Commissioner of Income Tax Vs Deep Baruah

Court: Gauhati High Court

Date of Decision: Nov. 10, 2009

Acts Referred: Income Tax (Appellate Tribunal) Rules, 1963 â€" Rule 11
Income Tax Act, 1961 â€" Section 139, 142, 142(1), 143, 143(1)

Citation: (2010) 2 GLR 419

Hon'ble Judges: Ranjan Gogoi, J; B.P. Katakey, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Ranjan Gogoi, J.
The two appeals, at the instance of the revenue, seek to challenge the order dated 29.12.2005 passed by the learned

Income Tax Appellate Tribunal, Guwahati Bench (hereinafter referred to as the Tribunal) by which the assessments of the respondent-assessee for

the assessment years 1999-00 and 2000-01, respectively, have been set aside on the ground that the same are barred by limitation. The appeals

have been admitted on the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case, there was infraction of the provisions contained in Rule 11 of the Income Tax

(Appellate Tribunal) Rules, 1963 and if so, as to whether the same has vitiated the order of the Tribunal dated 29.12.2005?

2. Whether on the facts and in the circumstances of the case, in a case where the return of income is furnished u/s 148 of the Income Tax Act,

1961, service of notice u/s 143(2) of the said Act beyond a period of 12 months from the end of the month in which the return was filed would

render the re-assessment proceedings invalid?

Though the above questions framed have been sought to be reformulated by the appellants at the hearing we did not find any substantial difference

in the questions as framed by the court and those suggested on behalf of the appellants. We, therefore, proceed to consider the appeals on the

questions of law already framed, as noticed above.

2. The brief facts that will be required to be noticed for an effective adjudication of the issues arising in the two appeals may now be stated.

For the assessment years 1999-00 and 2000-01, on receipt of notices issued u/s 148 of the Income Tax Act; 1961 ("the Act"), return of income

was filed by the assessee on 24.1.2003. On 5.2.2004 notices u/s 142(1) of the Act were issued to the assessee for production of the documents

mentioned therein. It appears that on behalf of the assessee an elaborate reply was filed for each of the assessment years. The representative of the

assessee was also heard by the Assessing Officer. Subsequently assessment orders u/s 143(3) of the Act were passed on 26.3.2004. The

assessee unsuccessfully challenged the aforesaid assessment orders before the learned Commissioner of Income Tax and thereafter moved the

learned Tribunal. The learned Tribunal recorded the finding that after returns were filed by the assessee on 24.1.2003 notices u/s 142(1) of the Act

were issued on 5.2.2004 and no notice u/s 143(2) of the Act was issued at all. Accordingly, the learned Tribunal thought it proper to arrive at the

conclusion that the assessments in question stood barred by limitation.

3. Sri Bhuyan, learned Counsel for the appellant, has submitted that the ground on which the learned Tribunal has set aside the assessment orders

was not specifically taken by the assessee in the appeal before the learned Tribunal. In this regard, the grounds urged by the assessee in the

memorandum of appeal filed before the learned Tribunal, which were reproduced by the learned Tribunal in the impugned order, has been referred

to by Sri Bhuyan. Sri Bhuyan has also placed before the court the provisions of Section 254 of the Act and Rule 11 of the Income Tax (Appellate

Tribunal) Rules, 1963. Sri Bhuyan has argued that under the proviso to Rule 11 of the Rules it is incumbent on the Tribunal to give an opportunity

to the affected party if any new ground of appeal is urged at the hearing. No such opportunity was afforded to the revenue in the present case. Sri

Bhuyan, learned Counsel for the appellant, has also urged that though in the present case, admittedly, no notice u/s 143(2) of the Act was served

on the assessee, the same will not vitiate the assessment orders inasmuch as pursuant to the notice issued u/s 142(1) the assessee had placed

elaborate written submissions before the Assessing Officer which are available on record. Sri Bhuyan has also submitted that the representative of

the assessee was heard by the Assessing Officer. In such circumstances no prejudice has been caused to the assessee by the absence of notice u/s

143(2) of the Act. In this regard, Sri Bhuyan has placed before the court a decision of the K.J. Thomas Vs. Commissioner of Income Tax,

4. In reply, Dr. A.K. Saraf, learned Counsel for the respondent-assessee, has submitted that the power of the Tribunal u/s 254 of the Act read

with Rule 11 of the Income Tax (Appellate Tribunal) Rules is very wide. An appeal can be disposed of by the learned Tribunal on any ground

urged in the memo of an appeal or on a ground taken with the leave of the Tribunal or on any other ground. According to Dr. Saraf, the proviso to

Rule 11 of the Income Tax (Appellate Tribunal) Rules deals with the third category of cases, i.e., where the learned Tribunal proceeds to consider

the appeal on any other ground. It is only in such a situation, according to Dr. Saraf, that the proviso stipulating the requirement of opportunity will

operate.

5. Dr. Saraf has also argued that under the scheme contemplated by chapter XIV of the Act the provisions of Section 142 deal with a return prior

to assessment of the income returned therein. The notice u/s 142(1) of the Act, therefore, is a pre-assessment notice. A return filed by an assessee,

on receipt of which notice u/s 142(1) is issued or even when no such notice is issued, can be finalized u/s 143(1) by means of an intimation of the

tax and interest payable or refundable as may be. If, however, the return filed is not finalized u/s 143(1) of the Act the Assessing Officer has to

assume jurisdiction to make an assessment for which notice u/s 143(2) is mandatorily required. According to the learned Counsel, issuance of

notice u/s 143(2) of the Act is a condition precedent to assumption of jurisdiction. Admittedly, no notice u/s 143(2) of the Act was issued in the

present case. Dr. Saraf has also submitted that the time limit for issuance of notice u/s 143(2) of the Act, as it stood at the relevant point of time, as

well as the time limit for completion of assessment u/s 153(2) of the Act has expired. Therefore, according to the learned Counsel, the assessment

orders are ex facie untenable and have also become barred by limitation.

6. To substantiate the above arguments Dr. Saraf has placed before the court para 5.12 and 5.13 of Circular No. 549 issued by the Central Board

of Direct Taxes which is available at page 19 of the statutes section in (1990) 182 ITR. The provisions of the aforesaid Circular are quoted below :

5.12 Since, under the provisions of Sub-section (1) of the new Section 143, an assessment is not to be made now, the provisions of Sub-sections

(2) and (3) have also been recast and arc entirely different from the old provisions. A notice under Sub-section (2) which will be issued only in

cases picked up for scrutiny, is now issued only to ensure that the assessee has not understated his income or has not computed excessive loss or

has not underpaid the tax in any manner while furnishing his return of income. This means that, under the new provisions, in an assessment order

passed u/s 143(3) in a scrutiny case, neither the income can be assessed at a figure lower than the returned income, nor loss can be assessed at a

figure higher than the returned loss, nor a further refund can be given except what was dun on the basis of the returned income, and which would

have already been allowed under the provisions of Section 143(1)(a)(ii).

5.13 A proviso to Sub-section (2) provides that a notice under the Sub-section can be served on the assessee only during the financial year in

which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the

Department must serve the said notice on the assessee within this period, if a case, is picked up for scrutiny. It follows that if an assessee, after

furnishing the return of income does not receive a notice u/s 143(2) from the Department within the aforesaid period, he can take it that the return

filed, by him has become final and no scrutiny proceedings arc to be stated in respect of that return.

(emphasis is ours).

7. Dr. Saraf has also placed before the court a decision of the Punjab and Haryana High Court Vipin Khanna Vs. Commissioner of Income Tax

and Others, wherein the following view has been taken.

The returns filed in response to notices u/s 148 of the Act were the same as filed originally. The Assessing Officer had the option to issue a notice

u/s 143(2) of the Act requiring the assessee to produce evidence in support of the returns if he considered it necessary to ensure that the assessee

had not understated the income or had not computed excessive loss or had not underpaid the tax in any manner. Such a notice could be issued

only within twelve months from the end of the month in which the respective returns had been filed originally. Admittedly, no such notice had been

served on the petitioner within the stipulated period and, therefore, it has to be held that the Assessing Officer had not found it necessary to require

the petitioner to produce any evidence in support of the returns. Thus, the returns filed by the petitioner had become final.

8. Reference has also been made to two decisions of the Madras High Court The Commissioner of Income Tax Vs. M. Chellappan and P.L.

Gandhi, and The Commissioner of Income Tax Vs. C. Palaniappan, wherein a similar view has been taken.

9. The first submission advanced on behalf of the revenue need not detain the court. The learned Tribunal had decided the appeals before it on a

pure question of law arising from facts that were are not in dispute. The representative of the Revenue before the learned Tribunal did not strike

any issue on the question now raised but had taken part in the proceedings in appeal by advancing his contentions which was duly taken note of by

the learned Tribunal.

10. In the present case the return of income was filed by the assessee pursuant to the notices issued u/s 148 of the Act. u/s 148 of the Act, an

assessee, on receipt of a notice issued there under, is required to file a return and if such a return is filed the same is to be treated, as far as may be,

as a return filed u/s 139 of the Act. The return is to be processed, in the next stage, u/s 142 in terms of which notice under any of the Sub-clauses

(i), (ii), (iii) maybe issued. After the assessee complies with the requirement of any of the notices that may be issued under Sub-clauses (i) or (ii) or

(iii) of Section 142(1) or even in a situation where no such notice is issued to the assessee, the Income Tax Officer may send an intimation to the

assessee of the sum payable by him on account of tax and interest or of the amount of refund duo. Alternatively, the Assessing Officer, if he has

reason to believe, that any claim made in the return is inadmissible or if he considers it necessary or expedient to ensure that the assessee has not

understated the income or has not computed excessive loss or has not underpaid the tax is required to serve on the assessee a notice u/s 143(2)

requiring the assessee to produce or cause to be produced the particulars specified in the notice or such particulars on which the assessee relies in

support of the claim made. Thereafter, on the appointed day, the Assessing Officer after considering such evidence and particulars as the assessee

may produce is required to finalise the assessment and determine the sum payable, if any, by the assessee u/s 143(3). This is the scheme of

assessment that is contemplated by Sections 142 and 143 of the Act.

11. The above scheme makes it abundantly clear that on receipt of the return that may be filed by an assessee after receipt of the notice u/s 148

the Assessing Officer has an option of proceeding either u/s 143(1) or if he so considers necessary u/s 143(2). In the event the Assessing Officer

proceeds u/s 143(1), upon determination of the amount of tax and interest payable or refund due for which an intimation is to be sent to the

assessee the return gets finalized, though under the provisions of the Act, as amended by the Direct Tax Laws (Amendment) Act, 1987, no

assessment order is passed at that stage. If, however, the Assessing Officer on consideration of the return does not proceed u/s 143(1) he is

required to proceed u/s 143(2) and issue a notice to the assessee and thereafter finalise the assessment u/s 143(3). The notice u/s 143(2) has to be

issued within the time frame stipulated which at the relevant point of time was 12 months from the end of the month in which the return is furnished.

An assessee upon filing a return may or may not receive an intimation from the Assessing Officer u/s 143(1) but until he receives a notice u/s

143(2) within the time stipulated the assessee wilt he entitled to understand that the return filed by him has been accepted. This is evident from para

5.13 of Circular No. 549 dated 31.10.1989 of the Central Board of Direct Taxes. The above is also the view taken by the Punjab and Haryana

High Court in Vipan Khanna (supra) and the Madras High Court in M. Chellappan and C. Palaniappan (supra).

12. Section 143 of the Act prior to amendment by the Direct Tax Laws (Amendment) Act, 1987 (with effect from 1.4.1989) contemplated an

assessment of a return in situations covered by provisions of Section 143(1) as it existed before amendment and alternatively an assessment after a

notice is issued u/s 143(2). By virtue of the amendment made by the Direct Tax Laws (Amendment) Act, 1987 (with effect from 1.4.1989) an

assessment is made only after notice u/s 143(2) is issued though a return may be finalized u/s 143(1) by issuing an intimation. Intimation u/s 143(1),

however, is not an assessment. Under the changed law proceedings of assessment commences with the notice u/s 143(2) and the order of

assessment is passed u/s 143(3). The aforesaid provisions, therefore, leave no room for doubt or ambiguity that jurisdiction to make an assessment

u/s 143(3) can be assumed only after a notice u/s 143(2) is issued. Such notice u/s 143(2), therefore, is a condition precedent for assumption of

jurisdiction to make an assessment order under the Act. The absence of prejudice, therefore, cannot confer jurisdiction, assumption and exercise

of which must necessarily be in accordance with the provisions of the Act.

13. In the present cases no notice u/s 143(2) of the Act having been issued to the assessee and the time limit for such notice having expired and the

time limit for completion of assessment being over we cannot find any fault with the conclusions reached by the learned Tribunal in the impugned

order dated 29.12.2005. We, therefore, dismiss both the appeals and affirm the order dated 29.12.2005 passed by the learned Tribunal.

However, in the facts and circumstances of the case, we make no order as to costs.