(2014) 03 CAL CK 0145

Calcutta High Court

Case No: ITA No. 47 of 2013

Commissioner of Income Tax	APPELLANT
Vs	
Subrata Roy	RESPONDENT

Date of Decision: March 21, 2014

Acts Referred:

- Evidence Act, 1872 - Section 114, 143
- Income Tax Act, 1961 - Section 144, 153, 271, 274

Hon'ble Judges: Sudip Ahluwalia, J; G.C. Gupta, J

Bench: Division Bench

Advocate: P. Dudharia, Advocate for the Appellant; R. Bharadwaj, Advocate for the Respondent

Judgement

1. The Court: The subject of challenge in this appeal, at the instance of the revenue, is a judgment and order dated 19th November, 2012 by which the learned Tribunal accepted the contention of the assessee that the assessment order was not passed on 31st December, 2008 which was the last date for making the assessment. The ground originally taken before the CIT(A) reads as follows:

For that the assessment is barred by limitation since the order of assessment and the demand notice was served 47 days after the limitation period and there was no evidence that the same was completed before the end of the limitation period and left the control of the AO within such period.

2. The aforesaid ground of the assessee before the CIT(A) failed for the following reasons appearing from the order dated 13th November, 2009 passed by the CIT(A).

3. I have considered the submission of the appellant and perused the assessment order. I have also gone through the assessment records. On perusal of assessment records and the order sheets attached to the assessment record, it is seen that the assessment was completed on 31.12.2008 and it was signed on the same date along

with the demand notice and notice u/s. 274 read with section 271 of the I.T. Act. The assessment order and the notice of demand were handed over to the Departmental Notice Server for service of the same on the appellant. However, it is reported by the notice server that the assessment order and the demand notice were refused to accept by the appellant. Later on, the order and the demand notice were sent by Registered Post. It is also observed from the assessment records that the last date of hearing was on 15.12.2008 and hence there is no reason to doubt that the assessment was not completed within the limitation period. Thus, from the assessment records, it is apparent that the assessment was completed within the limitation period i.e. on 31.12.2008. Moreover, section 153 of the I.T. Act states that no order of assessment shall be made u/s. 143 or section 144 at any time after expiry of (a) two years from the end of the assessment year in which the income was first assessable; or .....Thus, the Act also speaks about the completion of assessment and not the service of assessment order. In the case of K.U. Srinivasa Rao Vs. Commissioner of Wealth Tax, the Hon''ble High Court has held as under:

The word to be noticed is "made". It must be remembered that an order of assessment is not an administrative order, but a quasi-judicial order. It is true that an order of assessment may not have been made in the presence of the assessee and that it requires to be communicated, but still, its character as a quasi-judicial order must be kept in mind while interpreting the word "made". The Act merely requires that an order of assessment shall be made within the prescribed period. It does not further require that it should be communicated within the period prescribed.

4. The jurisdictional High Court in the case of India Ferro Alloy Industry Pvt. Ltd. Vs. Commissioner of Income Tax, on the issue involved has held as under:

what is required for completion of the assessment is the determination of the tax liability and issue of demand notice but certainly not the service of the same on the assessee.

5. Similar view was taken by the Apex Court in Commissioner of Income Tax, West Bengal III Vs. Balkrishna Malhotra, and also in -

(1) RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras,

(2) Ramanand Agarwalla Vs. Commissioner of Income Tax,

(3) BADRI PROSAD BAJORIA Vs. COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA.,

(4) KODIDASU APPALASWAMY AND SURYANARAYANA Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH.,

(5) Esthuri Aswathiah Vs. Commissioner of Income Tax, Mysore,

6. In view of above, it is held that the assessment was completed within the limitation period as provided under the Act and not barred by limitation. The ground no. 2 is dismissed."

7. Aggrieved by the aforesaid order, the learned Tribunal was approached and the learned Tribunal accepted the contention of the assessee for the following reasons:

But in the present case before us, it is a fact that despite repeated opportunities to the revenue they could not prove any documentary evidence that the assessment was framed on 31.12.2008 i.e. the date of assessment order. It is a fact that the assessment order and demand notice was handed over to Postal Authorities on 12.02.2009 and the same was received by assessee on 16.02.2009.

8. Aggrieved by the order of the learned Tribunal, the revenue has come in appeal.

9. Mr. Dudharia, learned advocate appearing for the revenue-appellant, submitted that there is a presumption in law that all official and judicial acts were regularly performed. He drew our attention to clause (e) of Section 114 of the Indian Evidence Act, 1872, which provides for a presumption as follows:

(e) That judicial and official acts have been regularly performed;

Mr. Dudharia contended that the learned Tribunal was wrong in holding that the Department "could not prove any documentary evidence that the assessment was framed as on 31.12.2008.

10. He contended that the fact that the assessment order is dated 31st December, 2008 is a proof of the fact that it was passed on 31st December, 2008. The fact was proved with the aid of the aforesaid presumption in law. It was open to the assessee to rebut the presumption which the assessee did not do. Mere fact that the demand notice was served after 47 days from 31st December, 2008 is not enough to show that the order was not passed on 31st December, 2008. He, therefore, contended that the order passed by the learned Tribunal is patently bad being contrary to law and should be set aside.

11. Mr. Bharadwaj, learned advocate appearing for the assessee, submitted that the assessment records were called for by the learned Tribunal. In spite of repeated opportunities, the department could not produce the same. Therefore, an adverse inference should be drawn that in case the documents had been produced, the same would have gone against the department. He, in this regard, drew our attention to clause (g) of Section 114, which allows a presumption as follows:

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

12. The second submission advanced by Mr. Bharadwaj was that the income tax assessment records taken into account by the CIT(A) were never offered for inspection to the assessee and there has, thus, been violation of the principles of

natural justice.

13. Mr. Dudharia submitted, in reply, that both the submissions advanced by Mr. Bharadwaj are without any substance. He contended that the second submission advanced by Mr. Bharadwaj today before this Court was never urged before the learned Tribunal. He contended that by way of an afterthought and in order to support the patently wrong order of the learned Tribunal that this submission has been made. With regard to the first submission, Mr. Dudharia contended that clause (g) of Section 114 of the Indian Evidence Act, 1872 does not apply to this case because the aforesaid clause is applicable with regard to a piece of evidence and has no application to the official records. Moreover, existence of the order dated 31st December, 2008 was never in challenge. The second submission advanced by Mr. Bhraadwaj provides ample assurance to the Court that the order dated 31st December, 2008 including other records in the file were very much in existence and the CIT (Appeal) perused the same.

14. We have considered the rival submissions advanced by the learned advocates for the parties and are of the opinion that the submission of Mr. Dudharia must be accepted. The submission that the assessment records were taken into account by the CIT(A) without disclosing the same to the assessee is altogether without any merit. The appellate authority cannot be expected to dispose of an appeal without looking into the assessment records. Had the appellate authority relied upon any independent enquiry or the result of any such enquiry, then it would have been incumbent upon the appellate authority to inform the assessee about the result of such enquiry so as to afford an opportunity to the assessee to make his submission with regard thereto. But the appellate authority had no such obligation to disclose the assessment records to the assessee before taking them into account at the time of hearing of the appeal. An appellate court cannot be prevented from perusing the lower court records. It is a strange submission to make that the lower court records could not have been perused without giving an opportunity to the assessee. The submission that the learned Tribunal was justified in drawing an adverse inference is altogether without any merit. The learned Tribunal was hearing an appeal. The learned Tribunal was not taking evidence of the matter as a Court at the first instance would do. The question for consideration was whether the order dated 31st December, 2008 could be said to have been passed on 31st December, 2008 when the demand notice together with a copy of the order was served after 47 days. A period of 47 days time is not time long enough which can even make anyone suspicious as regards the correctness of the date of the order. In any case the presumption arising out of clause (e) of Section 114 proves the fact that the order was passed on 31st December, 2008. The same presumption once again would apply to the order dated 13th November, 2009 passed by the CIT (Appeal). There is, as such, no reason to even entertain any doubt as regards the existence of the file including the order dated 31st December, 2008. There is equally no reason to doubt that the assessment order was passed on 31st December, 2008.

15. We are, as such, of the opinion that the order passed by the learned Tribunal cannot be sustained, which is accordingly set aside and the order of the CIT(A) is restored.