(3), and
  - (k) Any deficiency in "tax holiday" profits u/s 80J(3).

8. The record of the assessment of the assessee for the past years might be referred to only for the purposes of giving effect to the allowances referred to above.

9. Thus, it is clear that the change of status in summary proceedings u/s 143(1) was not such an adjustment to the income or loss declared in the return, permissible u/s 143(1) of the Act. The Income Tax Officer, while framing an assessment under section 143(1), has no jurisdiction not to accept the status as disclosed in the return of income. The Income Tax Officer if not satisfied by the disclosed status of the assessee in the return, has been empowered to issue a notice under sub-section (2) of section 143 requiring the assessee to produce or caused to be produced any evidence on which the assessee may rely in support of the return. Thereafter the assessment shall be finalised u/s 143(3) of the Act. The section as it stood at the relevant time, empowers the Income Tax Officer to make only certain specified adjustments to the income or losses declared in the return. At the same time certain safeguards were also provided to the assessee who feels aggrieved by the rectification of any arithmetical errors in the return or accounts and documents also about any adjustments in the income or loss by way of filing an application u/s 143(2), within one month from the date of service of the notice of demand issued in consequence of such assessment.

10. The upshot of the above discussion is that the Income Tax Officer is permitted to rectify arithmetical errors or mistakes and prima facie adjustments in the returns or the accounts and documents accompanying to it. He could allow any deduction, allowance or relief which, on the basis of the information available in the return, accounts and documents, was prima facie admissible but was not claimed. Similarly, "he could disallow any deduction, allowance or relief claimed in the return, which on the basis of the information available in such return, accounts or documents was prima facie inadmissible. The present case does not fall in either of the above category. In view of the plain language of section 143(1) of the Act, change of status has not been provided as prima facie adjustment u/s 143(1)(a) read with section 143(1)(b) of the Act, and the action of the Income Tax Officer u/s 143(1) was unjustified.

11. Thus, the necessary corollary of the above discussion is that the assessment in question made by the Income Tax Officer was beyond the scope of section 143(1). It is correct that the order purported to have been passed u/s 143(1), and it was beyond the four corners of the aforesaid section and such order was not appealable, at the relevant point of time. Such an order was not made appealable for the obvious reasons. The reason appears to be because of the limited nature of power to be exercised by the Income Tax Officer in such matters. Assessment orders passed u/s 143(3) were appealable. The basic difference is that the proceedings u/s 143(i) are summary in nature except making prima facie adjustments as provided therein, the disclosed income or loss is accepted as correct without calling upon the assessee while proceedings u/s 143(3) are also assessment proceedings but they are not summary proceedings. The assessing officer is entitled to assess the income or loss of an assessee inclusive of determination of correct status as per the material available on the record. Opportunity is also afforded to the assessee to establish its claim regarding allowances, deductions, etc. by producing relevant accounts and documents. The proceedings u/s 143(3) are full fledged

assessment proceedings there is no inhabitation or restriction on the power of the Income Tax Officer to assess the income. The validity of assessment order in question can be saved with reference to section 143(3) as power to frame assessment is there. The Supreme Court in the case of [State of Karnataka Vs. Muniyalla](#), has held "but it is now well-settled that merely because an order is purported to be made under a wrong provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it."

12. At this juncture it is apt to notice one argument of the learned standing counsel who referred the Explanation to section 143 and submitted that in view of the Explanation 1 (f), the assessment under sub-section (1) shall be deemed to be incorrect, inadequate or incomplete in material respect, in the present case and the Income Tax Officer was justified to tax on the income of the assessee in correct status. He could refuse to accept the disclosed status, while framing the assessment u/s 143(1). He proceeded on the assumption that the Explanation clarifies the words inaccurate, inadequate or incomplete in material respect with reference to sub-section (1) of section 143. The argument is misconceived. These expressions do not find place u/s 143(1) but they could be found out under sub-section (2) of section 143. The scheme of section 143 confers power to pass a summary assessment order after rectifying the arithmetical mistake, allowances and deductions permissible u/s 143(1) of the Act. The said assessment order can be reopened on the application of an assessee filed within the period of one month under sub-section 2(a) of section 143. However, power has also been conferred on the Income Tax Officer to issue notice to an assessee whether or not an assessment has been made under sub-section (1) to verify the correctness and completeness of the return by requiring the presence of the assessee u/s 143(2)(b) of the Act-When an Income Tax return should be treated as incorrect or inadequate or incomplete has been explained in the Explanation attached to section 143 of the Act and it is with reference to section 143(2). Therefore, the argument of the learned standing counsel that the exercise of power of passing the assessment order in question is referable to only section 143(1) and not to section 143(3) of the Act is not correct. The Income Tax Officer is not required to pass summary assessment order u/s 143(1) if he is of the opinion that the return is incorrect or incomplete and in such circumstances he has to issue a notice u/s 143(2) of the Act.

13. In view of the conclusion that the assessment order was u/s 143(3) of the Act, the same was appealable u/s 246(1) of the Act and the appeal was rightly entertained by the appellate authority.

14. We, therefore, answer the question referred to us in affirmative, i.e., in favour of the assessee and against the revenue. There shall be no order as to costs.